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BESTSELLER FOR OVER 46 YEARS

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FOREWORD

The author has always been keen to enlarge and improve the book at the time of its revised edition. He has added a new chapter on International Criminal Law and the Proposal for the establishment of an International Criminal Court. He has made a sincere endeavour to bring the subject-matter of the volume up-to-date. I notice that the latest pronouncements of the International Court of Justice concerning the case of Military and Para-military activities in and against Nicaragua (Nicaragua v. United States) 26th November, 1984, Case concerning Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada v. United States) 12th October, 1984 and Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta) 3 June, 1985 have been incorporated in the volume. I also notice that the author has dropped Appendix III on "Leading Cases" and the relevant matter of this Appendix has been incorporated in the text. Chapters on Law of the Sea, the International Court of Justice, Intervention, State Jurisdiction, Outer Space, Nationality etc., have been further elaborated and improved. The author has also made legal scrutiny of international events such as Star War, Accident at Soviet Nuclear Plant at Chernobyl, American Attack on Libya, Financial Crisis faced by the U.N., Nuclear Terrorism, Star Peace Plan, South Africa and Apartheid and Disarmament Summit between the U.S. and U.S.S.R. Despite these additions in this volume, the bulk of the book has been kept under check ; rather it has been slightly reduced. I do hope that the book will meet the needs of Indian students.

I wish him all success.

NAGENDRA SINGH

PREFACE TO THE TWENTY SECOND EDITION

In the twenty-second edition, the book has been thoroughly revised, improved and brought up-to-date.

In this edition, current national and international events have been critically discussed and analysed. These events include cases relating to Kulbhushan Jadhav—decision of International Court of Justice, response of Pakistan thereon, and India again going to International Court of Justice—China's expansionist policy in South China Sea, conflict between America and Iran, especially in relation to killing of General Sulemani of Iran, Covid-19, India and China conflict in Ladakh and China's expansionist policy in Sikkim, Arunachal Pradesh and Uttarakhand, and abrogation of Article 370 and Article 35A of the Constitution.

Twenty Second Edition of the book will immensely benefit the students of Law (LL.B. and LL.M.), students pursuing International Studies, International Relations, Defence studies International Organisations, and Human Rights. It also seeks to benefit candidates appearing for competitive examinations such as Central Civil Services and Provincial Civil Services Examination.

Throughout the revision work, my wife and children have been the constant source of inspiration. My publishers also deserve credit for publishing and releasing the book in an elegant manner.

Dated : 16 December, 2020 **Dr. S. K. Kapoor**
3/44, Prag Narain Road,
Lucknow - 226001

PREFACE TO THE FIRST EDITION

(1974)

This book has been written to serve the needs of the students of Law of Indian Universities and the candidates appearing at the different competitive examinations. An endeavour has been made to present the subject-matter in a systematic manner and in a lucid and simple language. An attempt has also been made to explain the different topics of International Law with the help of illustrations, problems and leading cases on the points. A critical discussion has been made of the current international problems involving questions of International Law, such as Indo-Pak War (1971), Emergence of Bangladesh, Banning of Pakistani Air flights through Indian territory, Problem of Bangladesh's Admission to the United Nations, Problem of Release of Pakistani Prisoners of War and Trial of War Criminals, Sending of Indian Forces to Sikkim in April, 1973, Problem of Succession in respect of public debts by Bangladesh, Legality or illegality of American action in Vietnam and Cambodia, Legality or illegality of nuclear warfare and nuclear tests including the recent Injunction granted by the International Court of Justice forbidding France to conduct its planned nuclear tests, Indo-Pakistan Agreement on Prisoners of War, 1973 (Delhi Agreement) and International treaties and agreement recently concluded. For the benefit of the students, some leading cases on International Law have been discussed briefly in a separate Chapter.

In the end, I thank the publishers for having spared no pains in getting the book printed and published in an elegant manner in a short time.

S. K. KAPOOR

ABBREVIATIONS

A.I.R.	All India Reporter
A.J.I.L.	American Journal of International Law
American Rep.	American Reporter
American Rev.	American Review
Annual Rev. of U.N. Affairs	Annual Review of the U.N. Affairs
B.Y.B.I.L.	British Year Book of International Law
California L.R.	California Law Review
Col. J. Transnat'l Law	Columbia Journal of Transnational Law
Col. L.R.	Columbia Law Review
C.L.P.	Current Legal Problems
F.A.R.	Foreign Affairs Reports
Harv. Int. L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Harvard J. Trans. L.	Harvard Journal of Transnational Law
I.C.L.Q.	International and Comparative Law Quarterly
I.J.I.L.	Indian Journal of International Law
I.J. Pol. Sc.	Indian Journal of Political Science
Ind. Q.	India Quarterly
I.C.J. Review	Review of the International Committee of Jurists
Illions L.R.	Illions Law Review
I.L.M.	International Legal Materials
I.L.R.	The International Law Reporter
Int. Lawyer	International Lawyer
Int. Affairs	International Affairs
Int. Orgn.	International Organisation
Int. Studies	International Studies
J.I.L.I.	Journal of the Indian Law Institute
J. of Law and Economics	Journal of Law and Economics
J. of Int. Law and Economics	Journal of International Law and Economics
Law.	Lawyer
Law. & Cont. Prob.	Law and Contemporary Problems
McGill L.J.	McGill Law Jcurnal
Ocean Dev. & Int. L.	Ocean Development and International Law
Proc. A.S.I.L.	Proceedings of Amercian Society of International Law
S.C.J.	Supreme Court Journal
Soviet Year Book of Int. Law	Soviet Year Book of International Law
U.N.C.	United Nations Chronicle
U.N. Monthly Chronicle	United Nations Monthly Chronicle
University of Toronto L.J.	University of Toronto Law Journal
Virginia L.R.	Virginia Law Review
Yale L.J.	Yale Law Journal
Yojna	Yojna

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Part 1

INTRODUCTORY

CHAPTER 1

INTRODUCTION

Dynamism in Law

Change is the law of nature. Everything, except of course the law of change itself, is subject to change. Law being no exception to this rule is inherently of dynamic character. But the twentieth century (and one and half decades of twenty one century) has witnessed ever accelerating rhythm of change; the scientific and technological developments have unleashed political, economic, social and cultural forces which are transforming the society in an increasing rate. The same trend is continuing with greater acceleration in the Twenty-first century. In view of the unprecedented speed and dynamism that are characteristic of the present age, it is very natural to inquire : can law keep pace with life?[1] This has indeed been a perennial question but it has assumed added significance in the present time due to unprecedented rhythm of change in various fields. At some quarters it is argued that "law is becoming less important and practical action more important, in shaping economic and social policy in an increasingly dynamic society and this is particularly true, internationally."[2] But as aptly answered by C. Wilfred Jenks that "all experience suggests that while economic growth, education and social attitudes have a far-reaching influence on social policy they can exercise their necessarily gradual influence effectively only if law provides a framework of recognised obligation and settled habit within which they can operate. Law cannot make men equal, but unless the equality of man is recognised by law there is little likelihood of other influences creating it in fact".[3] Further, "When justice cannot invoke the aid of the law, and of procedure effective to secure respect for the law, long and broad views on our common humanity all too readily succumb to entrenched privilege, this is no less true under new social order and in new states than in the most traditional of societies".[4] As pointed out by Prof. Edgar Bodenheimer, "Law being the cement which holds the social structure together, must intelligently link the past with the present without ignoring the pressing claims of the future."[5] The growth of law begins with the growth of society. At no specific stage of development, law can be said to have been invented and imposed *ab extra*.[6] Consequently legal orders are "pierced together slowly, in trial and error to human demands."[7] They are not produced overnight. They have their roots and backgrounds in the society. The study of international law should be directed "...... to explore how the present law has come to be, what it is, how it is involved in a process of reform and extension and intensification, in order that we may be able to assist in the building stone upon stone in storm and rain, of a transnational legal order for state and people and men".[8]

As pointed out by Roscoe Pound, "Law must be stable, and yet it cannot stand still".[9] The "central problem of law", consequently, is "to reconcile the conflicting needs of

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1. C. Wilfred Jenks, Social Justice in the Law of Nations, The I.L.O. Impact After Fifty Years, Oxford University Press (1970), p. 5.
2. Ibid at p. 80.
3. Ibid.
4. Ibid.
5. Jurisprudence—The Philosophy and Method of the Law. Harvard University Press, Cambridge, Massachusetts (1962), p. 218.
6. C.K. Allen, Law in the Making (1961), p. 6.
7. P.E. Corbett, Law and Society in the Relation of States, p. 287.
8. From the farewell lecture of Prof. Frederick Van Asbeck of Leiden University referred in Philip C. Jessup, "The Concept of Transnational Law. An Introduction. Vol. 3 (1964), pp. 1-2.
9. Interpretation of Legal History, Cambridge, Mass, (1923) p. 1.

stability and change".[10] The most important function of law is to help in solving the problems of the society in and for which it exists".[11] Law can perform this august function effectively only if it can reconcile the needs of change and stability.

Dynamism in International law

What is true of law in general, is also, even more particularly, true of international law. The problem of change, flexibility and adaptability is much more acute and urgent in the international field. "As a result of ... catastrophic upheaval on so many fronts in the realm of international law...... must perforce, also change. The central problem, given in the accelerating and meteoric changes occurring on so many fronts is this : Can the inertia built into the law as a social science and especially the branch of the law dealing with the relationship between sovereign nations, change quickly enough to meet the new challenges......"[12] Further, "... whether the Gutterdameruang of a nuclear holocaust can be avoided by the advent of the reign of the Rule of Law, whether this philosophy will supervene in time to save mankind from self destruction, and whether the changing norms of international law can help in the dire straits in which the world finds itself is the question, the answer of which is not readily at hand".[13]

It has been aptly remarked by Soviet authors, "International law is not static. It is constantly developing, sometimes it does not keep up with developments, other times it anticipates them and gives an early warning of tendencies in the development of international relations. Developing international law is probably more than ever replenishing collection of contractual and other documents. It is a developing philosophy of values. At major turning points in history it sometimes undergoes qualitative changes."[14] For example, on 5th June, 1989, the United Nations Environment Programme (UNEP) with a view to warn the people of the increase in the temperature of the earth due to 'Green house-effect', gave the slogan of "Global Warming; Global Warning". This indeed is a very serious problem with which the world is confronted. Due to increase in the temperature of the Earth level of the waters of the seas will increase more than a metre affecting more than half of the population of the world. At crucial or important turns of history, there are qualitative changes in international law. One such qualitative change was witnessed in June, 1992 when the Earth Summit, held at Rio de Janeiro (Brazil), undertook to save Planet Earth from Environmental crisis. It was also decided to hold a conference after five years to review the progress made during the last five years. The U.N. review conference was therefore held in 1997 wherein as many as 160 members participated. Yet another significant international conference, known as Kyoto Environmental Summit on Global Warming was held from 1 to 11 December, 1997. This conference fixed the targets to be achieved between 2008 and 2012. It was decided that on the basis of 1990 levels, America, European Union and Japan would reduce 7%, 8% and 6% respectively of the green house gases. The gravity of the problem can be gauged from the fact that the warnings of the scientists are proving to be correct. According to the Scientists the month of July, 1998 has been the warmest month of last 118 years and the temperature of the Planet Earth has increased by one per cent. But the trends for changes, or changes themselves for good, sometimes encounter a setback. For example, the above target was accepted by America under European pressure. America subsequently decided to abandon Kyoto Treaty in 2001 and announced in February, 2002 an alternative optional plan of voluntary cutting emissions. Canada, Britain and Germany did not agree with the latest American plan and expressed their reservations.

In recent times, nuclear disaster in Japan on account of Sunami and now (in middle of June 2013) huge disaster and devastation leading to death of hundred of persons due to bursting of clouds and flash of floods in Kedarnath and Badrinath in Uttarakhand are indicative of impending damages of climate change due to global warming.

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[10] Hardy C. Dillard, J., "Conflict and Change : The Role of Law," Proc. ASIL (April, 25-27, 1963), p. 50.

[11] J.L. Brierly. The Basis of obligation in International Law (Oxford, 1958), p. 72.

[12] Leonard M. Salter, "International Law in Transition : New Norms for Old", The International Lawyer, Vol. 7, No. 3 (July, 1973), p. 687.

[13] Ibid. at p. 695.

[14] Yuri Rybakov, Leonid Skotnikov, Alexander Zmeyevsky, "The Primacy of Law in Politics", Int. Affairs (May 1989), p. 57 at p. 61.

Dynonism in Environmental Law

However, Kyoto Treaty came into force on 16 February, 2005. It could be possible only with the support of 141 nations who had ratified the Treaty. As of November, 2009, 187 States had signed and ratified the Kyoto Treaty. But unfortunately, America, the greatest polluter of the world could not become a party to the Treaty.

Besides this, U. N. Framework Convention on Climate Change, 1992 has as many as 195 State Parties (all U. N. Members except South Sudan plus nine, cook Islands and European Union).

Further, Copenhagen Summit Conference on Climate Change, held in third week of December, 2009, is generally regarded as unsuccessful conference and dismal failure. However realizing that the summit conference was moving to an unsuccessful end, leaders of America, China, Brazil and South Africa in an attempt to save the conference becoming unsuccessful, presented an agreement before 194 countries attending the conference. After the negotiations of two weeks, the conference agreed to the establishment of a Green Fund with a view to protect poor countries from global warming. A Green Fund of 100 billion dollars for the period 2010 to 2012. America promised 3.6 billion dollars, Japan 11 billion dollars and 10.6 billion dollars was promised by European countries, India agreed to all this because Kyoto Treaty had yet not been abandoned.

Copenhagen Summit fixed target of limiting global warming by 2° celsius but no targets were fixed for the year 2020 or 2050. Kyoto Treaty remained in tact. Though it was not a perfect treaty yet it was a start to tackling global problem.

However, on 11th December, 2010 world leaders from 193 countries signed a new global climate legal regime called the Cancun Agreement. It almost sounded the death knell for Kyoto Protocol. But definite obligations of countries were not fixed at Cancun. They were to be fixed at Durban. On 28th November, 2010 to 11th December, United Nations climate change conference was held in Durban (South Africa) to establish, a new treaty to limit carbon emissions. The conference agreed to a legally binding deal comprising all countries, which will be prepared by 2015 and to take effect in 2020. After two weeks of negotiations a deal was reached on the last day i.e. Sunday, 11th December, 2011 after 60 hour long meeting. The terms of the Treaty were to be defined in 2015 and to become effective in 2020. The agreement referred as the "Durban Conference" was notable in that for the first time it included developing countries such as India and China as well as in the U.S. who refused to sign the Kyoto Protocol.

It is important to note that the agreement entailed the continuation of the Kyoto Protocol although some countries including members of the European countries are not likely to commit to it. Lastly, a notable achievement of the conference was the progress regarding creation of Green Fund to which management framework was adopted. The Fund to distribute US $ 100 billion per year to help countries adopt to climate impacts.

Reference may also in made here to the world summit of Legislatures organised by London based International, that has its office in India as well. It was organized from June 6-8, 2014. Its India President last year was Prakash Javedkar, now the new Environment Minister in Narendra Modi's cabinet.

A brief reference may also be made to the US President Obama's new promise, under the clear Air Act, to cut carbon emissions by 30% (from 2005 levels by 2030) in power plants. It needs to be lauded and welcomed and ought to be followed by other developed and developing countries.

Lastly, it is important to note Lima Deal of Conference of Parties (COP) of U.N. Framework Convention on climate change, at Lima on 15th December, 2014. A compromise draft on national pledges to cut, global carbon emissions saved the

UN climate talks from a collapse and kept hopes after a global deal in Paris next year (i.e. 2015) to climate change. After a marathon 13-day Conference of Parties (COP), negotiations on Sunday (i.e. 15-12-2014) adopted the draft that addressed India's concerns and set roadmap for a new binding deal.

The agreement—Lima Call for climate Action—is likely to pave the way for all nations to submit their 'nationally determined' pledge for emission cuts and adaptation measures by October, 2015.

The contentious issues will, however, come again during Paris talks (in late 2015) ahead of the final agreement. Indian Environment Minister, Prakash Javedkar said after the delegates approved a blue print for talks leading up to a deal in 2015 that will come into effect after 2020. The added, "All of India's concerns have been addressed. We achieved targets and we got what we wanted".

Nations participating in the conference concluded that by elaborating the elements of the new agreement, scheduled to be stumped in Paris in late 2015, while also agreeing to the ground rules on how all countries can submit contributions to the new pact during the first quarter of next year. These intended Nationally Determined contributions will form the foundation for climate action post-2020 when the new pact is set liability for reducing carbon emissions.

Breaking up of the Soviet Union, Vienna Conference on Human Rights (1993) establishment of World Trade Organization (WTO), establishment of International Criminal Court and more recently terrorist activities of Al-Qaida are such other important international turns which have brought about qualitative and revolutionary changes.

Crisis in International law

The rapid changes in different fields have brought a sense of "crisis" in international law. This "crisis" is a product of the acceleration of the process of change in the international community that is characteristic of our era.[15] And the factors responsible for this crisis include "rapid technological progress, the rise of new ideologies and systems of public order, including militant communism, decolonization, itself spurred on by the Communist challenge to the West; the appearance of many new states of widely different cultural backgrounds and levels of development; rising demands for social reform; the tear of war and growing reluctance of the more advanced states to protect their interests by coercive means; and the increase in the number and functions of international organisations".[16] In advisory opinion on Admission to Membership in the United Nations,[17] Judge Alvarez aptly remarked, "The fundamental principles of international law are passing through a serious crisis, and this necessitates its reconstruction. A new international law is developing which embodies not only this reconstruction but also some entirely new elements."[18] Scientific and technological advancements have also brought a sense of crisis in the field of international law. The increase of temperature due to 'greenhouse effect' leading to the depletion of ozone layer poses a very serious problem to our very survival and hence necessarily to International Law. Thus, "the present so-called "crisis" in international law was nothing more than a tension between the needs of stability and the demands of change. As regards the emergence of a large number of new countries. The new demands of the new countries did not mean or amount to any wholesale rejection of the traditional legal system but merely readjustment of the old law to the new conditions".[19] In times of rapid political, economic and technological changes, the development of law both within and among states, tends to lag behind; its content becomes unstable and uncertain, and its effectiveness is minimized. If the development processes of a legal system are inadequate, a 'crisis' of law emerges. The rapid changing world of the twentieth century and the twenty-first century is going through such a crisis. Whether or not the developmental processes it has created, and is creating, will prove adequate is one of the fundamental questions of contemporary international law."[20]

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[15] Oliver. J. Lissitzyn, International Law Today and Tomorrow, (Oceana Publications Inc. Dobbs Ferry, Newyork, 1965), p. 102.

[16] Ibid.; See also R.P. Anand, New States and International Law, (1972), p. 118.

[17] I.C.J. Rep. (1948) p. 4.

[18] Ibid, p. 67.

[19] Asian States and the Development of Universal International Law, edited by R.P. Anand, (1972) p. XXXI.

Problems of Adaptability and Change

In view of the rapid changes in different fields, many of our old ideas about international law have become inadequate or even obsolete in the light of modern requirements.[21] One of the main defects of international law, according to Brierly, has been that it has aimed to stabilize rather than to provide for the growth of international society, and to maintain existing values rather than to create new ones.[22] As compared to municipal law, international law is confronted with many difficulties and problems to keep pace with the rapidly changing times and circumstances. In the absence of a world legislative body, treaty making is the counterpart of the legislative process in the domestic field of the states. It is, therefore, more difficult to meet new situations and conditions resulting from the far-reaching scientific and technological developments, and other significant changes in the field of international law which requires the consent of different states with different traditions and ideologies. Nevertheless, international law is not static and that slowly but steadily it gathers dynamism and activity and endeavours to mend itself to the needs of the day. In order to be effective, international law or any law for that matter, must keep pace with the time, to obliterate those norms which have fallen out of date, and to baptize new principles as norms of law. As pointed out by Prof. Oliver, J. Lissitzyn, "Customary international law has at times developed with considerable speed to provide for the regulation of the new transitional needs and activities. The twentieth century has witnessed, for example, the rapid development of the doctrines of air sovereignty and the continental shelf".[23] He, however, adds, "Nevertheless, the acceleration of the process of change in the international community and detailed nature of the regulation required for many new activities render customs an inadequate instrument for the formation of legal norms in response to all the new needs and expectations.[24] Customs being thus an inadequate instrument for bringing about timely changes in international law, treaty process then remains the most effective process to effect changes. But treaty process is a cumbersome process for it obviously, invariably and inevitably depends upon the consent of states with different ideologies, traditions and interests. International treaties and conventions come into force only after they have been ratified by a prescribed number of states and the states are generally reluctant to ratify a treaty which affects or is likely to affect their rights and interests. States do not hesitate to abandon the treaty which affects their interests. The glaring example of this is the abandonment of Kyoto Treaty by America in 2001.

Thus as compared to municipal law, international law is confronted with many difficulties and problems in keeping itself abreast of the changing times and circumstances. These problems and difficulties are obviously due to the fact that international law operates in a decentralised system. Above all, the greatest problem is the concept of sovereignty.[25] But as aptly remarked by Judge Jessup, "Sovereignty in its meaning of an absolute, uncontrolled state will... is the quick sand on which the foundations of traditional international law are built...... once it is agreed that sovereignty is divisible and that it is therefore not absolute, various restrictions on and relinquishment of sovereignty may be regarded as normal and not stagmatizing. The slow but steady development of the majority rule in international organisations bears witness to the change which is taking place.[26] It is now generally recognised that sovereignty is neither absolute nor indivisible. In fact, 'Sovereignty' has a much restricted meaning today than in the eighteenth and nineteenth centuries, when with emergence of powerful highly nationalised states few limits on State's autonomy were acknowledged. At the present time, there is hardly a State which in the interests of the international community has not accepted restrictions on its liberty of action."[27]

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[20] Edward Collins, International Law in a Changing World, p. 424.

[21] See International Law: The Collected Papers of Sir Cecil Hurst (London, Stevens, 1950), pp. 156-157.

[22] J.L.A. Brierly, The Basis of Obligation in International Law, (Oxford, 1958), p. 58.

[23] International Law Today and Tomorrow, (1965), p. 105.

[24] Ibid.; See also Leo Gross, "Sources of Universal International Law". Asian States and the Development of Universal International Law, Edited by R.P. Anand, (1972), p. 189 at pp. 196-197.

[25] As aptly observed by Sir H. Lauterpacht, "International Law, whether codified or not, implies essentially a restriction on the sovereignty of states whose relation it governs. It is in the nature of things that states wedded to an uncompromising maintenance of their sovereignty cannot view with favour attempts at effective codification: AJIL. Vol. 49 (1955), p. 16 at p. 38; See also Q. Wright, "Toward a Universal Law for Mankind," Columbia Law Review, Vol. 63 (1963), pp. 445-6.

Traditional International Law and New International Law*

The traditional international law has undergone so many changes that the international lawyers have evolved a new term, *i.e.*, 'new international law' to indicate the norms and rules that have been evolved since the Second World War. Judge Alvarez has aptly observed, "A new conception of law in general and particularly of international law, has also emerged......... The traditionally, juridically and individualist conception... is being more and more superseded by what may be termed the law of social interdependence".[28] 'The ...... new international law has already manifested itself in the Charter of the U.N. The United Nations wish to promote peace positively by forming a constructive peace law. The interdependence of the nations is one of the corner stones of the new law of nations."[29] The traditional, international law was envisaged as a law governing the relations of sovereign states with each other. Prof. Oppenheim defined international law as "the name for the body of customary and conventional rules which are considered legally binding by civilized nations in their intercourse with each other."[30] This definition was given by Oppenheim in 1905 and sums up the position of classical, traditional international law that stood before the First World War. In view of the significant changes that have taken place since then this definition has become obsolete and inadequate. Later on changes were made in subsequent editions. For example, Eighth Edition of Oppenheim's book International Law was defined as "Law of Nations or International Law is the name of for the body of customary and treaty rules which are considered legally binding by States in their intercourse with each other."[31] "Indeed every important element in it can now be challenged."[32] "...... it is now generally recognised that not only states but also public international organisations have rights and duties under international law, even though they may not have all the rights and duties that states have."[33] The establishment of the League of Nations was a great landmark for this new development which culminated in the establishment of the United Nations. The international organisations have now become a common and regular feature of international life. In its advisory opinion, Reparation for Injuries Suffered in the Service of the U.N.,[34] The International Court of Justice confirmed this development by holding that the U.N. is a legal person and can bring out claims for reparation for the injuries suffered by persons (in the instant case by Count Barnodotte while serving in the Middle East) in the service of the U.N. It is, therefore, now an indisputable fact that public international organisations are also the subjects of international law. In fact, "the future of international law is one with the future of international organisation."[35] The establishment of World Trade Organisation in 1995 to regulate international trade and commerce is testimony to this fact. So is the case of the establishment of International Criminal Court.

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[26] Philip C. Jessup, A Modern Law of Nations, p. 40.

[27] J.G. Starke : Introduction to International Law, Tenth Edition (Butterworths, Singapur, 1989) p. 100

* See also for P.C.S. (1985) Q. 1 ; For answer see also Chapter on "Definition, Nature and Basis" and "Subjects of International Law". See also for P.C.S. (1987) Q. 1.

[28] I.C.J. Rep. (1948) p. 4 at p. 67.

[29] Dr. B.V.A. Roling, International Law in an Expanded World (1960) p. 121; See also RP Anand, New States and International Law (1972), p. 113.

[30] L. Oppenheim, International Law (Newyork, Longmans Green & Co., 1905) pp. 1-2.

[31] L. Oppenheim, International Law, Vol. I (Peace), Eighth Edition by H. Lauterpacht, pp. 4-5.

[32] Oliver J. Lissitzyn, International Law Today and Tomorrow (Dobbs Ferry, Newyork, 1965), p. 38. For a detailed criticism of Oppenheim's definition see also Chapter on "Definition, Nature and Basis of International Law".

[33] See e.g. Reparation for Injuries Suffered in the Service of the U.N. Advisory Opinion, I.C.J. Rep. (1949), p. 174; D.W. Bowett, The Law of International Institutions (London, Stevens & Sons, 1963), pp. 273-310. The Holy See has long been regarded as having rights and duties under International law.

[34] I.C.J. Rep. (1949) p. 174.

Secondly, "since the Second World War international law has been enriched not only by the addition of the numerous international and supernational state organisations, but also by a new international law that has been evolved around the individual."[36] Regarding this benign development in the field of international law, Corbett has also written, "To me it has long meant that we are witnessing a transition in international legal development from a prolonged stage in which the predominant, not to say exclusive, concern was the regulation of the conduct of states as distinct entities to one in which equal attention is given to promoting the growth of a body of world law transcending states, and applicable on a footing of equality, to individuals, corporations, international organisations and states." [37] Thus the most important change that has taken place is that of addition of new subject.[38] International law has undergone significant changes in the course of time. The shift has been "from the more or less formal regulation of diplomatic relations between states to an international law of welfare." [39], Further "international law is today actively and continuously concerned with such divergent and vital matters as human rights and crimes against humanity, the international control of nuclear energy, trade organisation, labour conventions, transport control or health regulation...As international law moves today on so many levels, it would be surprising indeed if the traditional principles of inter-state relations developed in previous centuries were adequate to cope with the vastly more divergent subject-matters of international law of the present day." [40]

These factors necessitated the revision of Oppenheim's definition of International Law once again. That is why, the editors of ninth edition of Oppenheim's book have defined International law in the following words :

"International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which governs the relation of states, but states are not the only subjects of International Law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law."[41]

Thirdly, it is now well established that international law comprises not only of customary and conventional rules but also of "general principles of law." [42] Article 38 (1) (c) of the Statute of the International Court of Justice mentions : "General Principles of law recognised by civilized states" as the third source in order in which the sources of international law are to be used by the International Court of Justice while deciding a dispute. "Article 38, paragraph 1(c) of the Statute of International Court of Justice... places on record one of the main sources of the rules of public international law. Indeed it describes the inexhaustible reservoir of legal principles from which the tribunals can enrich and develop public international law." [43]

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35. P.E. Corbett, Law and Society in the Relation of States, p. 12.

36. Dr. B.V.A. Roling, Internationl Law in an Expanded World. (Djambatan N.V. Amsterdam 1960), p. XXII: See also W. Friedmann, The Changing Structure of International Law (1964), pp. 221-249.

37. Percy E. Corbett, The Growth of World Law (Princeton, New Jersey, 1971), p. 184.

38. W. Friedmann, The Changing Structure of International Law (London Steven & Sons; 1964). p. 67.

39. W. Friedmann, "Changing Dimensions of International Law", Columbia L. Rev., Vol. 62 (1962), p. 1147 at p. 1148.

40. W. Friedmann, "Some Impacts of Social Organisation on International Law." AJIL, Vol. 50 (1956), p. 475 at p. 477.

41. Oppenheim's International Law Ninth Edition (Longman Group U.K. Limited and Mrs. Tomoko Hudson. 1992, Vol. I, Edited by Sir Robert Jennings' & Sir Arthur Watts, p. 4.)

42. Oliver, J. Lissitzyn, International Law To-day and Tomorrow (1965), p. 39.

43. McNair, "The General Principles of Law Recognised by Civilized Nations," BYBIL. Vol. XXXIII (1957), p. 1 at p. 6.

It may be noted here that even the latest definition of International Law given in Oppenheim's book (1992) is conspicuous by its silence about the general principles. Obviously therefore, the definition of International Law given in the Ninth edition of Oppenheim's book (1992) still suffers from this deficiency.

Further, "the very conception that international law is a 'body of rules', now stands challenged as static and inadequate.[44] It is a common place that law is a process, not a body of self-executing rules." [45] A static conception of international law based merely on body of rules, derived from technically defined 'sources' will be inadequate in facing the challenges and demands in a divided and dynamic world.[46] Though law is a dynamic concept yet it has become customary to define law as a body of rules. What is true of law in general is also true of international law. Therefore it does not seem to be proper to criticise Oppenheim on this account.

Lastly, the use of the term 'civilized states' has also been subjected to severe criticism. Several decades before western countries considered only Christian states as civilized states and neither long history nor culture was considered necessary for this. Even ancient and civilized countries like India and China were not considered to be civilized. The use of epithet 'civilized' in the definition was therefore, not proper. That is why, in later editions of Oppenheim's book the word 'civilized' was removed.

It may be noted here that present international law, to some extent, is based on the Charter of the United Nations and it is developing despite the weakness of the institution. The Charter gives a place of importance to the individuals and that is why human rights are developing under the present international law. In fact the development of new international law has begun after the establishment of the United Nations. The Charter is an international treaty and is based on the true legality of international law. International law in its turn derives inspiration from Charter and functions despite the weaknesses of the United Nations as an institution. There is no alternative to the United Nations and it is difficult to envisage a world without the United Nations which has become almost an Universal Organisation because as many as 191 countries have become its members. It has succeeded in preventing a world war for more than fifty years. Though in a negative sense, it is a great achievement indeed. It has made significant contributions in the social, economic and cultural fields. All this has infused new vigour and dynamism in the present international law. The United Nations has completed more than fifty years of its existence. It is now universally recognised that it has become an indispensable organisation. At present it is facing an unprecedented financial crisis which is affecting its overall performance in various fields. But there is no reason to believe that as in the past it will not be able to encounter successfully this crisis. It is in the interest of humanity as a whole that this august universal international organisation should be strengthened.

in the dynamic world of today, international law finds itself confronted with many challenges. The most formidable of these challenges are communism, terrorism emergence of large number of states, nuclear weapons, scientific and technologic revolution, depletions of ozone layer due to green-house effect etc.

Communist challenge

The Communist world is generally represented by the Soviet Union and China. It will, therefore, be relevant to consider the challenges posed by Soviet Union and Communist China and whether international law can meet these challenges. It may be noted at the outset that the Soviet theory of international law regards treaty or agreement as the only appropriate method for effecting changes and development in international law.[47] The

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[44] International Law Today and Tomorrow (Newyork, 1965), p. 39.

[45] M.A. Kaplan and Node B. Katzenback, The Political Foundations of International Law (Newyork and London, Johnwiley & Sons, 1961), p. 231 (and at pp. 19-29); and see, generally, the writings of My-res S. McDougal.

[46] Lissitzyn Note 42, at p. 40.

[47] See K. Venkatraman, "The Role of Customary Practice in the Development of Universal International Law," Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 212 at p. 215.

Soviet Union considered custom, as inadequate and insignificant for the development of international law. The Soviet attitude towards international law is the product of "the combined pressure of need and Marxist doctrine."[48] The Soviet Union generally made a pragmatic approach toward international law.[49]

According to the Soviet definition, international law is "the sum total of the norms regulating relations between states in the process of their struggle and co-operation, expressing the will of the ruling classes of these states and secured by coercion exercised by states individually and collectively."[50] After the death of Stalin, the above definition was slightly modified by inclusion of a reference to "peaceful co-existence."[51] Soviet writers laid a great emphasis on 'peaceful co-existence' in relations between the sovereign states. According to the Soviet view, "the principle of peaceful co-existence should be the basis of the whole structure of contemporary international law. Only if it is based on the principle of co-existence, can the international law best promote the cause of peace and mutual understanding between States." [52] The Soviet Union claimed that the principle of peaceful co-existence finds reflected in the principle of unanimity of the permanent members of the Security Council of the United Nations when major decisions are to be taken and contended that "The majority rule cannot be applied to the relation between different social systems. Such relations are inevitably to be based on mutual respect for the sovereign equality of nations, peaceful negotiation, and reasonable compromise.[53] It is on the basis of this principle that the Soviet Union adamantly refused to pay its part of the expenses for the United Nations Operation in the Middle 'East and Cango. The Soviet Union adopted the same attitude in regard to the giving of compulsory jurisdiction to the International Court of Justice. It consistently refused to accept or rather confer the obligatory jurisdiction on the International Court of Justice. The obligatory jurisdiction, it was claimed, "is not only contrary to the spirit of peaceful co-existence but at same time is not adequate in the present circumstances. The most burning international issues, such as, the liquidation of colonial system or the solution of the West Berlin are political problems first of all, and cannot be solved by a court or arbitration alone.[54]

Yet another concept evolved by the Soviet writers which posed a serious challenge to the existing international law was that of the wars of "National Liberation." [55] So was the case with the concept of 'unequal treaties.' The term 'unequal treaties' has been defined as follows: "Equal treaties are concluded on the basis of the equality of the parties; unequal treaties are those which do not fulfil this elementary requirement. Unequal treaties are not legally binding; equal treaties must be strictly observed." [56] The examples of the Soviet Challenges to International Law noted above are simply illustrative and by no means exhaustive. These examples should, however, not mislead us to think that the Soviet Union has not generally followed the norms and principles of international law. "The observance by the Soviet Union of much of international law need not be a cause for surprise. It demonstrates the essential role international law still plays even in the relations between antagonistic states so long there is no all out military conflict.

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[48] Lissitzyn, note 42, at p. 46.

[49] Ibid.

[50] Definition by A.Y. Vishinsky in 1948 quoted from Ibid at p. 49.

[51] According to the Soviet view "Co-existence is a continuation of the struggle between the social systems, but struggle by peaceful-means, without resorting to war without interference by one state in the internal affairs of another. It is competition in peaceful endeavours. It implies reciprocal concessions and compromises". Victor P. Karpov, "Soviet Concept of Peaceful Co-Existence and its Implications for International Law". The Soviet Impact on International Law. Edited by Hans W. Baade (Newyork, 1965), p. 14 at p. 15.

[52] Ibid. at p. 20.

[53] Ibid. at p. 17.

[54] Victor P. Karpov. "Soviet Concept of Peaceful Co-existence and Implications for International Law". Ibid., p. 14 at p. 18. See also Richard N. Gardner, "The Soviet Union and the United Nations". Ibid p. 1 at pp. 5-6.

[55] See George Ginsburgs, "Wars of National Liberation, and the Modern Law of Nations—the Soviet Thesis," Ibid, at pp. 67 to 77.

[56] Adopted from Oliver J. Lissitzyn. International Law Today and Tomorrow. (Newyork, 1965), p. 53.

International relations simply cannot be maintained without a framework of mutually recognised and observed norms... considerations of reciprocity, sometimes induce the Soviet Union to bring its practice into close conformity, with that of the rest of the world.[57] Therefore the view was expressed that "The Soviet ideology is likely to be modified as a result of the joint or co-operative activities with capitalist countries such as Antarcatica and Outer Space. This will inevitably lead to the expansion of the role of international law in the relations between the two camps." [58]

By the end of the year 1991 the communist system collapsed in the Soviet Union. The concepts of Glassnost and Prestroika created such strong ways for freedom and democracy that the whole existing system collapsed. The shortage of food production and consumer goods in the Soviet Union were mainly responsible for the abrupt collapse of seventy year's system. This led to the breaking up of the Soviet Union and mad rush for emulating the western system once its staunch rival. The constitutent states of the former Soviet Union started looking towards the west for help, aid and survival. Almost all the former republics of the Soviet Union became the members of the United Nations. Even in Russia formally Communism came to an end. Other Communist countries could not also escape this strong wave of opposition to Communism. Due to internal conflicts and civil war Yugoslavia was divided into several parts. Czchoslovakia was divided into two parts as Czech and Slovak leaders agreed to split the country on 20th June, 1992, ending a 74-year-old federation of their two peoples. Even in China, the advent of capitalism is posing a great challenge to Communism. Thus the Soviet challenge to the International Law has now come to an end. Russia has now become a member of the North Atlantic Treaty Organisation (NATO) and Prime Minister of Russia has recently hinted that Russia may join WTO. As China has already become a member of WTO, Russia may soon follow the suit.

The People's Republic of China or Communist China had also challenged the accepted norms and principles of international law in many important respects. For example, Communist China has been a much more staunch supporter of the concept of 'unequal treaties'. According to a Chinese writer "Whether or not a treaty is equal does not depend upon the form and words of various treaty provisions, but depends upon the state character, economic strength, and the substance of correlation of the contracting states."[59] Consequently, all treaties entered into by China in the nineteenth and early twentieth centuries regarding consular jurisdiction, unilateral most favoured nation treatment, restrictive tariff regulations, territorial cessions or leases, etc. are regarded as unequal treaties. A recent example of a multilateral treaty regarded as unequal by China is Treaty on Non-Proliferation of Nuclear Weapons, 1968 on the ground that obligations among all contracting parties are not 'identical and reciprocal'. But China herself does not uniformly follow this principle. The most glaring example of this is the provision relating to veto conferred on the permanent members of the Security Council under the U.N. Charter which is nothing but an unequal.[60]

It is significant to note here that Communist China had not articulated a comprehensive novel theory of international law. It is, however, clear, "that the People's Republic has not overtly rejected the entire fabric of international law that had developed as of the time when communism triumphed in China in 1949. Although usually reluctant to invoke international law, the PRC has often at least given lip service to its interpretation of customary and conventional norms when non-legal techniques of persuasion and dispute resolution have proven inadequate. There have been many occasions when Peking has purported to perceive and evaluate in terms of broadly accepted international legal principles. Furthermore because reciprocity is the basis of international law, no government can long except its legal claims to be honoured unless it demonstrates a corresponding willingness to honour the similar claims of its foreign counterparts. For these reasons it is not surprising that to considerable extent the PRC's articulation of its foreign policies has taken account of, and claimed consistency with basic principles of international law." [61]

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[57] Adopted from Oliver J. Lissitzyn. International Law Today and Tomorrow. (Newyork, 1965), p. 60.

[58] Ibid, p. 70.

[59] Quoted from Hungdah Chiu, "Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties." China's Practice of International Law; Some Case Studies, edited by Jerome Alan Cohen (Cambridge Massachusetts. (1972), p. 239 at p. 259)

[60] Ibid, see pp. 260-264.

Moreover, both the Soviet Union and Communist China, had not rejected the entire fabric of international law although they have tried to modify certain accepted principles in several important respects. At one time it appeared as if the Communist challenge had shaken the very foundations of international law but subsequently it became evident that in many spheres reconciliation between the conflicting demands became necessary and on the principle of reciprocity the communist countries also were compelled to accommodate themselves by observing many norms and principles of international law. International law was never static, like all living law it was always undergoing the process of reconstruction and re-interpretation in order to mend itself to the needs of the day.

The concepts of Glasnost and Prestroika during the regime of Soviet President Gorbachev brought about the Communist Republics closer to the Western States. Directly or indirectly these concepts awakened the hitherto dormant waves of independence. For a considerable period of time the Soviet Union was facing financial and certain internal problems. The shortage of food and consumer goods added to the gravity of the situation. People started losing faith in communism and were eager to follow the open market system of capitalism. One by one all republics of Soviet Union declared their separate independence. It ultimately led to the breaking up of the Soviet Union. In the course of time almost all the republics of former Soviet Union became members of the U.N. Communism was officially abolished in Russia. It was quite natural and obvious that other Communist States could not escape the influence of such epoch-making events Czecho-Slovakia was divided into two states. Yugoslavia was destined to witness greater turmoil and besides losing its membership of the U.N. in 1992, it was broken up into several states. The advent of capitalism even in China started shaking the foundations of communism. Thus one of the greatest challenge to International Law came to an end. China has now become one of the members of World Trade Organisation (WTO)

Challenge of Nuclear Weapons*

One of the most serious and formidable challenges with which international law is confronted with is the challenge of nuclear weapons. Due to devastating capability of nuclear weapons the world may be said to be sitting on a volcano which may erupt any time and may engulf the whole world. According to Fenwick, atomic bomb cannot come under the recognized laws of war and its nature is such that its use can be made only by violating the existing laws.[62] The development of nuclear weapons have shown the inadequacy of the existing laws of war. Therefore, ".........whether the changing norms of international law can help in the dire straits in which the world finds itself is the question, the answer of which is not readily at hand." [63]

Since International Law is a dynamic concept and it has the capability to adopt itself to the changes that take place, it can well be hoped that International Law will successfully face this challenge. The International Nuclear Forces Treaty (INF Treaty) 1987 is a glaring example of this. Both the great powers signed this Treaty on 8th December, 1987. This Treaty prohibits nuclear missiles of the range of 300 to 3400 miles. This Treaty provides for the destruction of 2800 missiles of the medium range (*i.e.* between 300 to 3400 miles). This Treaty has been rightly hailed as a good beginning in the direction of total elimination of nuclear weapons. On 31st July, 1991, President Gorbachev of Soviet Union and President George Bush of U.S. signed a historic treaty

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61. Quoted from Hungdah Chiu, "Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties." China's Practice of International Law; Some Case Studies, edited by Jerome Alan Cohen (Cambridge Massachusetts. (1972), pp. 12-13.

* P.C.S. (1966), Q. No. 1 ; See also Q. No. (e) of the same year and Q. No. 1 of P.C.S. Exam 1968.

62. C.G. Fenwick, International Law, p. 773.

63. Leonard M. Salter, note 12, at p. 695.

known as Strategic Arms Reduction Treaty (START) reducing 30% of strategic nuclear arsenals. Besides this, on 3rd June, 1993, President Boris Yeltsin of Russia and President George Bush of America signed START II which aims to reduce two-thirds of nuclear arsenals within next ten years. Reference may also be made to the Treaty on Non-Proliferation of Nuclear Weapons which has been signed by a large number of countries. There are certain unequal and discriminating provisions because of which it has failed to achieve the desired objectives. While it imposes obligation on non-nuclear nations it does nct impose similar obligations on nuclear powers. Nor does it provide for the destruction of existing nuclear arsenals or even the stoppage of testing new weapons by nuclear powers. Nuclear Tests by France in defiance of public opinion is a glaring example of this. That is why the need is to remove unequal and discriminating provision from the treaty and also to provide for time bound destruction of existing nuclear arsenals. The latest attempt to meet the nuclear challenge is the comprehensive Nuclear Test Ban Treaty. But this Treaty suffers from certain deficiencies and favours the nuclear power against those who do not possess or on the verge of acquiring them. Unless a Treaty guarantees the destruction of all nuclear arsenals and prohibits all nuclear tests for once and all time, it cannot achieve the desired objectives.

Reference may also be made the Comprehensive Test Ban Treaty (CTBT). In June 1995, a conference was held in Geneva to adopt the Comprehensive Test Ban Treaty to prohibit nuclear tests. This Treaty seeks to remove the shortcomings of the Treaty on Non-Proliferation of Nuclear weapons. Thus CTBT was adopted. CTBT Review conference was held in Vienna in the first week of October 1999. The conference was attended by 90 countries. The conference appealed to the countries whose ratification was necessary for the Treaty to come into force to ratify the treaty at an early date. Before the start of the Review conference, 154 countries had already signed and 51 countries had ratified it. Forty four countries have nuclear capacity including five original countries. Out of these 44 countries 26 countries have already ratified the treaty. So far as many as 144 countries have ratified CTBT. The remaining countries that have not so far ratified the CTBT are China, Democratic People Republic of Korea (DPRK) Egypt, India, Israel, Pakistan and the United States.

Reference may be made here to the Treaty on Non-Proliferation of Nuclear Weapons, 1968 which became effective on 5 March, 1970. It has been signed and ratified by as many as 190 countries. However four recognised sovereign states are not parties to this Treaty. These countries are India, Israel, Pakistan and North Korea.

Reference may be made here to the convention in early notification of a Nuclear Accident Radiological Emergency. It entered into force on 27th October 1986. Besides this reference may also be made to the Convention Assistance in the Event of Nuclear Accident or Radiological Emergency, 1986. It entered into force on 26 February, 1987. It has been ratified by 111 (one hundred eleven) countries.

North Korea has been behaving like a rogue nuclear nation. One after another it has been testing more and more powerful nuclear weapons. Time and again it threatens war with South Korea and America. In this very month *i.e.,* July 2017, it has tested Inter-Continental Ballistic Missile (ICBM) covering different parts of America. America on its turn shows its preparedness to retaliate. Thus at may by any wrong move, by either of these nations a nuclear war may start. To avoid such an eventuality, at G 20 meet, on 8th July, 2017 American President and Chinese President agreed to work on North Korea 'menace'. By nature, North Korean President does not seem to be listening to any advice. Let us hope that wisdom will prevail on these nations so as to avoid a nuclear war which would mean catastrophe and devastation. After the killing of Sulemani, top Iranian military commander, tension between Iran and America increased. Iran broke the earlier deal as to not to go nuclear and avowed to take revenge from America...

Scientific and Technological Revolution

Yet another formidable challenge confronting International Law is as to how to develop and adapt it in accordance with scientific and technological advancements which are taking place with an accelerated speed. The achievements in the field of means of communication and tele-communication have made it difficult rather impossible to prevent intervention by a state in the affairs and territory of other states. Consequently, the foundation of concepts such as Sovereignty and Nationality have been shaken.

Challenge posed by Depletion of Ozone Layer as a result of Green-house Effect

Depletion of ozone layer as a result of 'green-house effect' poses a very grave challenge before the whole world and hence before International Law. This challenge is probably more serious than the challenge posed by nuclear weapons. Though Ozone Treaty has been entered into in 1987 to face this challenge and other measures are also being taken to solve this problem with a view to meet this challenge as well as to deal with other environmental problems, U.N. Conference on Environment and Development (UNCED) popularly known as the Earth Summit was held in Brazil from 3rd to 14th June, 1992, to face this challenge so as to save planet earth. Kyoto Climatic Conference was held on December, 1997, to devise means and strategies to meet this challenge.

As of November, 2009, 187 Countries had ratified the Kyoto Treaty on climate change 1997. But U.S., the biggest polluter of the world, has caused the great upset. America refused to ratify the treaty because according to it, it would harm the economy and is flowed by the lack of restrictions by emerging economies, China, India and Australia. The other developed nations who have not joined the treaty stated that they were on track to cut emissions by 30%. Besides this, U.N. Frame work convention on climate change, 1992 has been ratified by 195 countries (all U.N. Members except South Sudan. Apart from U.N. Members Nive, Cook Island and European Union have ratified the convention.

Reference may be made here to Vienna Convention on the protection of Ozone Layer, 1985. It entered into force in 1988. So far it has been ratified by 197 countries (all UN members plus Nive, Cook Islands as well as European Union). Thus, this treaty has become universal. Besides this, Montreal Protocol in Substances that Deplete the Ozone Layer was also adopted. This protocol has also been ratified by 197 countries. It is necessary to note here that on 16th September, 2009, above mentioned Vienna Convention and Montreal Protocol became the first treaties in the history of the United Nations to achieve universal ratification.

Challenge Posed by Terrorism

Yet another challenge and indeed really potent, is that of terrorism. After the emergence of various terrorist outfits which have spread all over the world, has led a new dimension to the challenge of terrorism.

One of the reasons for expansion of its activities, is that there is no unity in the international community in respect of its elimination or destruction. Some countries especially America have attacked and bombarded some selective places in Syria and Iraq to defeat terrorism, but its approach has been selective and has not proved effective to resist the expansion of terrorist groups. Some other countries such as France, Iraq, Britain etc. have followed suite to American action and have attacked some places occupied by terrorist, but their approach has also been selective.

Another great power, Russia has also taken upon itself the task of elimination of terrorism. Russia started attacking places occupied by terrorist in Syria.

Western governments, especially America, are of the view that the vast majority of Russian strikes have targeted rebel groups in an attempt to defend President, Bashar al-Assad. America and Western Countries are satisfied with Russia entering the fight against terrorism. It is generally admitted that Russian attacks have proved to be more effective than those of America and other countries. However, the ground reality shows that militants advanced to the outskirts of Syria's second city of Aleppo, despite of Russian air strikes that aimed at routing the terrorism. NATO Secretary General, Jems Stoltenberg said that Russia's continued support for Syrian President is only serving to prolong the crisis there. He added that Russia should play a constructive role in the fight against terrorism.

It is clear from the aforesaid facts that if the world powers such as U.S. and Russia are keen in their fight against terrorism, they should unite whole heartedly in their fight against terrorism. Nothing less than this will not serve the desired result.

In the present world, terrorism is posing more and more dangers. Today, terrorism pervades all parts of the world. Each and every nation of the world is facing the menace of terrorism. No country is now safe from terrorist methods such as human bombs and 'lone would attack'.

Emergence of a large number of new states*

The present system of International Law has been described as being a product of Western power politics and as being unsuited to the needs and aspirations of the independent States of Asia and Africa.* As pointed out by Dr. Nagendra Singh, 'the greatest impact known to history on the development of International Law has been the sudden expansion of the world family of nations from 51 members in 1946 to 126 in 1969. At present, there are as many as 192 members of the United Nations. The U.N. has thus become nearly universal. The proliferation of the new states has not only made 'Eurocentrism' in thinking about international law as anachronistic but has also brought about qualitative changes in the norms and principles of international law.[64] Most of the new states were earlier the colonies of the Western states and had been relegated to the status of 'objects' and consequently, could not contribute in the development of norms and principles of the modern international law. However, this does not mean "that the new states are political entities which emerged out of the blue."[65] As a matter of fact, many of the new states, particularly in Asia, were previously independent and did play an active role in international affairs during the sixteenth; seventeenth and eighteenth centuries but they were subsequently made colonies and after being deprived of their identity as states and were relegated to the position of 'objects of international law,[66] After having freed themselves from the clutches and yoke of the imperialist powers, these new states for the first time tested the established doctrines of traditional law in accordance with their views and practices.[67] They started with the general premises that the norms and principles of international law in the development of which they had not participated were not binding on them. While doing so they rejected some of the existing norms and principles of international law. It is, however, significant to note that the new states have not rejected the whole fabric of international law for that would have implied a denial of their own rights accorded to them under international law. Their approach has been that of the rejection of some of the norms and principles and of 'eclectic' selection of others.[68] According to Robert L. Friedheim,[69] the term "new states" is a misnomer. In his view, such states should be referred as "Dissatisfied" States. In the view of another eminent writer, Syatauw,[70] the term 'new states' is misleading. The term 'new states' should be discarded, particularly if it is taken as referring to those states that have gained their independence since World War II. Not only is the term incorrect, it is misleading and therefore detrimental to a clear understanding of the working and development of international law and international relations. Many of us have used the term in our writings in the past, especially in the 1950 and the early 1960, the time of the great influx of new Asian and African States. But these so-called new states now have a history and experience of some ten, twenty or thirty years. They have come to participate fully and actively in international affairs. They have played their part in international decision-making, often bringing decisive weight to hear on the deliberations. They have provided officials for some of the highest functions in the organised international society such as the Secretary General of the U.N., an increasing number of Judges of the International Court of Justice and of the members of the International Law Commission and several mediators or members of committees of good offices."[71] Thus the term 'new states' is now "outmoded, incorrect and may therefore lead to serious misrepresentation. And this should at all cost be avoided in a field such as international law that is sufficiently hampered by misconceptions and misunderstandings."[72]

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* See also for P.C.S. (1966) Q. 1 ; P.C.S. (1968) Q. 1.

[64] See Upendra Baxi, "Some Remarks on Eurocentrism and the Law of Nations, Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 3.

[65] J.J.G. Syatauw, "The Relationship between the Newness of States and their Practice of Inernational Law". Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 10.

[66] R.P. Anand, New States and International Law, (Vikas Publications, Delhi, 1972), p. 113.

[67] J.J.G. Syatauw, Some Newly Established Asian States and Development of International Law. (The Hague, Martinus Nijhoff, 1961), p. 234.

A brief reference may also be made here of India's position in regard to the rules and principles of international law. Like other new states, India has also sought to reject or modify some of the rules and principles of the traditional international law. India has neither accepted the whole nor has rejected the entire fabric of the traditional international law. "India, like many other new nations, has expressed dissatisfaction with some of the rules of international law as developed in the West. This, however, does not mean that India's challenge of some of the rules of international law is motivated by any desire to subvert the international legal order. Nor is India's opposition of the same kind as that of the Soviet Challenge."[73] Further, In fact, India's argument would seem to indicate that it is far more influenced by the Western rather than Soviet concepts of international law. This should not be surprising. However, it must not be supposed that India would agree to all the rules and principles that are identified as international law in the West. Rather, it does not challenge the doctrine of international law in the same way as the Soviets challenge it."[74] Since her emergence as new state after the attainment of independence, India has made her own contribution for the progressive development of international law. Her contribution has been particularly significant in the fields of codification of international law, colonial issue,[75] peaceful co-existence[76] and non-alignment.[77]

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[68] See J.J.G. Syatauw. "The Relationship between the Newness of States and their Practice of International Law". Asian States and the Development of Universal International Law, Edited by R.P. Anand, pp. 12-18.

[69] See Robert L. Friedheim, "The Satisfied and Dissatisfied States Negotiate International Law", World Politics (October, 1965).

[70] J.J.G. Syatauw, "Old and New States: A Misleading Distinction for Future International Law and International Relation", I.J.I.L., Vol. 15, No. 2 (1975), p. 153.

[71] J.J.G. Syatauw, "Old and New States: A Misleading Distinction for Future International Law and International Relation", I.J.I.L., Vol. 15, No. 2 (1975), p. 153 at p. 171.

[72] Ibid, at p. 172.

[73] M.K. Nawaz, "International Law in the Contemporary Practice of India: Some prospectives Proc. ASIL, April, 25-27, 1963, p. 275 at p. 289.

[74] M.K. Nawaz, "International Law in the Contemporary Practice of India: Some prospectives Proc. ASIL, April, 25-27, 1963 at p. 282.

It is clear from the above discussion that no serious attempt has been made to devise an Afro-Asian system of International Law either as an adjunct of the existing system or as a substitute for the same nor does it seem to be feasible. The emergence of a large number of Asian-African States has made it clear that the international law which was mainly evolved by European powers to govern their relations with each other, needs reconstruction and reorientation in order to cater the needs and requirements of the majority of states. Hitherto, International Law was mainly based on the concepts of co-existence and reciprocity. From the international law of co-existence and reciprocity, international law now needs to be transformed into an "international law of co-operation."[78] The emergence of the new states has made the international society almost universal. This is evident from the fact that the U.N. has now as many as 191 members as against 51 members when it was established in 1945. International law must also, therefore, become universal in order to serve the interests of all states properly, equitably and effectively. It is generally recognised that like all living law, international law should also be "responsive to the needs of the society to which it was applied. International Law should change with the changed circumstances if it had to retain its health and vitality.[79]

The Breaking up of the Soviet Union.—International Law has been confronted with a new challenge that has manifested itself as a result of the breaking up of the Soviet Union. Hitherto the world was accustomed of having two Super Powers—U.S. and the U.S.S.R. and the Non-Alignment movement functioned as a balancing force. With the disappearance of the Soviet Union, the world has now only one Super Power *i.e.* the U.S. The domination of one Super Power may pose serious challenge to the existing international law including the law of the U.N. During the Gulf War (1991) the U.S. dominated the Security Council to such an extent that it did not allow the council to hold its meetings until its objective in war was achieved. The fear of domination by one Super Power will continue to lurk in the minds of member states until an alternative is found. That is why, developing states are now clamouring for democratisation of the organs of the U.N. including the Security Council. Though by and large the Soviet Union (now Russia) has endeavoured to reconcile itself with this revolutionary challenge that has taken place, rather befallen yet certain developments such as the eastward expansion of NATO are making the problem more complex. Russia has coped even with this disturbing problem and has now joined the NATO.

Need for Universal International Law

In order to cope with the manifold changes that have taken place and are taking place with accelerating rhythm, the need is to evolve a 'Universal International Law', "a relatively new phrase which has come into vogue in the last few years probably as a result of more intensely perceived ideological division in the world, the insistence on a common set of values as a pre-condition for a viable legal order, and, more recently, the challenge to the traditional body of doctrine and precept emanating from new states in Asia and Africa."[80] As aptly remarked by Prof. Quinsy Wright, "Stability with change, solidarity with variety, peace with justice, international law with national independence, these difficult conciliations, it is the task of international law to effect."[81] It has already been stressed earlier that the traditional definition of international law has now become inadequate. In order to ensure dynamism in international law and to make it universal certain new concepts such as "transnational law",[82] "Common law of mankind"[83], 'world order' and 'world law'[84] etc., have been put forward. The term 'transnational law' has been described as including "all law which regulates actions or events that transcends national frontier. Both public and private international law are included as are other rules, which do not wholly fit into such standard categories......... Transnational situations, then involve, individuals, corporations, states, organisations of states or other groups."[85] In his book, *The Common Law of Mankind,* C.W. Jenks has also contended that the traditional definition of international law is inadequate because it fails to convey that international law is a part of the Common Law of Mankind in an early stage of development. The term 'world order' has been described as follows: "The image projected is one of human behaviour regulated by law on a world scale in as much the same way as it is not regulated within the State. The order contemplated is supranational but its subject and actors are not necessarily states alone; they may be other groupings or even individuals. World order presumes world community under law; but not necessarily a community of states; it may be a community of individuals, transcending states."[86] Corbett, however, concedes that there are formidable problems and difficulties in the establishment of world law or world order contemplated. He simply states that ".........it has gained, ground and no excessive optimism is required to regard even the present stage as at least law in the making."[87] According to Jenks, "The whole future of man depends on his success in three quests : the quest for world peace, the quest for social justice, and the quest for personal freedom. These quests cannot succeed unless we develop a common law of mankind in an organised world community."[88] The need is therefore to evolve a common law of mankind. To put it in other words, in order to become useful and effective, International Law must keep pace with the accelerated rhythm of change; it must develop faster than it has done in the last fifty years and become more universal. In his excellent paper,[89] Dr. Quincy Wright has rightly pointed out, that the foundations already exist "in the formal acceptance of the states of the purposes, principles, organs and procedure of the United Nations. The challenge is to build on these foundations so that the international system they contemplate, will supersede in practice as well as in theory and law, the inadequate system of power politics that has led to two major and many lesser wars in the twentieth century. Salvation of the world from the holocaust of nuclear war may provide necessary inducement". In South West Africa cases, Judge Tanaka has, also aptly observed : "The unified national laws of the character of *jus gentium* and the laws of human rights which is of the character of *jus naturale* in Roman law, both constituting a part of the law of world community which may be designated as *World Law, Common Law of Mankind* (Jenks 1958), *Transnational Law*, (Jessup 1956) at the same time constitute a part of international law through the medium of Article 38 (1) (c)".[90] The traditionally, juridically, and individualistic conception of international law is being slowly but steadily, transformed into the law of social interdependence. The most important characteristics of this law are—(a) "It is concerned not only with the delimitation of the rights of states, but also with harmonizing them; (b) in every question it takes into account all its various aspects; (c) it takes the general interest fully into account; (d) it emphasises the notion of the duties of states, not only towards each other but also towards international society; (e) it condemns the use of abuse of right; (f) it adjusts itself to the necessities of international life and evolves together with it; accordingly it is in harmony with policy; and (g) the rights conferred by strictly juridical law it adds which states possess to belong to the international organisation which is being set up.[91]Thus the new International law that is being evolved is not strictly juridical; it also takes into account political, economic, social and psychological factors.[92]

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[75] See M.K. Nawaz, "International Law in the Contemporary Practice of India: Some prospectives Proc. ASIL, April, 25-27, 1963 at pp. 281-288.

[76] See Nagendra Singh, India and International Law, (S. Chand & Co., New Delhi, 1969), pp. 73-86.

[77] As pointed out by Dr. Nagendra Singh, "In modern times, after Independence in 1947, non-alignment and peaceful co-existence have been the watchwords of this country's foreign policy. In this direction India's contribution can best be summarised in advocacy of the concept of Panchsheel" Ibid. at p. 75: See also Nagendra Singh, "India and International Law". Edited by R.P. Anand (1972), p. 25 at pp. 37-40.

[78] The term 'Co-operative international law' has been defined by W. Friedmann as describing "the growing number of international legal relationships and organisations...... concerned with the regulation of experiments in positive international collaboration. The legal and institutional problems posed by the developing and increasingly important branches of international law are essentially of a different character from those posed by traditional international law. To speak in sociological terms, a developing co-operative international law represents community aspects, rather than society aspects, in relationship between states and nations", Law in a Changing Society (1959), p. 460.

[79] R.P. Anand, Asian States and the Development of Universal International Law, (1972), p. xiv.

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[80] Leo Gross, "Sources of Universal Law", Ibid. p. 189.

[81] "The place of international law in the Contemporary Study and Practice of International Relation," Patna Law College Golden Jubilee Commemoration Volume, p. 62 at p. 76.

[82] See Philip C Jessup, Transnational Law, New Haven, Yale University Press, (1956).

[83] See C.Wilfred Jenks, The Common Law of Mankind (1958); See also Saul H. Mendlovitz, on the Creation of a Just World Order, Preferred worlds for the 1999 (The Free Press, Newyork, 1975); Richard A Falk, A Study of Future Worlds (Newyork, 1975); Rajni Kothari Foot Steps into the Future (1974).

[84] See Percy E. Corbett, The Growth of World Law, (1971). See also Hedley Sull "Models of Future World Order" India Quarterly, Vol. XXXI (1975), p. 62.

[85] Philip C. Jessup, Transnational Law (1956), pp. 2-3.

[86] P.F. Corbett, The Growth of World Law (1971), p. 10.

[87] Ibid, at p. 23.

[88] C.W. Jenks, Social Justice in the Law of Nations (1970), p. vii.

[89] "The Foundations for a Universal International System" in Asian States and the Development of Universal International Law (1972), p. 145 at p. 167.

Reference may be made here to some of international convention or treaties whose membership has become universal or nearly universal. Some of these treaties or conventions are following :

1. U.N. Charter (193 Members);
2. U.N. Convention on Climate Change (197 State Parties);
3. Convention or Treaty Establishing International Labour Organisation (187 of U.N. Members);
4. World Health Organisation (194 Countries);
5. Food and Agricultural Organisation (194 Members);
6. International Monetary Fund (188 State Parties);
7. Universal Postal Union (192 State Parties);
8. International Tele-Communication Union (193 Member States);
9. International Maritime Organisation (173 Members);
10. World Intellectual Property Organisation (192 Members);
11. Convention on Elimination of All Forms of Discrimination Against Women (188 States Parties);
12. International Convention on the Elimination of All Forms of Racial Discrimination (177 States Parties);
13. Convention on the Rights of the Child (194 States Parties);
14. World Trade Organisation (164 Members);
15. United Nations Industrial Development Organisation (174 Member States);
16. United Nations Educational, Social and Cultural Organisation (195 Members);
17. World Meteorological Organisation (191 Members);
18. International Finance Corporation (184 Countries);
19. Nuclear Non-Proliferation Treaty (190 Members).
20. U.N. Convention on Biological Diversity (196 States Parties).
21. International Civil Aviation Organisation (193 Members)
22. International Fund for Agricultural Development (173 Members)

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[90] I.C.J. Rep. (1966), p. 6 at p. 248.

[91] Per Judge Alvarez, Admission of a State to Membership in the United Nations : I.C.J. Rep. (1948), p. 4 at p. 67.

[92] *Ibid.*

23. U.N. Convention on the Law of the Sea (168 Countries)
24. Vienna Convention on Diplomatic Relations, 1961 (192 Members)
25. U.N. Convention to Combat Desertification (197 States Parties)
26. International Development Association (173 Members)
27. Convention on Development, Production, Stockpiling of Bacteriological and Toxic Weapons and their Destruction (190 countries)
28. Vienna Convention on Consular Relations (180 countries)
29. 1989 Basel Convention on the Control of Transboundary Movements of Hazardous wastes and Disposal (187 countries)
30. Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to Protection of Victims of International Armed Conflict (174 countries)
31. Protocol Additional Relating to Protection to Victims of Non-International Armed Conflicts (168 countries)
32. International Convention for Suppression of Terrorist Bombings, 1997 (170 countries)
33. International Convention on Suppression of Financing of Terrorism, 1999 (190 countries)
34. U.N. Convention Against Transnational Organized Crimes, 2000 (185 countries)
35. Protocol to prevent and Suppress and Punish Trafficking of Persons, 2000 (166 countries)
36. International Covenant on Civil and Political Rights, 1966 (172 countries)
37. International Covenant on Economic, Social and Cultural Rights, 1966 (170 countries)
38. International Convention Against Taking of Hostages, 1979 (174 countries)
39. Optional Protocol to the Convention on the Involvement of Children in Armed Conflicts, 2000 (163 countries)
40. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2000 (169 countries)
41. International Convention on All Forms of Racial Discrimination, 1966 (182 countries)
42. U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1989 (189 countries)
43. Convention Concerning the Protection of World Cultural and Natural Heritat, 1972 (191 countries)
44. Vienna Convention for Protection of Ozone Layer, 1985 (197 countries)
45. Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation, 1971 (185 countries)
46. Protocol for the Suppression of Unlawful Acts Against Safety of Civil Aviation, 1971 (197 countries)
47. Convention concerning Discrimination in Respect to Employment and Occupation, 1960 (172 countries)
48. Convention on Psychotropic Drugs, 1971 (183 countries)
49. Convention Against Illicit Traffic in Narcotic Drugs, Psychotropic Substance, 1988 (198 countries)
50. U.N. Convention Against Corruption, 2003 (175 countries)
51. Kyoto Protocol to the U.N. Framework Convention on Climate Change, 1997 (192 countries)

52. Genocide Convention, 1948 (152 Members)
53. International Convention for Suppression of Crimes against Persons Enjoying International Protection (Including Diplomatic Representation), 1973 (180 countries)
54. U. N. Convention on Law of Treaties, 1969 (116 countries)
55. Statute of International Criminal Court, 2002 (123 State Parties)
56. Convention on Political Rights of Women, 1952 (123 State Parties)
57. Optional Protocol to the Convention on Political Rights of Women, 31 March, 1953 (123 State Parties)
58. Treaty to ban Anti-Personnel Land Mines, 1997 (164 State Parties)
59. Convention on the Prevention and Punishment of the Crime of Genocide (147 Members)
60. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (147 State Parties)
61. U.N. Convention on the Rights of the Child, 1989 (193 Members)
62. Convention on the Rights of Persons with Disabilities, 2006 (131 countries)
63. Convention concerning Protection of World Cultural and National Heritage, 1972 (189 countries)
64. Convention on the Development, Production, Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, 1971 (185 countries)

The above list is simply illustrative and by no means exhaustive. The above list shows that even now there are great number of rules of international which apply universally on sovereign nations.

Development of International Law by International Organisations

A brief reference may also be made here to the development of international law by the organs of the international organisations. The organs of international organizations contribute to the clarification and development of international law.[93] They help to create *opinio juris* but state practice becomes evidence of law only when the vast majority of states believe themselves to be legally bound. These organs often invoke legal principle in order to reach normative decisions. As pointed out by Rosalyn Higgins, "The collective processes in a United Nations organ help to focus attention upon the need for mutual observance of the rules. Indeed, in some cases reference to a widely accepted rule of law can serve a bridge between differing ideologies."[94] The constituent instruments of international organisations represent an advanced stage of the development of international law. They have "introduced a quasi-legislative element in the law making processes at the expense of contractual element, facilitating a quicker response to the problems of international social order."[95]

What is true of the organs of the U.N. is also, even more, true of the organs of the specialized agencies of the U.N. For example, both the World Health Organisation (WHO) and the International Civil Aviation Organization (ICAO) carry out a wide range of activities which contribute to the development of International Law. This has become possible due to the provisions of the Constitutions of these specialized agencies. Under Article 21 of the Constitution of WHO, each Member has undertaken the obligation to take *action*

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[93] See Rosalyn Higgins, "The Development of International Law by the Political Organs of the United Nations," *Proc. ASIL* (1965), p. 116 appearing in Edward Collins (Ed.) International Law in a Changing World, pp. 446-450.

[94] Ibid, at p. 447.

[95] Obed Y. Asamoah, The Legal Significance of the Declarations of General Assembly of the U.N. (1966) p. 2.

relative to the acceptance of the Conventions (adopted by a two-thirds votes of the Health Assembly) *or agreement* within a period of 18 months after its adoption by the Health Assembly. In case a Member does not accept the convention or agreement within the said time, it is required to furnish the Director-General with a statement of the reasons for non-acceptance. Article 37 of the I.C.A.O. convention authorises the I.C.A.O. to adopt regulations[96] with a wide variety of technical matters essential to the safe and swift operation of international civil aviation. According to Article 90, an annex may be adopted by a two-thirds majority vote of the members of the Council. A regulation thus adopted comes into force three months after its submission to the member-States or within the time specified by the Council, "unless the majority of contracting States register their disapproval with the Council." Under Article 38 of the I.C.A.O. convention, if a member finds it difficult or impracticable to comply with any of the international standards or procedures adopted by the Council, it is under the obligation to notify I.C.A.O. immediately of the differences between its own practices and the practice established by the Annex. If the member concerned fails to notify or remains silent, it will amount to approval.

As pointed out by an Author,[97] "the modifications of the usual international legislative procedures adopted by the World Health Organization and the International Civil Aviation Organization have permitted these two organizations to make valuable contributions to international law. In the case of WHO the most important contribution is without doubt the International Sanitary Regulations." This document is so basic to the prevention of the 'spread of pestilential diseases and one of the few multilateral treaties of its scope without serious loopholes due to incompatible reservations, has been described by Professor Jenks as *'one of the major achievements of the international legislative process.*"[98] Further, "In the case of the I.C.A.O. the major contribution is in the international standards and recommended practices and procedures which permit international air navigation to be carried on with safety, regularity and efficiency. I.C.A.O.'s enlightened procedures for modification permit the I.C.A.O. to keep up with rapid changes that are taking place in civil aviation and the same time to avoid being bogged down in many of the ordinary time-consuming activities of other international organizations."

Reference may also be made here to the unusual legislative procedure introduced by the International Labour Organization (ILO). Under the Constitution of the ILO, members have undertaken an obligation to submit conventions and recommendations adopted by the conference by a two-thirds majority for the consideration of the national authorities competent to give effect to their provisions. Once accepted, these conventions become binding upon members. The legislative procedure of the ILO, when introduced in 1919, was a radical innovation in following three respects : (1) "The whole conception of a convention being adopted by an international conference by a two-thirds majority and authenticated by the President and the Secretary-General of the conference instead of being signed by plenipotentiaries was then new." (2) "An even more radical innovation than the substitution of adoption for signature was the participation in the act of adoption of non-government delegates voting independently. This has remained a unique feature of ILO procedure. "No less radical and unprecedented an innovation was the obligation to submit conventions adopted by the International Labour Conference by a two-thirds majority for parliamentary consideration irrespective of the attitude towards the convention of the representatives of the Government concerned."[99]

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[96] Regulations are the combination of 'international standards' and 'recommended practices' dealing with technical matters essential to the safe and swift, operation of international civil aviation and are designated as "Annexes" to the ICAO convention. A 'recommended practice' is one the uniform application of which is desirable in the interests of safety and efficiency of international air navigation. The members are not under obligation to obey it, on the other hand an "international standard" is recognised as necessary for the safety or regularity of international civil aviation. It is binding upon the members, I.C.A.O. International Standards and Recommended Practices Personal Licensing Annex. I (Fifth Edition), Montreal, (1962), p. 3.

[97] George A. Codding, Jr. : "Contributions of the World Health Organization and the International Civil Aviation Organization to the Development of International Law" Proc. ASIL (1985), p. 147.

[98] C. Wilfred Jenks, the Common Law of Mankind (London : Stevens & Sons, 1958) op. cit 187.

A brief reference may also be made to a similar provision in the Constitution of the Universal Postal Union (UPU) which provides that those postal administrations which do not respond to a proposal put to them by the International Bureau within a period of three months, will be considered to be in agreement with the proposal. As written by Codding, Jr., "The experiences of WHO and ICAO have a high potential value. Other international agencies could possibly adopt them profitably to their own use, particularly those agencies whose activities are of a technical nature. A combination of all the special procedures of ILO, WHO, ITU and UPU in one international organization provides speculation. In any case, it is becoming increasingly obvious that some major changes are needed in the international legislative process if the international community is to be able to keep up with the amount of work that is being delegated by States to international organizations. The WHO and ICAO have, at least, made a start."

Now the world is witnessing the third phase of the post-war development of international organisations. The first phase started immediately after 1945 when U.N. system including the International Monetary Fund (IMF) and the World Bank was established. The second phase started near about 1960 when common market, organisation of European Co-operation and Regional Development Bank etc. were established. The third phase started near about 1973 and is still continuing. In the third phase, U.N. Environment Programme, World Food Council, International Energy Agency (IEA) etc. have been established.[100] The importance of international organisations is constantly increasing and they are making significant contribution for the development of international law. In many matters they have become part and parcel of international life.

Thus this international legislative procedures established and developed by the specialized agencies are far advanced than those established and developed by the organs of the U.N. The organs of the United Nations particularly the General Assembly and the Economic and Social Council, should emulate the examples of the specialized agencies discussed above. Jenks has aptly remarked : "The future of International law, and in large measure the future of international society, depends on our succeeding in developing during next generation a whole series of new major branches of the law of which, despite immense and most encouraging progress during the last half-century only the beginnings as yet exist. Indeed, "The future belongs to International Organisations."[101] And the future of international organisation is safe so long as the United Nations is there. The United Nations has already completed more than sixty years of its successful existence. Since it has become an indispensable organisation the development of international law will go in future, rather it will gather momentum in the course of time. Though the fiftieth anniversary of the United Nations is indeed a great achievement and deserved the wide publicity it received yet another historic event of great importance was the 50th anniversary of the International Court of Justice on 18th April, 1996 which was unfortunately eclipsed by the former event.[102] So far as the development of international law is concerned, the latter event is equally, or even more significant.

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[99] C. Wilfred Jenks : Social Justice in the Law of Nations—The ILO Impact After Fifty years (Hersch Lauterpacht Lectures, 1969 [Oxford University Press, 1970] at pp. 22-25.

[100] C. Fred Bergsten, "Interdependence and the Reform of International Institutions" Int. Orgn., Vol. 30, No. 2 (Spring 1976), p. 361.

[101] E. Shibaeva, "Law of International Organizations in the System of Modern International Law", IJIL, Vol. 17 (1977), p. 227 at p. 233; See also M.K. Nawaz, "Law and International Organization", IJIL Vol. (1977), p. 234.

[102] See Rahmatullah Khan, "50th Anniversary of the International Court of Justice", IJIL, Vol. 36, No. 4 of 1996, p. 80.

Rethinking about new international law making processes[103]

In view of the revolutionary changes that have taken place in the field of international law, it has become imperative that the speed of development of international law be accelerated and the law-making processes of new international law be amended and be made in consonance with changing times and circumstances. Law-making capacity of General Assembly resolutions should be recognized and they should be used for the development of international law. New means and processes should be developed so as to make use of the advisory opinions of the International Court of Justice for the development of international law. Article 38(1) should be amended to incorporate decisions and determinations of the organs of International Organisations as a source of international law. This formal recognition will infuse dynamism in international law and will enable it to keep pace with changing times and circumstances. There is also the need of serious reconsideration over the basis of obligation in international law. The basis of obligation in international law is changing from sovereignty oriented consent to community oriented consensus.[104] Along with consent, consensus should also be recognized as a basis of obligation in international law. The concept of *Jus Cogens* should be further developed and encouraged so that international law may be developed as a super-national system binding on all states. In order to achieve the objective of progressive development of international law and its codification powers and jurisdiction of the International Law Commission should be enhanced.

Brief Review of International Law in the Second Millennium.—The Second Millennium witnessed the birth, growth and development of Public International Law as a universal force or a legal system to reckon with. The modern International Law as a definite branch of jurisprudence which we know today is said to be dating from the Sixteenth and Seventeenth centuries. Born as it were in Europe, it was determined by the modern European system. Started to serve the interests of a few European States and thus marked by Euro-centrism, in the course of time it became a branch of jurisprudence of general and then universal application. There has been vertical and horizontal expansion of International Law. Besides applying on the lands, rules of International Law apply to outer space, lakhs of kilometres outside the orbit of Earth to the thousands of metre's below the waters of the Oceans. On the other hand, from being traditional law governing the relation of sovereign states, international law expanded to embrace international organisations, non-state entities and individuals as its subjects. Indeed the establishment of the U.N. and development of human rights was probably the most remarkable things that were witnessed in the second millennium. While traditionally comprising of only customary and treaty rules, international expanded to include general principles of law recognized by civilized states, decision and determinations of judicial and arbitral tribunals and juristic works.

While there has been phenomenon expansion of international law, it was also confronted with challenges at different fronts such as those of nuclear weapons, Scientific and Technological revolution, environmental degradation and pollution population explosion etc. While some serious efforts such as those of entering into International Nuclear Forces Treaty (INF Treaty), Strategic Arms Reduction Treaty (START), Non-Proliferation Treaty (NPT) and Comprehensive Test Bond Treaty (CTBT), have been made the challenge remains still formidable and grim. So is the case with the problem of environmental pollution and degradation. Yet another anomaly that has been witnessed during the Second Millennium is the uneven development and progress of countries of the world. While a few countries European and American have prospered, a number of Asian and African countries are still struggling with shortages of food and consumer goods. The population explosion has further complicated the problem and has made the situation quite grim. Yet another serious problem confronting the International Law is the growing menace of terrorism with its different manifestations such as hijacking and taking of hostages and its linkage with illicit drug trafficking. Last but not the least, establishment of peace remains as elusive as ever. Though it is quite heartening to note that the United Nations, which was established after the Second World War, has been successful in preventing the Third World War yet it cannot and must not be forgotten that absence of war does not denote peace. It is ironical that the United Nations Charter simply speaks of 'maintenance' of international peace and security and not the establishment of peace. The pre-requisites of the establishments of peace are economic, social and political justice which remain the cherished goal to achieve.

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[103] For a little detailed study see paper entitled "Rethinking About New International Law Making Processes" read by the author on 2nd April, 1989 at New Delhi in the Twenty-third Annual Conference of the Indian Society of International Law.

[104] See R.P. Anand, "International Organisations and Functioning of International Law", I.J.I.L., Vol. 240, No. 1 of 1984, p. 63.

Challenges before International Law in the Third Millennium.—It is desirable to keep in mind the challenges before International Law in the Third Millennium. One of the greatest challenges before International Law in the Third Millennium is the danger of a nuclear war. As noted above, despite serious efforts to meet this challenge in the Second Millennium, the situation continues to remain serious rather grim. If the nuclear war takes place, either the man may have to start again from the stone age or while mankind may be erased from the face of earth. One of the main reasons for the lack of success in this field is the narrow national interests and ambitions and lack of mutual trust and confidence among states. Even the realization of the consequences of even a limited nuclear war have failed the countries to come together for the general benefit of the whole mankind. International Law will have to cope with this great menace. At stake is the very survival of mankind.

Yet another formidable challenge is that of environmental degradation and pollution which is no less serious than that of a nuclear war. Serious efforts have been made in the Second Millennium to solve this problem. Stockholm Conference of 1972 and Earth Summit of 1992 deserve special mention in this connection. These conferences have simply sown the seeds, shown the ways through which the problem can be solved. But the real problem is that of implementation. For example, in the Kyoto Environmental Summit on Global warming it has been decided that America, European Union and Japan will reduce the consumption of green house gases by 7%, 8% and 6% from the level of 1990 and these targets will have to be achieved in between 2008 and 2012. Only the Third Millennium will witness whether the countries named above are able to achieve these targets. There was, however, a setback when America abandoned the treaty in 2001. The Kyoto Treaty came into force on 16 February, 2005 and has now as many as 187 States Parties. But America, the main polluter did not become a member of the Treaty. This is indeed a great setback. Moreover many Asian and African countries including India because of their economic problems are not able to make their contributions in the reduction of consumption of green house gases. If the present and ensuing environmental problems are not solved in a near future, the Planet Earth will have to encounter a very bleak and grim future. If the present rate of warming up of the Earth continues, waters of oceans may rise by several metres, ice on the high mountains may melt, vegetation and human life may suffer because of direct ultra-violet rays of the sun, disease's like cancer may proliferate and so on.

Glaring examples of oonstant increase in global warming of the planet earth are Nuclear disaster in Japan and bursting of clouds and flash flood in Kedarnath and Badrinath in Uttarakhand. Mankind will be in peril if it does not take heed of these and several other events.

Yet another challenge before International Law in the Third Millennium is the menace of terrorism. It is unfortunate that no serious attempt had been made till recently to tackle this problem at the international level. International Law during the Third Millennium will have to tackle this problem.

The United States of America had to pay dearly for the attack of terrorists on twin towers of World Trade Centre at Newyork on 11th September, 2001, *i.e.* the very first year of the New Millennium is without any shade of doubt are the most horrible and devastating events of the history. It shook not only America, the mightiest country of the world but also the whole world. It sent the chilling shock waves throughout the entire world. If America, the strongest nation of the world, can thus be the target of the terrorists no country in the entire world is safe.

America regarded it as a war against it and vowed to avenge itself. But America did not respond immediately. America first enlisted the support of its allies and other countries and even asked Pakistan to support it in its war against terrorism. Then America waged a full-scale war against Taliban Government of Afghanistan. Due to heavy American bombings, for nearly two months the Taliban Government crumbled and collapsed. Due to the efforts of the United Nations, a new interim Government of Afghanistan has been formed.

Yet another serious event that manifested the menace of terrorism was the terrorist attack on Indian Parliament on 13th December, 2001. Though the attempt was foiled by the security staff of the Parliament, it shocked the conscience of whole nation and underlined the need of more and strict vigilance over all the important buildings of the country.

The menace of terrorism has not abated even after the decline and fall of Taliban Government of Afghanistan. This is evident from the terrorist attack on American Centre at Kolkata. Fortunately, the international community seems to have awakened to the grave challenges of terrorism. For example, the United Nations adopted the International Convention for the Suppression of the Financing of Terrorism, 1999. The United Nations adopted International Convention for the Suppression of Acts of Nuclear Terrorism (April, 2005). But acts of terrorism all over the world, especially in India, remain unabated. This is evident from London Blast in July, 2005, attack on Ram Janam Bhumi Premises at Ayodhya in July, 2005, attack on Sankatmochan Temple in Varanasi and Mumbai Blasts at Local Trains on 7 August, 2006. Though India is most hard-pressed due to terrorist attacks for a long time, yet it cannot but be denied that terrorism is not limited to India, it has spread all over world even in America and Britain. It can be curbed only with the help and cooperation of all nations.

During the Third Millennium International Law will also have to cope with scientific and technological advances in the field of means of communication and telecommunication which are taking place with an accelerated speed.

A formidable challenge before International Law in the Third Millennium is that of economic disparity. A considerable number of Asian and African countries are still facing the problems of poverty, shortages of food and consumer goods, debt burden etc. During the Second Millennium, the concept of new-International Economic Order was evolved but despite several solemn declarations it could not make much headway due to non-cooperation of developed countries. Ultimately the forces free and open markets and capitalism triumphed. This finds its manifestation in the establishment of the World Trade Organisation (WTO). Even countries like Russia, despite their inhibitions, have been compelled to vying with other countries to get the membership of this organisation which is the brain child of countries like America. China has already become a member of W.T.O. International Law in the Third Millennium will have to cope with this formidable problem. So long as there is a wide gap and economic disparity between the rich and poor countries permanent and lasting peace cannot be secured or established.

Last but not the least, one of the most remarkable things that took place after the establishment of the United Nations was the development of the concept of Human Rights which tended to make International Law a branch of jurisprudence of universal application. While human rights jurisprudence has recorded phenomenon growth during last fifty years, it is somewhat paradoxical that violations of human rights and fundamental freedoms all over the world have not abated. The problem of their observance and implementation still remains crucial. There is no dearth of law. Monitoring and international supervision of the observance of human rights will have to be improved in the Third Millennium.

Recent Developments

Two prominent developments have taken place which may change or affect India's future in particular and whole world in general. The first development is the conclusion of Indo-U.S. Nuclear Deal on July 18, 2005, India and the U.S. signed the landmark Civilian Nuclear Agreement in Washington DC. This event took the world by surprise on March 2, 2006, separation of Civilian and Military Nuclear Reactors was initiated by India and the U.S. that listed out which reactor India would put under IAEA safeguards. On December 18, 2006, the Hyde Act was passed by the U.S. Congress and was enacted into law by President Bush amending the U.S. Atomic Energy Act. On July 27, 2007, the 123 Agreement was initiated by the U.S. and India outlining how they would conduct civilian Nuclear trade.

On August 1, 2008 International Atomic Energy Agency (IAEA) cleared India's specific safeguards agreement that defines its level of supervision of civilian Nuclear plants. The next step was Nuclear Supply Group (NSG) waiver. The NSG waiver came through after intense negotiations among its 45 members to allow nuclear trade with India. Finally, on October 8, 2008, President Bush signed the Act and made the 123 Agreement as approved by the Congress into in the U.S. Law. Subsequently, the formal signing of the Agreement between the representatives of the U.S. and India was also completed. Thus ending 30 years of isolation, India has become a member of elite club of Nuclear Nation. Thus India can import much needed fuel for its plants. While, India's weapons programme can develop unhindered. India can now import sensitive technology for reprocessing and enrichment of fuel. So also India can export its indigenously designed nuclear reactors to other countries. There is likelihood of $100 billion worth of nuclear commerce in the next 20 years. Thus India can now formally begin trade in civilian nuclear technology while continuing to develop its weapons.

The second development is India's mission to the Moon. On 22 October, 2008, India launched at 6.22 a.m. its spacecraft to the Moon, thus becoming the 6th nation to enter the elite club in this field. Further, it is planned that Indians in Moon will be in 2020. By 2015, India will send its own astronauts into space.

Indian Space Research Organisation (ISRO) is making innovations day by day and by leaps and bound. On 25th June, 2017 it launched into orbit 13 satellites including Cartosat-2E satellite. The recently launched 712 kg cartosat series space craft is an advanced remote sensing satellite capable of providing scene-specific spot imagery. This time the total weight of all the 13 satellites was about the weight of several elephants, indeed a great achievement. Earlier, ISRO surprised the world by launching into space 104 satellites including the satellites of developed nations such as America, Russia, France etc. It is a world record.

N.B.—For further details see, Chapter on Outer Space.

Conclusion

It is clear from the above discussion that International Law, like all living law, is not static; it gathers dynamism and activity mending itself to the needs of the day. It is quite obvious that "New times bring more varied problems, and the area of International Law is one of the area where novel concepts and new directions will have to be fashioned to cope with problems being posed under new circumstances."[105] "Every new crisis seems to add voices—voices of goodwill which ask whether that law is not already long out of today's date, also left behind by radical developments in international society."[106] It may, however, be added that every new crisis may become the harbinger of new developments in international law. The genocide perpetrated in Bangladesh is a glaring example of this phenomenon. According to Thomas M. Frank and Nigel Rodley, "International Law is not static. The Bangladesh case is an example, by far the most important in our times, of the unilateral use of military force justified *inter alia,* on human rights grounds, and India succeeded. International law, as a branch of behaviourial science as well as normative philosophy, may treat this event as the harbinger of a new law that will henceforth, increasingly govern inter-State relations. Perhaps India's example by its success has already entered into the nations' conscious expectations of future conduct".[107] The apalling human tragedy and genocide perpetrated in an unprecedented scale in Bangladesh ceased to be a matter of domestic affair of Pakistan and had become international. It clearly demonstrated the utter helplessness of the international machinery for the protection of human rights.[108] It also dawned the realization to evolve norms and principles of International law to cover such situations. It would, therefore, be no excessive optimism to hope that the Bangladesh episode may be a harbinger of new law in the field of human rights. The traditional International Law has undergone enormous changes in the last fifty years. International Law has always endeavoured to cope with the changing times and circumstances. There is no reason to believe that the possibilities of future growth have been exhausted. International Law "is still growing and indeed the pace has increased enormously in the last fifty years."[109]

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[105] Leonard M. Salter, "International Law in Transition ; New norms for Old", The Int. Lawyer, Vol. 7, No. 3 (July 1973), p. 687.

In the absence of a world legislative body, International Law finds itself confronted with many problems and difficulties keeping pace with the needs of the day. It is, however, heartening to note that since the inception of the United Nations Charter, the most remarkable constitutional development has been the continuous growth of the powers and functions of the General Assembly. The resolutions and declarations of the General Assembly are generally said to be recommendatory but under certain circumstances they may be more than mere recommendations and may create legal implications. Being the most representative of the U.N.'s organs, the General Assembly has great potentialities of future growth and its declarations and resolutions have great potentialities of becoming the sources of Universal International Law.[110] The International Court of Justice has also lent its support to this auspicious evolution of the law of the United Nations.[111] It is, however, not suggested that the General Assembly has become an international legislative power but that it may become if its growth continues unhampered. In the words of Judge Alvarez,[112] "the General Assembly... is the meeting place where states discuss political matters of general interest... in doing so, the Assembly is in a good position to reconcile law and politics. In short, the Assembly...... is tending to become an international legislative power. In order that it may actually become such a power, all that is needed is that governments and public opinion should give it support. Public opinion is an important factor which comes into play in the new International Law." It has been aptly pointed out, "The G.A. (*i.e.* General Assembly) resolutions constituted the "joint action" and the 'process' through which states and peoples pursued their objectives. The point is, it would be naive to ignore such *law creating* resolutions—one may legitimately go a step further to state that given the current concerns of the world community and the versimilitude of joint action being taken, law-making conventions and conferences are only tiny episodes in the drama of creation of International Law.

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[106] "Force, Intervention and Neutrality in Contemporary International Law", Proc. ASIL, April 25-27, 1963, p.147.

[107] After Bangladesh : The Law of Humanitarian Intervention by Military Force", AJIL, Vol. 67, No. 2 (April, 1973) p. 275 at p. 303.

[108] See "U.N. Prevention of Human Rights Violations : The Bangladesh case" Int. Orgn. Vol. 27. No. 1 (Winter, 1973), p. 115; See also "Biafra, Bengal and Beyond; International Responsibility and Genocidal Conflict", AJIL Vol. 66, No. 4, (September 1972), p. 89.

[109] J.E.S. Fawcett : The Law of Nations (London, 1968), p. 27.

[110] See Leo Gross : "Sources of International Law", Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 189 at pp. 204-209.

[111] See for example Judgment of Judge Alvarez in Admissions case, I.C.J. Rep. (1948), p. 68, Injuries Case, I.C.J. Rep. (1949), p. 182 and Certain Expenses case, I.C.J. Rep. (1962), p. 185.

[112] Reservations to the Genocide Convention, I.C.J. Rep. (1951), p. 15 at p. 49

For modern international law in the making one needs to look beyond the law-making conferences to the *law creating* conferences......... the UNCTAD, GATT, IBRD, IMF, OECD, OPEC, etc. are vigorously involved in creating this new International Law............... And International Law would cease to have any validity or relevance if it did not take cognizance of the processes through which the world community pursued its pressing concerns."[113]

For the development of International Law in the present times, following four points also deserve a special mention—(1) The development of International Law now does not depend on the will of some powerful states. (2) As compared to the years preceding the Second World War, the Communist States are now taking more active part in International Legislation. (3) Newly independent states are taking active part in the development of International Law. (4) Large number of newly independent states will greatly influence the development of International Law. This will influence specially the economic condition of individual states.[114]

"International law is confronted with many difficult problems and challenges, the most formidable being the danger to our entire planet from a nuclear conflagration. International law today is involved constantly in the resolution of these difficult problems and challenges and has become a dynamic and progressive force in the world.[115]

The significance of the present International Law need not be over-emphasized. Indeed it is that indispensable body of rules regulating for its most part the relations between states, without which it would be virtually impossible for them to have steady and frequent intercourse. It is in fact an expression of the necessity of their mutual relationships. In the absence of some system of International Law, the international society of states could not enjoy the benefits of trade and commerce, of exchange of ideas, and of normal routine communication."[116]

International Law "must be continuously developed by *revision in content, expansion of scope, and improvement of the means of securing compliance,* so that it is kept in accord with the changing needs of the international community".[117] Since the present age is witnessing accelerating and meteoric changes on so many fronts, International Law must also develop much faster than it has done in the past. If at any time, the lag between the law and changes taking place in the international field widens too much, the resultant will be inevitable catastrophe. Indeed the future of mankind rests on the capability of International Law to develop and adapt itself to the changing times and circumstances.

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[113] Rahmatullah Khan, "International Law—Old and New", I.J.I.L., Vol. 15 (1975), p. 371 at p. 374; see also Rosalyn Higgins. The Development of International Law through the Political Organs of the United Nations (1963), p. 2; Guenter Weissberg, "United Nations Movements Towards World Law" I.C.L.Q. Vol. 24, Part 3 (July 1975), p. 460 at p. 461; see also Michel Virally, "The Sources of International Law" in Sorensen, Manual of Public International Law, p. 162.

[114] Leo J. Bouchez, "Some Reflections on the Present and Future of the Law of the Sea" in the Present State of International Law (1973), p. 143 at p. 149.

[115] R.S. Pathak, "The Functioning of International Law in the International System", I.J.I.L., Vol. 24 (1984) p. 1.

[116] Starke's International Law Eleventh Edition, Butterworths (September, 1994, Edited by I.A. Shearer), p. 14.

[117] Edward Collins, note 20, p. 424.

CHAPTER 2

DEFINITION OF INTERNATIONAL LAW

In the view of European Scholars, modern International Law is determined by the modern European system. According to Oppenheim, International Law is "essentially a product of Christian civilization, and began gradually to grow from the second half of the Middle Ages." [1] This view is subject to criticism because there are several such principles and rules of International Law as existed in their developed form in the ancient period. Some of them are such as existed in their developed form in ancient India. The view of Oppenheim and other Western jurists that International Law owes its birth to the modern European system is not correct. International Law was in a developed state in the Ramayana and Mahabharat period.[2] The example of International Law relating to Diplomatic Agents may be cited in this connection. Thus the birth of International Law can be traced back to ancient times.[3] However, it cannot be denied that the words 'International Law' were used for the first time by eminent British jurist, Jermy Bentham in 1780.[4] Since then, these words have been used to denote the body of rules which regulate the relations among the States. Though International law can be traced to ancient Greece, Rome and India, it cannot be denied that the public International law which we know today, study and practice has come to us through Europe. It is determined by the modern European system. It will, therefore, be proper to refer it as 'modern international law.'

Definition*

I. L. Oppenheim**.—Professor Oppenheim has defined International Law in the following words :

> "Law of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other."

This definition[5] was given by Oppenheim in 1905. Oppenheim is one of the most celebrated authors of Public International Law. A critical discussion of Oppenheim's definition is made below with a view to show and highlight the changes that have taken place in the concept and definition of Public International Law during the last to ten decades.

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[1] L. Oppenheim, International Law, Vol. 1, Eighth Edition (1970 reprint), p. 6.

[2] See S.S. Dhavan, The Ramayana—International Law in the Age of Ramayan, National Herald Magazine, Jan. 28, 1973, p.1.

[3] Dr. Nagendra Singh, aptly remarked: "A study of the Smrities (200 B.C. to 400 A.D.) would undoubtedly reveal that Ancient India had a highly developed system pertaining to the laws and rules of war based on considerations of humanity and chivalry. The rules of war applied even if the struggle was in the nature of a civil war which is again in conformity with the modern concept as embodied in the Geneva Conventions of 1949 and the one underlying the recognition of belligerency.... Let alone the laws of war, it was much more to in the realm of the laws of peace that India's contribution as far as universality of application is concerned came to be so well-marked and known.... Apart from the aforesaid illustrations concerning the laws of war, there are several important topics of International Law such as the right of asylum, the treatment of aliens or foreign nationals, the immunity and privileges of ambassadors etc., in respect of which India evolved rules and regulations dating back to some years before Christ." India and International Law (1969), pp. 3-4, 11 and 21. For India's contribution to the Development of International Law; see also excellent article, "India and International Law" by Nagendra Singh appearing in Asian State and Development of Universal International Law, edited by R. V. Anand, (1972), pp. 25-42.

[4] See L. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 94.

* See Q. No. 2 of P.C.S. Exam. 1976—For the answer of this question see the definitions of Oppenheim, Brierly, Holland, etc. and the criticism of the definition of Oppenheim. See also 'conclusion' given after the definitions. The correct definition of International Law has been given under the heading 'Conclusion' ; see this also, for Q. No. of I.A.S. Exam, (1972) ; see also for P.C.S. (1985) Q. 1 See also matter discussed under Chapter 1.

** See also for CSE (1995) Q. 5 (a) ; see also for IAS (2002) Q. 5 (a) UPPCS (2002) Q. 5; see also Nature and Basis of International Law.

[5] See Oppenheim, International Law (Newyork, Longmans, Green & Co., 1905) pp. 1-2.

Criticism.—Professor Oppenheim's definition suffers from several serious defects. It might have been good and adequate when it was given but now it has outlived its utility and has become obsolete and inadequate.[6] "Indeed every important element in it can now be challenged." The definition of Oppenheim has been subjected to following criticism—

(i) In the first place... "it is now generally recognized that, not only "States" but public international organisations, have rights and duties under International Law, even though they may not have all the rights and duties that States have." [7] In fact, "The future of International Law is one with the future of International organisation." [8]

(ii) The use of the term 'civilized states' by Oppenheim is also severely criticized. The criterion of distinguishing so-called 'uncivilized states' was neither long history nor culture. Even though China had 5,000 years old culture, she was not included in the group of civilized states. So was the case of oriental States. In not too distant past, the Western States regarded only the 'Christian States' as 'Civilized States'. This criterion was undoubtedly wrong. At present there are as many as 193 members of the U.N. which include Christian as well as non-Christian States. That is why, in later editors of Oppenheim's book have deleted the term 'civilized states'. For example, in eighth edition of Oppenheim's book,[9] International Law has been defined in the following words :

"Law of Nations or International Law (Droit des gens, volkerrecht) is the name for the body of customary and treaty rules which are considered legally binding by States in their intercourse with each other."

(iii) Thirdly, "More controversial but no longer untenable is the view that even individuals and other private persons may have some such rights and duties." [10] Of all the changes that have taken place in the International Law since the Second World War, the most important change has been the addition of new subjects.[11] The main change that has taken place is that from the formal structure of relation of States it is moving towards the interests and welfare of citizens of member States.[12] As Jenks has rightly remarked : "contemporary International Law can no longer be reasonably presented within the framework of the classical exposition of International Law as the law governing the relations between states but must be regarded as the common law of mankind in an early stage of its development."* It is no longer possible to regard International Law as governing relations solely between States. At present, it also governs relations between States and international organisations, between States and private persons, and between International Organisations and private persons. This has been conceded even in later editions of

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[6] Oliver, J. Lissitzyn, International Law To-day and Tomorrow (Oceana Publications Inc. Dobbs Ferry, Newyork, (1965), p. 38.

[7] Ibid; see also Reparation for Injuries Suffered in the Service of the U.N. Advisory opinion, I.C.J. Rep. (1949), p. 174; D.W. Bowett, The Law of International Institutions (London, Stevens & Sons, 1963), pp. 273-310, Percy E. Corbett. The Growth of World Law (Princeton, New Jersey, (1971), p. 183. See also Josef L. Kunj, "The Changing Law of Nations", A.J.I.L., Vol. 51 (1957), p. 77.

[8] Percy E. Corbett, Law and Society in the Relation of States, p. 12 ; See also E. Shibaeva, "Law of International Organisations in the System of Modern International Law", I.J.I.L. Vol. 17 (1977), p. 227 at p. 233.

[9] L, Oppenheim, International Law—A Treatise, Vol. I Peace, Eighth Edition, Edited by H. Lauterpacht, pp. 4-5.

[10] See W. Friedmann, The Changing Structure of International Law (1964), pp. 221-249. See also Dr. B.V.A. Rolling, International Law is an Expanded World (Djambatan N.V. Amsterdam, 1960), p. xxii; see also P.E. Corbett, The Growth of World Law (1971), p. 184; C. Wilfred Jenks, Social Justice in the Law of Nations (1970), pp. 16-20.

[11] Friedmann, Ibid, at p. 57.

[12] C.W. Jenks, The Common Law of Mankind (1958), p. 27, See also W. Friedmann, "Changing Dimension of International Law", Columbia Law Review, Vol. 62 (1962), p. 1147 at p. 1148.

[*] Asked Q. No. 3 of I.A.S. Exam, (1972) ; For answer see also preceding asterisk ; see also matter discussed under the heading "Need for Universal International Law" in Chapter 1.

Oppenheim's book. For example, in eighth edition of his book following passage deserves mention : "It must be noted that although the rules of International Law are primarily those which govern the relation of states, the latter are not the only subjects of International law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law." [13] In this connection, the example of the advisory opinion of the International Court of Justice on *Effects of Awards of Compensation made by the U.N. Administrative Tribunals*[14] may also be cited. Besides this, 1965 Convention on Settlement of Investment Disputes between States and Nationals of other States deserves a special mention. Reference may also be made to the Universal Declaration of Human Rights, 1948, which enumerates a number of rights of the individuals and now "constitutes authoritative interpretation" of the human rights provisions of the Charter. International Covenants of Human Rights and the Optional Protocol to the Covenants on Civil and Political Rights further confirm that the individuals have become not only the subjects of International Law but can also directly claim rights and remedies provided under International Law. Individuals can send petitions to the U.N. Commission on Human Rights. Individuals can also send petitions (or make complaints) to the Human Rights' Committee established under the International Covenant on Civil and Political Rights, 1966. Above all, the Charter of the U.N. begins with the words "we the people of the United Nations." The developments since the inception of the U.N., particularly the international protection of human rights, have confirmed that these words have not crept into the Charter incidentally but were deliberately used and were pregnant with meaning. It may, therefore, be observed that the present International Law cannot be regarded as the law governing the relations between States, but must be regarded "as the common law of mankind in an early stage of its development." European Convention on Human Rights, 1950, American Convention on Human Rights, Convention on Suppression and Punishment of Apartheid, 1973, Convention on the Elimination of All Forms of Racial Discrimination, etc. also deserve a special mention in this connection.

(iv) Fourthly, "it is now widely recognised that International Law consists not only customary and conventional rules but also of 'General Principles of Law.'[15] Article 38 of the Statute of the International Court of Justice mentions 'General Principles of Law Recognised by Civilized States' as the third source in order under which the sources of International Law are to be used while deciding an international dispute. That is to say, if the Court does not find any International Treaty or International custom on a particular point under dispute, the Court may take the help of 'General Principles of Law Recognized by Civilized States'. As aptly pointed out by Lord McNair, it describes, "the inexhaustible reservoir of legal principles from which tribunals can enrich and develop public International Law." [16]

(v) Fifthly, "the very conception that international law as a "body of rules" now stands changed as static and inadequate." Further, "Like all living law, international law does not stand still but is continuously reinterpreted and reshaped in the very process of its application by authoritative decision-

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[13] Oppenheim, note 9, pp. 5-6.

[14] (1954) I.C.J. Rep., p. 47.

[15] Lissitzyn, Supra Note 6, p. 39.

[16] McNair : "The General Principles of Law Recognised by Civilized Nations" BYBIL Vol. XXXIII (1957), p. 1 at p. 6; see also Manley O. Hudson, The Permanent Court of International Justice, 1920-1942 (Newyork 1943), pp. 606-620; J.E.S. Fawcett : The Law of Nations (London, 1968), pp. 21-25; Vladimir Paul : "General Principles of Law in International Law", I.J.I.L., Vol. 10 (1970), p. 324.

makers, national and international." [17] International Law, or any law for that matter is a dynamic concept. Law changes with the change of time and circumstances. A law, to be living, must be flexible, adaptable and changeable. M.A. Kaplan and Nde B. Ketzenbach[18] have aptly remarked, "it is now a common place that the law is a process, not a body of self-executing rules". What is true of law, in general is also true of International Law. The changing character of International Law is a consequence of transformation of general conditions, a transformation the impact of which is equally felt in the municipal legal orders. This is good so far as it goes but it cannot be denied that it has become customary to define law as "body of rules." Therefore it is not proper to criticise Oppenheim on this account.

In view of the changing character of International Law, Oppenheim's earlier definition has now become obsolete and inadequate. Prof. Friedmann has remarked, "Both in volume and scope, the area of international institutions and agreement has greatly widened. International Law is today actively and continuously concerned with such divergent and vital matters as human rights, crimes against peace and humanity, the International control of nuclear energy, trade organisation, labour conventions, transport control or health regulations. This is not to say in all or any of these fields international law prevails, but there is no doubt today that they are its legitimate concern." [19] Further, "As International Law moves today on so many levels, it would be surprising indeed if the traditional principles of inter-State relations developed in previous centuries were adequate to cope with the vastly more divergent subject-matters of International Law of the present day.[20] It has, therefore, become necessary to redefine International Law. "The redefinition of International Law will be a continuing process, but it will be increasingly unlike the subject defined and handed down to us by previous generations." [21]

New Definition of International law in ninth edition of Oppenheim's Book.—The editors of the ninth edition of Oppenheim's book, Sir Robert Jennings and Sir Arthur Watts have revised Oppenheim's definition of International law. In their words :

"International law is the body of rules which are legally binding on States in their intercourse with each other. These rules are primarily those which govern the relation of states, but States are not the only subjects of international law. International Organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law." [22]

Further, "States are the *principal subjects of international law* .... States are primarily, but not exclusively, the subjects of *international* law. To the extent that bodies other than States directly possess some rights, power and duties in international law they can be regarded as subjects of international law, possessing international personality." [23] Moreover, "Not only individuals but also certain territorial or political units other than States, to a limited extent, be directly the subject of rights and duties under international law." [24]

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[17] Lissitzyn, Supra note 6, p. 39.

[18] The Political Foundations of International Law. (John Wiley & Sons, 1961), p. 231; See also Myres McDougal, "International Law and Social Science; A Mild Plea in Avoidance", A.J.I.L., Vol. 66 (1972), p. 77.

[19] W. Friedmann, "Some Impacts of Social Organizations on International Law", A.J.I.L., Vol. 50 (1956), p. 475 at p. 477.

[20] Ibid.

[21] W. Friedmann, "The Changing Dimensions of International Law", Columbia Law Review, Vol. 62 (1962), p. 1147 at p. 1165.

[22] Oppenheim's International Law, Ninth Edition (Longman Group U.K. Limited and Mrs. Tomoko Hudson, 1992), Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, p. 4.

[23] Ibid, at p. 16.

[24] Ibid, at p. 17.

Thus the above concept and definition of International Law given in ninth edition of Oppenheim's International Law is nearly similar to that given by Starke and Fenwick. However, it is still deficient in one respect because it is still conscpicuous for its silence regarding general principles of law recognized by civilized nations.

In view of the foregoing discussion and taking into consideration the present state of international law, international law may be defined "as the body of general principles and specific rules which are binding upon the members of international community in their mutual relations." [25] The term 'international community' is very appropriate for it includes States, international institutions, individuals and other non-State entities.

II. Some other Definitions.

(i) J.L. Brierly.—In the words of Brierly : "The Law of Nations or International Law may be defined as the body of rules and principles of action which are binding upon civilized States in their relations with one another." [26]

(ii) Torsten Gihl.—Professor Torsten Gihl defines International Law in the following words : "The term 'International Law' means the body of rules of law which apply within the International Community or Society of States." This definition presupposes that States constitute a society and that this society has a legal system, International Law or the law of nations. This is another way of saying that International Law exists, that there is a body of rules, having the character of rules of law, which regulate the relations of States *inter se*[27].

(iii) Hackworth.—In the words of Hackworth : "International Law consists of a body of rules governing the relations between States. It is a system of jurisprudence which, for the most part, has evolved out of the experiences and the necessities of situations that have arisen from time to time.[28]

(iv) Queen v. Keyn.—In the *Queen* v. *Keyn,*[29] Lord Coleridge, C.J., defined International Law in the following words : "The law of nations is that collection of usages which civilized States have agreed to observe in their dealings with one another."

(v) West Rand Central Gold Mining Ltd. Co. v. King.[30]—In this case the Court observed, International Law may be defined as "the form of the rules accepted by civilized States as determining their conduct towards each other and towards each other's subjects.

(vi) S.S. Lotus case.[31]—In *S.S. Lotus* case, International Law was defined in the following words : "International Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restriction upon the independence of States cannot therefore be presumed." [32]

(vii) Philip C. Jessup.—Jessup has defined International Law in the following words : "International Law or the Law of Nations must be defined as law applicable to States in their mutual relations with States." Judge Jessup further adds, "International Law may also......... be applicable to certain inter-relationships of individuals themselves, where such inter-relationships involve matter of international concern."[33]

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[25] Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 31; See also conclusion given after the definitions.

[26] The Law of Nations, Sixth Edition, Edited by Sir Humphrey Waldock (1963), p. 1.

[27] Torsten Gihl : The Legal Character and Sources of International Law (Stockholm, (1957), p. 53).

[28] Hackworth : Digest of International Law, Vol. (1940), p. 1.

[29] 2 Ex. D. 63, 153, 154 (1876).

[30] (1905) 2 K.B. 91.

[31] (1927) P.C.I.J. Series A. No. 10.

[32] Ibid, at p. 18.

[33] Philip C. Jessup : A Modern Law of Nations (1948), p. 17.

(viii) Gray.—According to Gray : "International Law or the Law of Nations is the name of a body of rules which according to the usual definitions regulate the conduct of states in their intercourse with each other."

(ix) Hall.—In the words of Hall : International Law consists of certain rules of conduct which modern civilized states regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country and which they also regard as being enforceable by appropriate means in case of infringement." [34]

(x) Kelsen* —According to Kelsen : "International Law or the Law of Nations is the name of a body of rules which—according to the usual definition—regulate the conduct of the States in their intercourse with one another." [35]

Criticism—The above definitions can also be criticised in the same way as Oppenheim's definition has been criticised. These definitions are not appropriate and do not properly represent international law as it exists today.

III. Soviet definition and approach to International Law**

According to the Soviet definition, International Law is "the total of the norms regulating relations between States in the process of their struggle and co-operation, expressing the will of the ruling classes of these States and secured by coercion exercised by States individually and collective." [36] Another eminent Russian writer defined International Law as "the totality of norms, which were developed on the basis of agreements between the States which govern their relations in the process of struggle and co-operation between them, expressing the will of the ruling classes, and are enforced in case of necessity, by the pressure applied either collectively or by individual States." [37] After the death of Stalin the above definition was slightly modified by inclusion of a reference to "peaceful co-existence". In recent years, Soviet writers have laid a great emphasis on 'peaceful co-existence' in relation between the sovereign states. According to the Soviet view, "the principles of peaceful co-existence should be the basis of the whole structure of contemporary international law. Only if it is based on the principle of co-existence can international law best promote the cause of peace and mutual understanding between States."[38] According to another eminent Soviet writer "International law can be defined as the aggregate of rules governing relations between states in the process of their conflict and co-operation designed to safeguard their peaceful co-existence, expressing the will of the ruling classes of these states and defended in case of need by coercion applied by states individually or collectively.

This definition notes the class, character and significance of International legal relations (states), the nature of the relations between them, conflict and co-operation and the method of safeguarding and implementing the rules of International Law, *i.e.* their defence individually or collectively, by the states themselves............ The purpose of present day international law is to regulate relations between states and this way strengthen world peace and security .... Although International law, like any branch of law, has a class character and pertains to the superstructure, it cannot express the will of the ruling class of any particular state. It is the expression of the agreed will of a number of states in the form of an International agreement or custom which has grown up over a long period. The purpose of present day international Law is to promote peaceful co-existence and co-operation between all states regardless of their social systems." [39]

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[34] International Law, Eighth Edition, p. 1.

* See also for Q. No. 1 of P.C.S. Exam, (1974) ; for Holland's views see matter discussed under the heading "whether International Law is the vanishing point of jurisprudence ?" discussed in this Chapter.

[35] Hans Kelsen, Principles of International Law, p 3.

** Asked in I.A.S. Exam, (1975) Q. No. 1(c) : For answer see also "Soviet Practice" discussed under the Chapter entitled "Relationship Between International Law and Municipal Law".

[36] Definition by A.Y. Vyshinsky in 1948.

[37] Adopted from Kazimierz Z. Grzybowski, Public International Law, (1970), p. 17.

[38] Hans W. Baade (Ed.), The Soviet Impact on International Law (1965), p. 15.

[39] F.I. Kozhevmikov (Ed.), International Law, pp. 7, 8, 10 and 11.

Criticism.—The Soviet definition emphasises struggle and co-operation between States will of the ruling classes, etc. But as pointed out by George Ginsburgs, "Indeed, whereas today the trend in most of the world moves more and more in the direction of a qualified recognition that international law no longer applies to states alone, but encompasses a variety of international personalities other than states as well, including, possibly, individuals, the Soviets have today adamantly opposed most aspects of such expansion of international law. Their jurists with rare exceptions continue to cling to a very conservative conception of what constitute a subject of international law." [40] The Soviet definition is not adequate because it does not mention international organisations, individuals and non-State entities as subjects of international law. It does not also include the general principles of law recognised by civilized States. In view of the breaking up of the Soviet Union and end of Communism there, Soviet definition and concept the Soviet Union and end of Communism there, Soviet definition and concept have also undergone significant changes.

IV. Chinese Definition and approach to International Law.—According to a Chinese writer : "International Law like all other branches of law, is created in a definite stage of mankind's social development. The origin of international law is directly related to the creation of the state. International law is created as the political, economic, and the relations among states emerge." [41] In his view, only the definition of international law given by Soviet scholars (for example, by Vyshinsky given earlier), explains the question of the contents and substance of international law. This definition (*i.e.*, of Vyshinsky) is adaptable to the "international law of various historical periods including the modern one." He points out that international law possesses the following characteristics of law in general : (i) it expresses the will of the ruling class; (ii) it is the aggregate of norms adjusting definite social relations; and (iii) it is guaranteed by enforcement measures. In his view, therefore, international law is a kind of law possessing legal validity; it is not what are called self-executing norms of morality." [42]

As pointed out by Jerome Alan Cohen and Hungdah Chieu[43] : By the time the above article appeared in late 1957, the Soviet definition of international law that it recites had been supplemented by the insertion, after the words 'struggle and co-operation' of the phrase 'designed to safeguard their peaceful existence'.[44] This change followed the CPSU's promulgation in 1956 of a new policy that required scholars to recognise that the purpose of present day international law is to promote peaceful co-existence and co-operation between all states regardless of their social systems[45]......... Although the PRC (*i.e.*, People's Republic of China) began to emphasize peaceful co-existence as early as 1954 and although Chinese writer appears to have accepted the post-1956 Soviet modification of the definition of international law to include reference to peaceful co-existence, by the 1960's the Chinese and Soviet view of this slogan and its legal implications differed substantially. For example, on October 8, 1964, Wu Te-feng, then a Vice-President of the Supreme People's Court and President of the Chinese Political Science and Law Association stated : Imperialism is the basic source of war, and American imperialism, moreover, is the most ferocious and ambitious aggressor ever to exist in the history of mankind, and it is the most flagrant violator of the principles of modern international law. Naturally, democratic legal workers in various countries should engage in the thorough exposure of, and determined struggle against it. However modern revisionists nevertheless make great efforts to propagandize the carrying out of 'peaceful co-existence' with imperialism without being subject to any principle disseminating the view that contemporary international law is the law of 'peaceful co-existence' with

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[40] The Soviet Impact on International Law (1965), p. 67 : see also Jenks, The Common Law of Mankind, p. 1; McDougal Studies in World Order, p. 170; Philip C Jessup Transnational Law, p. 2.

[41] Ho Wu-Shuang and Ma Chun, "A Criticism of the Reactionary Viewpoint of Ch'en Ti-Ch'ing on the Science of International Law", CEYC No. 6: 35 (1957) in Peoples China and International Law, Edited by Jerome Alan Cohen and Hungdah Chieu, Vol. I, Princeton, Jersey, (1974), p. 26.

[42] Ibid at p. 27.

[43] Jerome Alan Cohen and Hungdah Chien, Supra note 40, at pp. 27-28.

[44] See P.I. Kozheznilkov Supra note 41, at p. 7.

[45] Ibid, at p. 11.

American imperialism.[46] This development was mainly due to the conflicts between China and Soviet Union and the latter was referred as modern revisionist. But in the 1970's even the Chinese developed relations with America, Britain and other so-called imperialist powers and hence once again a shift has come in the attitude of Chinese scholars.

The Chinese scholars criticize vehemently the definitions of international law given by Oppenheim and other Western writers. In the view of a Chinese writer,[47] these definitions cause us first to realise that Bourgeois international law is created for the so-called 'civilized states' and does not possess the spirit of democratic legislation in the international big family. In the view of Bourgeois writers, only 'Christian states' are 'civilized states' while non-Christian states, mainly oriental states, are 'uncivilized states'. For instance, Oppenheim said that before the First World War, China, Persia, Burma, Abyssinia, and other oriental states were still 'uncivilized states'. The criterion of the Bourgeoisie for distinguishing so-called 'civilized and uncivilized' states is neither long history nor culture. Even though China has had 5,000 years of excellent culture, she was not included in the group of 'civilized states'. The exclusion of Oriental states from the exclusive club of 'civilized states' reflects exactly the needs of the aggressive interests of the imperialistic monopolistic Bourgeoisie. He added, "......... although bourgeois international law may in certain periods and under certain conditions play a role of mutual restriction among 'civilized states' it is mainly a weapon used by 'civilized states' to control and oppress what they consider to be 'uncivilized states'. The 'uncivilized states' are their preys. The Chinese people feel very deeply here. In the past, imperialism seized the right of consular jurisdiction in China on the pretext that China was 'backward in the rule of law' and 'uncivilized'. By establishing 'spheres of influence, advocating the 'open door' and 'equal opportunity for all' and even trying to partition China, imperialism treated China as a 'backward' and 'uncivilized' State which could be oppressed." [48]

In China, International law is regarded as "a legal instrument in the service of foreign policy." [49] In the words of a Chinese author, "International law, in addition to being a body of principles and norms which must be observed by every country, is also, just as any law a political instrument : whether a country is a socialist or capitalist, it will to a certain degree utilize international law in implementing its foreign policy." [50]

As regards the subjects of international law, like Soviet Union, the Chinese also do not regard International Organisation and individuals as subjects. In their view, the Bourgeois theory concerning the subjects of law is inconsistent with the principles of modern international law.[51] But this view cannot be accepted. As pointed earlier, while criticising Oppenheim's definition that individuals have now become subjects of international law and can now, although only in a few cases, claim rights directly under international law and need not always do so through the medium of State. Similarly international organisations have also become subjects of international law. They can enter into agreements or treaties with other international organisations as well as states and other entities. They are legal persons and may make claims for the compensation of persons suffering injuries in their service.[52] China has now taken a complete U turn. It has recently joined the W.T.O.

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[46] Reporter of Cheng-fa-yen Chiu, "China Political Science and Law Association held Fourth General Meeting" CPYC No. 4: 28 (1964).

[47] Ying T'ao "Recognise the True Face of Bourgeois International Law from a few Basic Concepts", KCWTYC No. 143-44 (1966) in Jerome Alan Cohen and Hungdah Chiu, Supra note 43 at pp. 29-30.

[48] Ibid, at pp. 30-31.

[49] Shiu Sung, Yii-Ta-hasin, Luying-hui, and Ts'ao K'o, "An Initial Investigation into the old Law view point in the Teaching of International Law" CHYYC No. 4 : 14 (1958) in Jerome Alan Cohen and Hungdah Chiu, Supra note 43 at p. 31.

[50] Chou Fulun, "On the Nature of Modern International Law—A Discussion with Comrade Liu Hsin" CHYYC No. 3 : 55 (1958). Adopted from Ibid at pp. 31-32.

[51] For Chinese Approach to International Law See also "Chinese Practice" under the chapter entitled "Relationship between International Law and Municipal Law" and 'Chinese view' under the Chapter entitled "Subjects of International Law and Place of Individual under International Law".

[52] See for example, Advisory opinion of the International Court of Justice. Reparation for Injuries Suffered in the Service of the U.N., I.C.J. (1949), p. 174.

V. Charles G. Fenwick.—In the words of Fenwick :

> "International law may be defined in broad terms as the body of general principles and specific rules which are binding upon the members of the international community in their mutual relations".[53]

Appraisal.—Fenwick's definition is better than all the above-mentioned definitions because instead of the word 'states' he uses the words 'members of the international community' which include states, international institutions, individuals and non-state entities. He also uses the term 'general principles', His definition is very short but pregnant with meaning and takes into account the changes that have taken place after the Second World War. Indeed it is an appropriate and correct definition of international law.

VI. Whiteman.—Whiteman defines International Law in the following words : "International law is the standard of conduct, at a given time, for states and other entities subject thereto."

Evaluation.—This is a very brief but adequate definition. The words "other entities subject thereto" may include international organisations, individuals and non-State entities. The words used in the definition are apparently very simple but they are pregnant with meaning and very vast in their scope. Moreover, Whiteman has also emphasised the dynamic aspect of international law. She writes, "International law is, more or less, in a continual state of change and development. In certain of its aspects the evolution is gradual in others it is avulsive."

VII. J.G. Starke.—In the words of Starke[54] :

> "International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other, and which includes also :
>
> (a) the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with States and individuals ; and
>
> (b) certain rules of law relating to individuals and non-States entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community."

The definition of Starke is appropriate because it takes into account the changing character of international law and truly reflects the present position of international law.

Conclusion.—On the basis of the above definitions we may conclude that International law is a body of rules and principles which regulate the conduct and relations of the members of international community. The contention that States alone are subjects of international law is not only inconsistent with the changing character of international law but has become completely obsolete and inadequate. Individualistic character of international law is being replaced by the law of social inter-dependence.[55] In re *Piracy Jure Gentium*,[56] Lord Chancellor Sankey aptly remarked that international law is a "living and expanding Code." In view of the changing character and expanding scope of international law today, international institutions, some non-State entities and individuals have also become the legitimate subjects of International law. Nevertheless, it cannot be denied that even today, as pointed out by Starke, "it is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore do commonly observe, in their relations with each other........."[57] "Thus International law is constantly evolving body of norms that are commonly observed by the members of international community in their relations with one another. These norms confer rights and impose obligations upon States and, to a lesser extent, upon international organisations and individuals."[58] Moreover, "International law has effects on, and is effected by, the international relations, political thought and communications, as well as by the awareness of women and men in every State that they are a part of those addressed by the United Nations' Charter as being 'We, the People of the United Nations".[59]

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[53] International Law, (Third Indian Reprint, 1971) p. 31.

[54] Starke's International Law, Eleventh Edition, Butterworth (September, 1994), p. 3.

[55] Admission of a State to Membership in the U.N., I.C.J., Reports (1948), p. 4 at p. 67, per Judge Alvarez.

[56] (1934) A.C. 586, 589.

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57. *See Supra note 54.*

58. Edward Collins, *International Law in a Changing World* (1969), p. 2.

59. Martin Dixon and Robert McCorqudale, International Law (First Indian Reprint, 1995) p. 1.

CHAPTER 3

NATURE AND BASIS OF INTERNATIONAL LAW

Before we take up different aspects of nature and basis of international law it will be desirable to discuss in detail the question whether international law is true law or not. This is necessary because the nature of international law is not the same that of national law, and a number of conceptions or even assumptions as to who is subject to the rules of international law as to the acceptance of international law (entailing rights and obligations and the enforcement of them) must be analysed before the substance of international law itself can be determined.[1] Though this question is now only of academic interest because it has been well established for once and for all times that international law is law, a discussion of this question is still important for it helps to understand the nature of international law. The observation that international law is not law was made by jurists who were trained and groomed under municipal law and jurisprudence and who sought in international law all those things which they had been seeing and were accustomed of seing in municipal law. They were under a fallacy that there could be no system of law and jurisprudence other than municipal law and jurisprudence. They failed to realize that while state law is essentially a centralized system, international law operates in a decentralizd system. The fallacious observation made by jurists such as Austin, Pufendorf, Hobbes, Holland and Jethrow Brown influenced international lawyers and writers so much so that even at present they have not been able to free themselves completely from such influence. For example, Starke has criticized Austinian concept of law and subscribes to the view that international law is law yet seems to be under some influence of the said fallacy because he goes on to remark that international law is a 'weak law'. Once it is admitted that municipal law is a centralized system while international law operates in a decentralized system, it becomes obvious that comparison of the two systems is not proper. Even if a man is so weak and thin and appears like a skeleton, he will still be called a man. When we say he is weak, we do so by comparing him with a healthy and strong person. Thus being 'weak' here is a relative concept. So is the case with international law when it is said that it is a 'weak law'. It is only by comparing it with municipal law we can say this. But it must be stressed that the comparison is not happy and proper because municipal law and international law are different for they operate under different set of circumstances. International law is as good and strong as it can be under the system and circumstances it operates. Its sanctions are as effective and potent as they can be under the decentralized systems in which they operate. As aptly remarked by Prof. Hart, international law is law because states regard it as law. Nothing need be further proved. It may be added that international law is not only law but its significance and efficacy are constantly increasing. International law deals with such matters, *inter alia,* such as nuclear weapons and environment upon which very survival of mankind depends.

Whether International Law is a law in the true sense of the term or not?[*]

"The new-fangled term 'international law' was invented at a time when men's minds were obsessed by theories of national sovereignty and it is not surprising therefore, that there came to be attached to it a stigma and a contempt which have never attached to the traditional 'law of nations'.[2] The controversy whether international law is a law or not revolves on the divergent definitions of the word 'law' given by the jurists. If we subscribe to the view of Hobbes, Austin and Pufendorf that law is a command of sovereign, enforced by a superior political authority, then international law cannot be included in the category of law. On the other hand, if we subscribe to the view that the term 'law' cannot be limited to the rules enacted by superior political authority, then international law can be included in the category of law. In his paper entitled, "Is there a true International Law?" Published in 1884, eminent jurist Lawrence aptly remarked, "Everything depends upon the definition of law which we choose to adopt. The controversy is really a logomachy—a dispute about words, not things." Thus, "The largest of jurisprudential controversy, namely, that as to the word 'law' is a verbal dispute and nothing else".[3] Whether or not one wishes to attribute a legal character to the norms of international law depends largely upon the definition of law he chooses to accept." [4] Thus the jurists are divided into two main groups in regard to the legal character of the norms of international Law. We will now discuss critically the views of both the groups of jurists.

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[1] *See* Martin Dixon and Robert McCorqudole, International Law [Lawman (India) Pvt. Ltd., New Delhi, 1995], p. 7.

[*] See P.C.S. Exam., (1969), Q. 6(a) ; I.A.S. (1973) Q. 4 ; I.A.S. (1961) Q. 4 ; P.C.S. (1967) Q. 1 ; P.C.S. (1982) Q. 1(b) ; P.C.S. (1984) Q. 1(b) ; P.C.S. (1995) Q. 7(a).

[2] B.A. Wortley, Jurisprudence (Newyork, 1967), p. 153.

Hobbes, Pufendorf and Austin subscribe to the view that law "properly so called" is a command of the sovereign and is enforced by a superior political authority. Since law is the command of a determined superior, no law can exist where there is no supreme law-giver and no coercive enforcement agency. According to Austin, law is given by determinate superior political authority to political inferiors and is backed by a coercive enforcement agency. Thus, in the view of Austin, sanction occupies an important place in the enforcement of law. People follow law because they fear that if they do not do so, they might be compelled and even punished. According to Hobbes, man is by nature nasty, brutish and violent and fear or sanction which is inherent in law is necessary to maintain order in society. In his view, men need for their security "a common power to keep them in awe and to direct their action to the common benefit." Thus, we see that those jurists who deny the legal character of International law regard law as the command of the sovereign and having a coercive enforcement agency. In the view of these writers, the rules commonly called international law, are in fact the rules of 'positive morality'. Holland, Jeremy, Bentham and Jethro Brown, etc., are other prominent jurists who deny the legal character of international law.

In support of their view-point these jurists put forward the following arguments : (1) In municipal law, there is a determinate superior political authority which does not exists in international law. (2) As compaired to municipal law, international law lacks an effective legislative machinery. (3) International law lacks sanction which, according to the writers of this pursuasion, is an essential element of law. (4) There is no such executive power in International Law as may enforce the decisions of the International Court of Justice and ensure the observance of the provisions of the treaties. (5) International Law lacks a potent Judiciary. (6) Some writers call international law a quasi-law.[5]

The above view which denies the legal character of International law has been severely criticised by a large number of jurists. It is based on the definition of law that law is the command of the Sovereign backed by coercive enforcement agency. In other words, sanction is an essential element of law. But as pointed out by Prof. Oppenheim, "this definition is not correct. It does not cover that part of Municipal Law which is termed as unwritten or customary law. There is, in fact, no community and no State in the world which could exist with written law only".[6] Prof. H.L.A. Hart has also criticised the definition of law given by Austin. In his view, this concept "plainly approximates closer to penal statutes enacted by the Legislature of a modern State than to any other variety of law." [7] According to Prof. Oppenheim,[8] law may be correctly defined as "a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power."* J.L, Brierly has also criticised Austinian concept of law. In his words : "Unless we distort the facts so as to fit them into the definition it cannot account for the existence of the English Common Law." [9] Further, "If, as Sir Frederick Pollock writes, and as probably most competent jurists would today agree, the only essential conditions for the existence of law are the existence of a political community and the recognition by its members of settled rules binding upon them in that capacity, international law seem on the whole to satisfy these conditions." [10] Thus the existence of law presupposes the existence following prerequisites : (a) a community ; (b) a body of rules ; (c) common consent of the community that (d) if necessary, for enforcement of these rules by external power. "The three requirements of this definition (*i.e.* Oppenheim's definition of law) are satisfied by international law, to a greater or lesser extent. The states of the world do together constitute a body bound together through common interests which create extensive intercourse between them, and differences in culture, economic structure, or political system, do not affect as such the existence of an international community as one of the basic factors of international law. Rules for conduct of the members of that community exist and have existed for hundred of years. Equally, there exists a common consent of the community of states that rules of international conduct shall be enforced by external power, although in the absence of a central authority for this purpose states have sometimes to take the law into their own hands by such means as self help and intervention ...." [11] It may be added that outlawing of resort to force by the United Nations and steps for international enforcement action have led to less reliance on self help.[12]

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[3] Glanville, L., Williams "International Law and Controversy Concerning the word "Law", BYBIL. Vol XXII (1945) p. 146.

[4] Edward Collins, International Law in a Changing World (1969) p. 2.

[5] See for example, D.J. Lathan Brown, Public International Law, (London, Sweet and Maxwell, (1970), p. 274.

[6] International Law, Vol. I, Edited by Lauterpacht (1970, Reprint), p. 7.

[7] H.L.A. Hart, The concept of Law, (Oxford, 1961), p. 24.

[8] International Law, Vol. I. Eighth Edition, p. 10.

International Law is Really Law*.—Most of the jurists now subscribe to the view that international law is really law. So far as the sanction or coercive force behind the law concerned, it may be said that it is not an essential element of law and even if sanction is regarded as an essential element of law there are sanctions in international law. The common law of England is its glaring example. To some extent, covenant of the League of Nations provided, and now the U.N. Charter provides for some sanctions. So far as the legislative, judicial or executive branches in the international system are concerned, "What matter is not whether the international system has legislative, judicial or executive branches corresponding to those we have become accustomed to seek in a domestic society ; what matter is whether international law is reflected in the policies of nations and in relations between nations." Further, 'The fact is, lawyers insist that nations have accepted important limitations on their sovereignty, that they have observed those norms and undertaking, that the result has been substantial order in international relations." [13]

J.G. Starke, who has also criticised the Austinian concept of law, subscribes to the view that international law is really law. In this connection, he has put forward four main arguments. In the first place, it has been established by modern historical jurisprudence that in many communities, a system of law existed and was being observed though such communities lacked a formal legislative authority. "Such law did not differ in its binding operation from the law of any state with a true legislative authority." [14] Secondly Austin's views might have been correct for his time but in view of present day international law, they are not true.[15] Customary rules of international law are diminishing and they are being replaced by law-making treaties and conventions. Law-making treaties are counterparts in the international system of the legislation in the municipal legal system. Thus International legislation has come into existence and it is now wrong to say that international system has no legislation at all. Thirdly, "the authoritative agencies responsible for the maintenance of International intercourse do not consider International law as merely a moral Code."[16] Lastly, the United Nations is based on the true legality of international law.[17]

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* Asked in I.A.S. Exam. (1973), Q. No. 6(a).

[9] The Law of Nations, Sixth Edition (1963), p. 70.

[10] Ibid. at p. 71.

[11] Oppenheim's International Law, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition Longman Group UK Limited and Mrs. Tomoko Hudson, 1992, pp. 9-10.

[12] Ibid, at p. 10.

** See also for P.C.S. (1995) Q. 7(a) ; UPPCS (2004), Q. 5.

[13] Louis Henkin, How Nations Behave (1968), p. 28.

[14] J.G. Starke, An Introduction to International Law, Eighth Edition (1977), p. 20.

[15] Ibid.

Oppenheim regards international law as law because of the following two reasons : In the first place, international law is constantly recognised as law in practice. The Government of different States feel that they are legally as well as morally bound to follow international law.[18] Secondly, while breaking international law, States never deny its legal existence. On the contrary they recognise its existence and try to interpret international law as justifying their conduct.[19] An emerging system of sanctions for the enforcement of international law, recourse to law-making treaties and certain aspects of the activities of international organisations indicating the emergence of legislative process, recognition of certain rules having the character of *jus cogens* etc. are some of the "indications of a growing maturity in the international legal order". Indeed,"...... international law may now properly be regarded as complete system".[20] Further, "while the frequency of the violations of International Law may strain its legal force to breaking point, the formal, though often cynical, affirmation of its binding nature is not without significance."* Frequent violations do not prove that the law does not exist. Even Municipal or State law is frequently violated. But as pointed out by Oppenheim, violations of International Law are certainly frequent, especially during war. But the offenders always try to prove that their acts do not constitute a violation, and that they have a right to act as they do according to the law or at least that no rule of the Law of Nations is against their acts. It is true that frequency of violation of International Law may strain its legal force to breaking point. For example, during the Second World War rules of International Law were frequently and flagrantly violated. For some time at least, it appeared as if no law existed. But thanks to the inner vitality of the Law of Nations, within a few years, faith in the law was again revived and States again reaffirmed their faith in the rule of law. They demonstrated this by establishing the United Nations which is based upon the true legality of International Law.

Even when States violate rules of International Law, they do not deny the existence of law but try to justify their conduct and affirm the binding nature of the rules of International Law. This affirmation is significant for it lends to the strength of the law and the legal system. As pointed out by Edward Collins[21] : "International Law is created and is deemed to be legally binding by authoritative national and international decision makers because they understand that generally agreed upon rules and principles of action serve the indispensable function of providing a basis for the orderly management of international relations." Brierly has also aptly remarked : "It is both practically inconvenient and also contrary to the best juristic thought to deny its (international law) legal character."[22] Prof. H.L.A. Hart has also written : "It is clear that in the practice of States certain rules are regularly respected even at the cost of certain sacrifices ; claims are formulated by reference to them, breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation and relation. These, surely, are all elements required to support the element that there exist among States rules imposing obligations upon them."[23]

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[16] J.G. Starke, An Introduction to International Law, Eighth Edition (1977), p. 20.

[17] Ibid at p. 21.

[18] International Law, Vol. I, Eighth Edition, pp. 14-15.

[19] Ibid at p. 15.

[20] Oppenheim's International Law, note 11, at pp. 11-12.

* See Q. No. 4 of I.A.S. Exam, (1961) ; C.S.E. (1979) Q. 7(a).

[21] See Glanville L. Williams "International Law and Controversy Concerning the word "Law" (1945) p. 29.

[22] The Law of Nations, Sixth Edition (1963), p. 69.

[23] The Concept of Law (Oxford, 1961), p. 226.

The arguments of the jurists who regard International Law as really law, may be summed up as follows :

(1) The term law cannot be limited to rules of conduct enacted by a sovereign authority. Sir Henry Maine, one of chief exponents of historical school of jurisprudence, carried on research on historical jurisprudence and firmly established that in primitive society there was no sovereign political authority yet there were laws.

(2) The Austinian concept of law fails to account for the customary rules of International Law. If we accept the Austinian definition of law common law of England will lose its legal validity.

(3) Customary rules of International Law are diminishing and are being replaced by law-making treaties and conventions. To day, the bulk of International Law comprises of rules laid down by various law-making treaties, such as, Geneva and Hague Conventions. The rules laid down by these treaties are binding although they do not emanate from a sovereign political authority.

(4) When international questions arise, States do not rely upon moral arguments but rely upon treaties, precedents and opinions of specialists.

(5) States do not deny the existence of International Law. On the contrary, they intepret International Law so to justify their conduct.

(6) In some State (*e.g.* U.S.A. and U.K.), international law is treated as part of their own law. A leading case on the point is the *Paquete* v. *Habanna*,[24] wherein Justice Gray observed : "International law is a part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

(7) As per Statute of the International Court of Justice, the International Court of Justice has to decide disputes as are submitted to it in accordance with international law.

(8) International conferences and conventions also treat international law as law in its true sense.

(9) The United Nations is based on the true legality of international law.

(10) So far as sanction in law is concerned, international law does not completely lack it.

(11) It is true that international law is frequently violated but it does not mean that international law is not law. Even State or municipal law is violated. Frequent violations of law indicate the weakness of enforcement machinery and have nothing to do with the legality of the rules. Legality of rules and enforcement of rules of law are two different things.

(12) The decisions of the International Court of Justice are binding upon the parties to a dispute and only in respect of that dispute. The powers and jurisdiction of International Court of Justice are not equivalent to the Municipal Court but under certain conditions, its decision can be enforced. Article 94 of the U.N. Charter provides that each member of the U.N. undertakes to comply with the decision of the International Court of Justice. It further provides that if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

On the basis of above arguments, it may be concluded that International law is really law. However, it has to be admitted that international law is not equivalent to municipal law. "It is obvious that international law, unlike municipal law, operates in a decentralised political system. There is no world legislature, no international policies, and no International Court with compulsory jurisdiction."[25] Starke has expressed the view that international law is a *"weak law."* He writes : "This cumulative evidence against the position taken by Austin and his followers should not blind us to the fact that necessarily international law is *weak law*. Existing international legislative machinery, operating mainly through law-making conventions, is not comparable in efficiency to State legislative machinery."[26] But despite the weaknesses of the international legal system, the legal character of international law cannot be denied. Moreover, this weakness becomes manifest when we compare international law with Municipal Law. But this comparison is not happy and appropriate. International Law operates in a decentralized system whereas Municipal Law operates in a centralized system. International law must be judged in the context of system in which it operates. As aptly remarked by Judge Philip L. Jessup :[27] "Impotent to restrain a great nation which has no decent respect for the opinion of mankind, falling in its severest test of serving as a substitute for war, international law plods on its way, followed automatically in routine affairs, invoked, flouted, codified, flouted again but yet again invoked........... But can one say that the international law with which they deal has no reality"?[*] Indeed no one can deny the legal character of international law. As compared to municipal law it is definitely weak ; nevertheless it is law. As a matter of fact, as pointed out by J.L. Brierly, International Law is neither a myth on the one hand nor a penacea on the other, but just one institution among others which we can use for the building of a better international order."[28] As aptly remarked by Prof. Louis Henkin.[29] "Fortunately, international law exists and it works—not perfectly or always but well enough and often enough to make a considerable difference in the conduct of international law affairs. Although there is no one to determine and adjudge the law, there is wide agreement on the content and meaning of law and agreements, even in a divided world burgeoning with new nations." Moreover, as pointed out in the Ninth Edition of Oppenheim's International Law,[30] "Furthermore, international law may now properly be regarded as a complete system. By this is meant not that there is always a clear and specific legal rule readily applicable to every international situation, but that every international situation is capable of being determined *as a matter of law,* either by the application of specific legal rules where they already exist, or by the application of legal rules derived by the use of known legal techniques, from other legal rules or principles.[**]

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[24] (1900) 175 U.S. 677 at p. 700.

Last but not the least, most of the controversy about the legal character of International Law is due to the tendency of the jurists to compare it with Municipal Law. As indicated above, the comparison is not happy. Unlike Municipal Law, International Law operates in a purely decentralized system. Due to this peculiar reason, International Law is bound to be distinct from Municipal Law. International Law must be understood and appreciated in the peculiar system in which it operates. It is as good and effective as it can be under the circumstances and peculiar system under which it operates.

International Law and Municipal Law[***]

It has been pointed out, "Although International Law is readily distinguishable in many respects from domestic law it is nonetheless a system of law possessing certain characteristcs peculiar to itself as well as certain others common to Municipal Law." It cannot be denied that the International legislative machinery operating mainly through law-making conventions is weak as compared to the legislative machinery of States because States enter into treaties and conventions on the basis of equality. Sovereign equality of States is the well-recognised and established principle. There is no power over and above the States. The International Executive and Judiciary are also weaker than their counterparts in the State system.

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[25] Edward Collins International Law in a Changing World (1969), p. 3.

[26] J.G. Starke, An Introduction to International Law, Eighth Edition (1977), p. 22.

[27] See "The Reality of Internaitonal Law", Foreign Affairs, Vol. 18 (Jan. 1940), p. 214.

[*] *Asked in I.A.S. Exam. (1978), Q. No. 1.* : For the answer of this question see matter discussed under the heading "whether International Law is a law in the true sense of the term or not"?

[28] Preface to The Law of Nations, Fifth Edition (1955).

[29] Louis Henkin, "Does Internaitonal Law Work?" The American Review, Vol. XV, (July 1971), p. 63.

[30] Oppenheim's International Law, Note 11 at pp. 12-13.

[**] See Q. No. 1 of P.C.S. Exam, (1967) ; for further elaboration of the answer see also matter discussed under the heading "International Law is Really Law".

[***] *See also for CSE (1993) Q. 5(b).*

There are however, certain similarities between the two. Like State Judiciary, in the international legal system also there is a court, International Court of Justice and under Article 59 of Statute of the Court its decisions are binding upon the parties to a dispute and in respect of that dispute. More than 47 States have conferred compulsory jurisdiction upon the court. Similarly, Security Council may be said to be the Executive of the International legal system. Under Article 94 of the Charter of the U.N., if a party to the dispute before the International Court of Justice fails to implement the decision of the Court the other party may bring the matter before the Security Council and the Council may make recommendations or decide the measures to be taken to implement the decision. However, it may be noted that apart from this, Security Council's main function is to maintain or restore international peace and security. Unlike State law, it does not possess powers to enforce law (*i.e.*, international law) as such and this is probably the greatest weakness of international law. Thus international law possesses characteristics peculiar to itself as well as certain others common to municipal law. In the words of Palmer and Perkins, "International Law is largely but not altogether concerned with relations between States, whereas municipal law controls relation between individuals and the State. The two kinds of laws are similar in their resources—chiefly custom and express agreement—with, however, substantial differences in legislative machinery. They differ altogether in their judicial processes. Both are applied by national courts, which results in complete decentralization of the judicial function in international law and effective centralization in Municipal law. What is true of the judicial function is also true of the executive function. As in tort, in domestic law, traditional international law always depended for its enforcement upon the initiative of the injured party. Most municipal laws, on the other hand, are enforced by a responsible executive unknown to international law."

Theory and Reality in International Law*

In the international legal system there is a great difference between theory and reality. That is why, Emmanuel Kant has criticized International Law by remarking : ".....this pompous law of nations which is so eloquent in books and silent in the cabinets of diplomats ?** There are those who assert that international law, in order to be worth, its salt must be based solely upon logic and principle. But international law, notwithstanding the reasoned theses of the commentators, consists, in the last analysis, of those principles upon which soverign nations can agree. Such agreement is seldom, if ever, reached without regard to the political process.[31] "Usually the international law aspects of international relations are co-mingled with political strategic, economic, geographical, social, and other elements and in consequence it may be difficult to determine the exact part played by international law. Account must be taken of these non-legal factors in analysing internaitonal incidents whch have taken place or in predicting what States will do in a given situation." [32]

One of the main reasons for the difference between theory and reality in International Law is the concept of sovereignty. Each State is sovereign and equal in the eye of law. There is no power over and above the State. Whenever the national interests of a State are affected, it resorts to the concept of sovereignty and hence its decision or action is based more on its own interests than on the rules of international law and it claims that even international law allows it to exercise its own discretion in such matter. For example, international law recognises the essentials of statehood of a State. It also recognises that certain legal consequences ensue when a State is recognised. But it depends upon the sweet will or discretion of a State whether to recognise or withhold recognition of a politically organised community which has emerged as a State. It is the recognising State itself which decides (so far as the relations between the recognising and the recognised States are concerned) as to whether a politically organised community has in fact attained statehood and this appraisal cannot be questioned. And obviously, in many cases, decisions of the recognising State are motivated by political considerations.

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* See Q. No. 1(b), of I.A.S. Exam, (1975) ; and Q. No. 1(a) of I.A.S. (1975).

** Asked in I.A.S. Exam, (1963), Q. No. 1.

[31] "International Law and the Political Process", 38 United States Department of State Bulletin 832 (1958).

[32] "The International Law Focus in International Politics" in William W. Bishop, Jr., International Law ; Cases and Materials, Second Edition (Boston : Little, Brown and Company, 1962), p. 6.

At present it is generally recognized that the sovereignty of a State is neither indivisible nor unlimited. States have now agreed to the curtailment of part of their sovereignty in the interest of international community. This is true but in practice whenever the interest of a state is adversely affected it invokes the concept of sovereignty. Thus sovereign equality is one of the keystones of international legal system. Even the United Nations Charter provides that organisation is based on the principle of *sovereign equality* of all its members.[33]

Yet another example of the difference in theory and reality in International Law is the rules developed in connection with the relationship of International Law and Municipal Law. In principle most of the States recognise that customary rules of international law are part of their own domestic law but they have made this principle subject to so many exceptions that in practice whenever there is any conflict between a rule of International Law and a rule of domestic law, it is the latter which prevails over the former.[34] Relationship of law and power in international relations cannot be ignored and hence International Law, a normative order, should conform to the twin tests of meeting social needs and reflect true state of international practice among States." [35]

Distinction between Public International Law and Private International Law.*

The definition of Public International Law (or commonly known as International Law) has been discussed in detail earlier. At one time, International Law was defined as the body of rules which regulates relations among the states. One of the main distinctions then between Public and Private International Law was therefore said to be that while the former regulated relations among States, the latter regulated the relations of individuals. But in view of the expansion of the subjects of international law, old definition of Public International Law has become obsolete and inadequate. Public international law now regulates the relations among the members of International community which include individuals also.

According to Pit Cobbet, "Private International Law is the body of rules for determining questions as to selection of appropriate law, in Civil cases which present themselves for decision before the courts of one State or country, but which involve a foreign element, *i.e.*, which affect foreign persons or foreign things or transactions that had been entered into wholly or partly in a foreign country, or with reference to some foreign system of law." Thus Private International Law is that branch of International Law which decides law applicable in the issue in disputes involving more than one nations and determines the court which will have jurisdiction to decide the issue. It is more popularly termed as 'conflict of Laws'.

Main points of difference between the Public and Private International Law are following :—

(*i*) Public International Law, for its major part, deals with States and to a lesser extent deals with the individuals, Private International Law deals with the individuals.

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[33] This is provided in the principle of Article 2 which shows the importance of this principle in the international legal system.

[34] For further elaboration see Practices of States under the Chapter "Relationship between International Law and Municipal Law".

[35] See Charles De Visscher, Theory and Reality in Public Internaitonal Law (1968), p. 137.

* Asked in P.C.S. Exam. (1947), Q. No. 2(a).

(ii) Private International Law is a part of Municipal Law but so is not always the case with Public International Law. Only customary rules of International Law are considered to be part of the domestic law of a state.

(iii) Public International Law (at least rules having general application) is same for all the States whereas Private International Law may be different in different States.

(iv) Private International Law determines as to which Law will apply in a case having a foreign element. There is no such problem in the field of Public International Law. Public International Law is confronted with different type of problems whenever there is conflict between it and the internal law of a state. The problem arises as to which will prevail.

(v) Private International Law also determines the court which will have jurisdiction to decide the issue in question. In this respect also it differs from Public International Law.

(vi) According to Robert Phillimore, rights arising out of Public International Law are absolute and their breach constitutes a *causes belli* (*i.e.,* whatever involves or justifies war). This view does not seem to be correct in the presence of the provisions of Kellog-Briand Pact and the U.N. Charter which have outlawed war. But Private International Law does not at all confer absolute rights.

(vii) International Law comprises mainly of the rules recognised by States in their relation with each other and mostly arises out of International customs and treaties. On the other hand, rules of Private International Law are framed by the legislature of a State and recognised and developed by State Courts.

In some exceptional cases rules of Private International Law may become rules of Public International Law when they are incoporated in the international treaties.[36] In such a case, if a state party fails to observe the rules of private international law, proceedings may be started against it for breach of an International obligation owed to another party. Even in those cases where rules of private international law cannot themselves be considered as rules of public international law their application by State as part of its internal law may directly involve the rights and obligations of the State under public international law, for example, matter concerning the property of aliens or the extent of the jurisdiction of a State.[37] According to Palmer and Perkins[38] as distinguished from Public International Law, 'Private International Law' "is a branch of the law which deals entirely with the relations of persons living under different legal systems. Occasions for the application of Private International Law arise when justice requires that law of some outside jurisdiction—not necessarily a foreign State—be applied in a particular case. For example, to cite a famous English situation, when couples left England to be married in Scotland where the marriage laws were less stringent, and question arose whether the validity of the marriage should be determined by English Law or by Scottish law. The English Courts held that the laws of Scotland should apply. Frequently the nationality of a person is the issue." [39]

Is International Law a mere Positive morality ?*

In order to know whether international law is a mere positive morality, it is necessary first to know what is a rule of morality and then, what is the difference between a rule of morality and a rule of law. As pointed out by Prof. Oppenheim : "A rule is a rule of morality if by common consent of the community it applies to conscience and to consience only : whereas, on the other hand, a rule is a rule of law, if by common consent of the community it will eventually be enforced by external power." [40] Thus a rule of morality is a rule which applies to conscience only and cannot be enforced by external power. A rule of law, on the other hand can be enforced by external power. There is now general agreement about the binding nature of international law whereas a rule of morality is not binding. International morality or ethics has been defined "as standards of 'right behaviour' that are based on personal judgments." Further : "Although attitudes about morality when widely shared, influence the development of international law, there is no recognised legal obligation to obey the norms of morality until they are accepted by authoritative decision-makers as international law." [41] Frederick Pollock has rightly observed : "If International Law were only a kind of morality, the framers of State papers concerning foreign policy would throw all their weight on moral arguments. But, as a matter of fact, this is not what they do. They appeal not to the general feeling of moral rightness, but to precedents, to treaties and to opinion of specialists."* According to Prof. H.L.A. Hart,[42] there are a number of different reasons for resisting the classificaiton of rules of international law as 'morality'. He points out the following reasons :

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[36] See Schwarzenbergar : A Manual of International Law, 2nd Edn., p. 2.

[37] Oppenheim's International Law, note 11, at p. 7.

[38] Norman D. Palmer and Howard E. Perkins' International Relations—The World Community in Transition, Third Indian Edition (1970), p. 270.

[39] As stated by Prof. Edwin D. Dickinson, "there is a host of problems concerning the adjudication and regulation of matters of private right and duty which arise uniquely from the continuing movement of persons or things from one nation to another and form the increasing case with which relationships of agreement, family, property, enterprise, or the like may be consummated across national frontiers", Law and Peace (Philadelphia : University of Pennsylvania Press, 1951), p. 59 ; Adopted from Ibid.

* P.C.S. (1984) Q. 1(B) ; p.c.s. (1991) Q. 6 (B) ; UPPCS (2001) Q. 5(a) ; IAS (2006) Q. 5(a).

(1) "The first is that States often reproach each other for immoral conduct or praise themselves or others for living upto the standard of international morality. No doubt one of the virtues which States may show or fail to show is that of abiding by international law, but that does not mean that law is morality. In fact the appraisal of States conduct in terms of morality is recognizable different from the formulation of claims, demands, and the acknowledgement of rights and obligations under the rules of international law".

(2) "Claims under international law are not couched in such terms, though of course, as in municipal law, they may be joined with a moral appeal. What predominates in the arguments, often technical, which States address to each other over disputed matters of international law, are references to precedents, treaties and juristic writings, often no mention is made of mutual right or wrong good or bad." [43]

(3) "The rules of international law, like those of municipal law are often morally quite indifferent. A rule may exist because it is convenient or necessary to have some clear fixed rule about the subject with which it is concerned, but not because any moral importance is attached to the particular rules."

(4) "It is clear that in the practice of States certain rules are regularly respected even at the cost of certain sacrifices ; claims are formulated by reference to them ; breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation or retaliation. These, surely, are all the elements required to support the statement there exist among States rules imposing obligations upon them." [44]

As pointed out earlier, a distinction is made between moral and legal principles and while the former apply to conscience only, the latter create obligations. For example, the International Court of Justice in *South-West Africa Cases (Second Phase)*[45] made it clear that the court "can take account of moral principles only in so far as these are given in a sufficient expression in legal form." But even the World Court cannot always ignore the role of morality and the court has time and again accepted the relationship between morality and international law. For example in the *North Sea Continental Shelf Cases*[46] the court observed : "whatever the legal reasonings of a court of justice, its decisions must by definition be just and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within rules, and in this field it is precisely a rule of law that calls for the application of equitable principles."

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[40] *International Law, Vol. I, Eighth Edition*, p. 8.

[41] Edward Collins, *International Law in a Changing World* (1969), p. 3.

* Asked in I.A.S. Exam, (1966), Q. NO. 1.

[42] *The Concept of Law* (Oxford, 1971), pp. 222-226.

[43] *Ibid*, at p. 223.

[44] *Ibid*. at p. 226 ; see also Frederick Pollock, *Oxford Lectures* (1890), p. 18.

[45] I.C.J. Reports (1966) p. 34.

[46] I.C.J. Reports (1966), p. 49.

Whether International Law is the vanishing point of jurisprudence ?*—Holland has remarked that International Law is the vanishing point of jurisprudence. In his view, rules of international law are followed by courtesy and hence they should not be kept in the category of law. According to him, rules of international law cannot be kept into the category of law because they lack sanction which is an essential element of municipal law. Austin also subscribes to this view, Justice V.R. Krishna Iyer, formerly member, Indian Law Commission has also remarked, "It is a sad truism that International law is still the vanishing point of jurisprudence." [47] This view is not correct. It is now generally agreed that Holland's view that international law is the vanishing point of jurisprudence is not correct. A majority of international lawyers not subscribe to this view. Holland's view is based on the proposition that there are no sanctions behind international law. Although it cannot be conceded that the sanctions behind international law are much weaker than their counterparts in the municipal law, yet it cannot be successfully contended that there are no sanctions at all behind international law. For example, if there is a threat to international peace and security, under Chapter VII of the U.N. Charter the Security Council can take necessary action to maintain or restore international peace and security. Besides this, the decisions of the International Court of Justice are final and binding upon the parties to a dispute.[48] A number of other sanctions exist under different international organisations such as ILO, ICAO, WHO, UPU. As pointed out in Ninth Edition of Oppenheim's International Law,[49] "An emerging system of sanctions for the enforcement of International law is discernible.........[50]. There are also certain other indications of a growing maturity in international order." Further, "there is similarly increasing acceptance that the rules of international law are the foundation upon which the rights of States rest, and no longer merely limitation upon the rights of states rest, and no longer merely limitation upon states' rights which, in the absence of a rule of law to the contrary, are unlimited."

ICAO, WHO, UPU. etc. have similar sanction and have their own ways and means to enforce law and ensure its observance. Last but not the least, public opinion is the ultimate sanction behind international law and for that matter any law.

Thus it is wrong to say that there are no sanctions at all in international law. As remarked by R.W.M. Dias, "The principal reasons why State obey international law appear to be fear and self-interest. Fear operates through war, reprisals, restoration, pacific blockade and naval military demonstration."[51] It cannot, however, be denied that the greatest shortcoming of international law is the absence of effective machinery to carry out sanctions. It may be noted,".......just because the simple truism which hold good for individuals do not hold for States, and the factual background to international law is so different from that of municipal law, there is neither a similar necessity for sanctions (desirable though it may be that international law should be supported by them) nor a similar prospect of their safe and efficacious use that no simple deductions can be made from the necessity of organized sanctions to municipal law in its setting of physical and psychological facts, to the conclusion that without them international law, in its very different setting imposes 'no obligations' is not binding, and so not worth the title of 'law'.[52]

Holland regards international law as the vanishing point of jurisprudence because in his view, there is no Judge or arbiter to decide International disputes and that the rules of international law are followed by States by courtesy. This view is far from truth in view of the developed and changed character of international law today. It is incorrect to say that international legal system is without a Court to decide international disputes. The establishment of the Permanent Court of International Justice under the League of Nations, has rightly been reckoned as a landmark for the development of international law because through it international legal system was provided with a judicial organ to resolve international disputes through judicial decision. The greatest proof of its utility and importance is the fact that its successor, the International Court of Justice, established under the U.N. Charter is based on the Statute of the Permanent Court of International Justice.

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* Asked in P.C.S. Exam, (1972), Q. No. 1 ; for suggestions for strengthening International Law see "Suggestions for Improving International Law" discussed in this very chapter, see also for P.C.S. (1990) Q. 6(a) ; IAS (2001) Q. 5(a) ; IAS (2007) Q. 5(a).

[47] "Mass Expulsion As Violation of Human Rights", I.J.I.L. Vol. 13 (1973) p. 169.

[48] Article 59 of the Statute of the International Court of Justice.

[49] Brierly, Note 10 at pp. 11-12.

[50] Ibid., at p. 72.

[51] R.W.M. Dias, Jurisprudence (1970), p. 404.

[52] H.L.A. Hart, The Concept of Law (Oxford, 1971), at pp. 214-15.

It is true that the decisions of the International Court of Justice are not equivalent to the Municipal Courts. Nevertheless, the decisions of the International Court of Justice possess binding force and can be enforced under certain circumstances. They are binding upon the parties to dispute and only in respect of that disputes. The provision to this effect is contained in Article 59 of the Statute of the International Court of Justice. Besides this Articles 94 of the United Nations Charter provides that each member of the U.N. undertakes to comply with tne decision of the International Court of Justice in any case to which it is a party. Article 94 further provides that if any party to a case fails to perform the obligations incumbent upon it under judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Thus we see that the international legal system is not only provided with a judicial organ to resolve international disputes but its decisions are binding and can be enforced under the conditions and circumstances as stated above. So far as the question of jurisdiction is concerned, Article 36 (2) of the Statute of the International Court of Justice provides that the State may confer compulsory jurisdiction upon the court in all legal disputes concerning (a) the interpretation of a treaty ; (b) any question of International Law ; (c) existence of any fact which if established would constitute a breach of an international obligation ; and (d) the nature or extent of the reparation to be made for the breach of an international obligation. A number of States (47) have conferred compulsory jurisdiction upon the Court. Thus the Court exercises compulsory jurisdiction on a large number of international disputes. Moreover leaving apart a few exceptions, decisions of the Court have been respected and implemented.

As noted above, under Chapter VII of the U.N. Charter, the Security Council possesses wide powers to declare sanctions against the States who are guilty of violation of the provisions of the U.N. Charter relating to international peace and security. U.N. action in the Gulf War (1991) is a glaring example of the fact that International Law possesses not only sanctions but that they can also be effective. By annexing Kuwait, Iraq had openly violated International law. The Security Council of the U.N. passed a resolution asking Iraq to vacate and free Kuwait. On Iraq's failure to implement the said resolution, Security Council passed political and economic sanctions against Iraq. When even these sanctions failed, Security Council permitted America and its allied nations to use force for the implementation of resolutions of Security Council. Thus America and its allied nations forced Iraq to withdraw from Kuwait. Earlier, the United Nations had taken enforcement action under Chapter VII of the Charter in several cases such as in 1948 against North Korea and in 1961 in Congo. Reference may also be made to United Nations sanctions against Libya in Lockerbie case, *i.e.* bombing of Pan American (Flight) airliner in 1988 over Lockerbie (Scotland) killing 270 persons.

Besides United Nations, there are sanctions in other intergovernmental organisations such as International Labour Organisation (ILU), World Health Organisation (WHO), International-Tele-Communication Union (ITU), International Civil Aviation Organisation (ICAO), International Monetary Fund (IMF), World Trade Organisation (WTO) etc. For example, in case of a dispute relating to the obstruction in International Civil Aviation Organisation (ICAO), the decision of the Council of ICAO is binding. Similarly, International Labour Organisation (ILO) has a special mechanism by which it functions to evaluate and promote compliance and standards. This mechanism consists of the following : (i) Through the ILO's regularly reporting structure; (ii) Through special mechanism established to protect freedom of association; (iii) Commissions of enquiry; and (iv) Representatives under which procedure a committee is appointed by the Governing Body which then reviews the Committee's report. It need not be over-emphasized that unlike state or municipal law, public international law operates in a decentralised system, its sanctions are therefore distinct and different from that of municipal law.

Thus International Law is in fact a body of rules and principles which are considered to be binding by the members of international community in their intercourse with other. If a State violates rules of International Law, it can be enforced by an external power. In innumerable treaties States have not only accepted it to be binding but also confirm the fact that it is a law between themselves. They also accept international law by asking their officers, courts and nationals to act in accordance with obligations imposed by international law. The legal character of international law has also been recognized in the 1970. Declaration on the Principles of International law Concerning Friendly Relation and Cooperation among States. The Seventh Principle of this Declaration says, it is the duty of every state to fulfil in good faith its obligations under the generally recognized principles and rules of international law.[53] So is the case with the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations adopted by the General Assembly of the U.N. on 18 November, 1987.

On the basis of above discussion it may be concluded that International Law is, in fact, law and it is wrong to say that it is the vanishing point of jurisprudence.[54]

Does International Law comprise of the Rules of International Comity ?

The International comity consists of "practices that are observed between States as a matter of courtesy or convenience". For example, Canada and America permit each other's nationals to enter their territory without passports, but they do not extend this privilege to other States. Their treatment regarding each other's diplomatic agents, on the other hand, is governed by the rules of International law. So is the case with India and Nepal. The rules of international comity are observed by State as a matter of courtesy or convenience whereas the rules of international law are observed by States because they are binding upon them. Edward Collins has aptly remarked : "the binding nature of International Law also distinguishes it from international comity, which consists of practices that are observed between States as a matter of courtesy or convenience."

Weaknesses of International Law

International Law is said to be a "weak law". The weaknesses of international law become evident when we compare it with Municipal law. Following are some of the weaknesses of international law :—

(1) The greatest shortcoming of international law is that it lacks an effective executive authority to enforce its rules.

(2) It lacks an effective legislative machinery.

(3) The International Court of Justice lacks compulsory jurisdiction in the true sense of the term.

(4) Due to lack of effective sanctions, rules of international law are frequently violated.

(5) The enforcement machinery of international law is very weak.

(6) A great limitation of International law is that it cannot intervene in the matters which are within the domestic jurisdiction of States.

(7) As compared to rules of State law, the rules of International Law suffer from greater uncertainty.

(8) International Law has, in many cases, failed to maintain order and peace in the world.

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[53] See Oppenheim's International Law, note 11, at pp. 13-14.

[54] See also reasons for "International Law being really law" discussed earlier.

Despite the above mentioned weaknesses, it has to be noted, that international law is constantly developing and its scope is expanding. It is a dynamic concept for it always endeavours to adopt itself to the needs of the day.[55] Its survival and efficiency are due to its changing and adaptable character. As compared to Municipal Law, International Law works in a decentralised system. All States consider themselves independent and sovereign. It is really creditable that the rules of international law are considered binding upon the States because either through treaties or otherwise States have consented to surrender a part of their sovereignties. This is due to the facts of international politics, inter-dependence of States and the continuous growth of the concept of international or world community.

Suggestions for improving International Law*

(1) The International Court of Justice should be given compulsory jurisdiction, in the true sense of the term, over all international disputes.

(2) An International Criminal Court should be established to adjudicate cases relating to international crimes.

(3) International law should be properly codified.

(4) The machinery to enforce the decisions of the International Court of Justice should be strengthened.

(5) An international Police system should be established to check international crimes and to enforce the rules and principles of International law.

(6) An International Bureau of investigation and Prosecution should be established for investigation of matters relating to international crimes and the prosecution of international criminals.

(7) In order to make International Law changeable and adaptable in accordance with the changing times and circumstances, powers and the scope of the activities of the International Law Commission should be expanded.

(8) The United Nations Charter should be amended so as to authorise the U.N. to intervene in such matters within the domestic jurisdiction of the States as are of international concern or affect international community.

(9) Such activities of the U.N. should be encouraged as may develop the feelings of international brotherhood so as to ensure the encouragement of the development of International Community in the true sense of the term.

(10) Today international law regulates the conduct and relations of not only States but also international organisations and individuals. But there is a need to give impetus to the development of international law in these fields.

(11) The doctrine of judicial precedents should be applied in the field of international law. This will help to strengthen the international law.

(12) In order to strengthen the legislative machinery of international law, more law-making treaties and conventions should be made and there should be provision for their revision from time to time.

(13) The legislative activities of the General Assembly should be further encouraged.

(14) The legislative activities of International Organisations (apart from the U.N.) such as ILO, WHO, ICAO, ITO, UPU, etc. should be highlighted and emulated.

(15) Last but not the least, there must be basic recognition of the interest which the whole international society has in the observance of its laws. Breaches of the law must no

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[55] See also Josef L. Kunz, "The Changing Law of Nations", A.J.I.L. Vol. 51 (1957), p. 77.

* See Q. No. 1 of P.C.S. Exam, (1972).

longer be considered the concern of only the State directly and primarily affected."* In view of the growing interdependence of States upon each other, the international community in the real sense of the term has now emerged. In order to strengthen international law, it should be clearly recognised by all States that the observance of the rules of international law is in their own interest and hence they should ensure that there are no breaches of the rules of international law. In case there are any breaches of international law, the international community as a whole must be concerned with it. For example, if genocide is committed in any State or there are violations of human rights, it should not only be the concern of the State directly and primarily affected but it should be the concern of international community as a whole. It cannot be denied, that the concepts of Sovereignty and Domestic jurisdiction are the formidable obstacles in this basic recognition. For example, whenever when the U.S. raised the matter of alleged violation of human rights in Soviet Union (*i.e.*, its treatment of dissidents) the latter took the plea of the principle of non-interference in internal matters. Nevertheless, it may be noted that it is now generally agreed that the 'concept of absolute sovereignty' has become outdated for once a State signs an international treaty and by ratifying it agrees to abide by it, it is deemed to surrender part of its sovereignty to that extent at least. The contents of the term 'domestic jurisdiction' are also variable. Any matter which is regulated by international law cannot be said to be matter within the domestic jurisdiction of a State. With the constant expansion of international law and covering of more and more fields day by day, the domestic jurisdiction of State is lessening. For example in view of the Universal Declaration of Human Rights, International Covenant on Human Rights, etc., violations of human rights no more treated within the 'domestic jurisdiction' of a State. Thus slowly and gradually the international community is moving towards the goal of the basic recognition that breaches of international law are the concern of the international society as a whole. This is manifest from international concern of *apartheid* and other forms of racial discrimination, violation of human rights, etc. So is the case of co-operation and solidarity shown by the International community with Kuwait which led to the vacation of Iraqi aggression from Kuwait's soil. Reference may also be made to U.N. action in Somalia and Bosnia.

The above suggestions will make international law, to some extent, equivalent to a Municipal Law. At present, several of these suggestions may appear to be impracticable or even utopian but the growth of the feeling of internationalism and the development of international community may make some of them practicable. With the growth of internationalism and the feeling of universal brotherhood, international law will also become effective and powerful.

Sanctions in International Law**

There is great controversy among the jurists in regard to the sanctions in international law. It has already been pointed out earlier that there are two extreme view-points in this regard. According to one view point, there are no sanctions at all behind the international law. In accordance with the second view point even if it is admitted that there are no sanctions behind the international law it can be included in the category of law because sanction is not an essential element of law. In between these two extreme views, some authors hold the view, and rightly too, that it is wrong to say that 'International law is without sanctions.'

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* See for Q. No. 10 of I.A.S. Exam, (1983), See also criticism of Oppenheim's definition and Chapter entitled "Subjects of International Law and Place of Individual in International Law".

** See for I.A.S. Exam, (1975) Q. No. 8 (d) ; Q. No. 1(a) of I.A.S. (1974) and Q. No. 7 of I.A.S. (1964)—for observation of Gerald Fitzmaurice, See matter discussed under the heading "Self-Defence and Self-Preservation under the Chapter entitled "Intervention" ; UPPCS (2004) Q. 5 ; IAS (2009) Q. 8(a).

As aptly remarked by Josef L. Kunz, "Legal sanctions constitute the reaction of the legal community against a delict. In contrast to disapproval by the members of a community as a moral sanction, legal sanction are socially organized measures in contrast to the transcendental sanctions or religious norms, they are to be applied against or without the will of person against whom they are directed ; they are finally, to be applied by physical force, if necessary." [56]

In the view of Kelsen, the distinguishing feature of law is that it is a 'coercive order' ; the rules of law be connected with a sanction. From the view point even of the legal system, force must be either a sanction or delinquency. In the international field, sanctions exist in the form of war and reprisal. The difference between the municipal law of States and international law would consist in the degree of centralization as regards the use of force ; within the State, force is monopolized by the community, but in the society of State a legitimate use of force may be made by the subjects of law, the individual States.[57] As a matter of fact, it would be wrong to say that there are no sanctions at all behind international law although it is true that as compared to municipal law the sanctions of international law are far less effective. Starke has pointed out the following sanctions behind the international law—

(1) Under Chapter VII of the United Nations Charter, if there is threat to the international peace and security or an aggression has taken place, the Security Council can take necessary action to maintain or restore international peace and security. In this way, to some extent, the violation of international law can be checked and necessary action can be taken for maintenance of peace and security.

(2) The decisions of the International Court of Justice are binding upon the parties to the dispute. Article 94 of the United Nations also provides that if a party to the dispute does not follow the decision of the Court, the other party may approach the Security Council which can take necessary measures to ensure the implementation of the decision. However, it cannot but be admitted that the U.N. Charter does not contain any provision to maintain international law generally.

(3) Under Article 2(4) of the Charter, the members of the U.N. have undertaken that they shall respect the territorial integrity and political independence of each other and shall not use force against each other. There is only one example in the Charter wherein the members may use force. That is contained under Article 51 of the Charter which confers on the members the right of individual and collective self-defence. But even this right can be exercised only when an armed attack has taken place and is subject to overall supervision and control of the Security Council.[58]

But a pertinent question arises as to whether international law can be maintained without strong coercive mechanism? As aptly pointed out by Soviet authors,[59] "Such mechanism exist in principle, for example, the powers of the Security Council and Chapter VII of the U.N. Charter. They should, of course, be set in motion whenever necessary. However, in the longer run it is nevertheless impossible to count excessively on these mechanisms, the application of which is hampered in practice and which have so far proved to be only marginally effective." Further, "A reasonable world order, an order reflecting a balance of interests can be maintained with a minimum of coercion............ First of all, there arises in this context the matter of effective mechanisms for control over compliance with international treaties......... Another area in the efforts to strengthen law and order is the use and upgrading of the mechanisms of peaceful settlement of disputes.[60]

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[56] "Sanctions in International Law", A.J.I.L., Vol. 54 (1960) p. 324.

[57] Torsten Gihl, The Legal Character and Sources of International Law (Stockholm, 1975), p. 61 ; Kelsen, General Theory of Law and State (1946), op. cit, pp. 328 et seq.

[58] For a detailed discussion on 'Self-defence'. 'Self-help' etc., See Chapter entitled "Intervention".

[59] Yuri Rybakov, Leonid Skotnikov, Alexander Zmeyevsky, "The Primacy of law in Politics" Int. Affairs (May, 1989) p. 57 at p. 59.

Thus International law is not without sanctions although these sanctions are not generally for the enforcement of international law in general. These sanctions are to maintain or restore international peace and security which is only a part of international law. As pointed out by Josef L. Kunz, "A more advanced international law must be based on the full recognition by states of the primacy of international law and enforceable sanctions both for the maintenance of peace and security and for the enforcement of international law in general by organs of international community". While welcoming the President of India to lay the Foundation stone of the building of Indian Society of International law, Judge Nagendra Singh aptly remarked, "According to our ancient concept of law the element of sanction provided by the authority of state is inherent in law itself to such an extent that without ostensible demonstration law has a halo of respect behind it and every one has to learn to ever respect it. Manu said : .... दंड धर्म विर्दुतधं This is equivalent to saying that law itself has an in-built element of respect and sanction behind it and wise human beings in their own interests need not search for authority to obey law as all laws are ordained to be obeyed. The position of International Law is somewhat like Manu's concept in this respect that there is no ostensible sanction or world authority in a budding state. However, respect flowing from inherent utility is so embedded in the very concept of that branch of law that it compels obedience to the precepts and tenets of international law." [61] It cannot be denied that international community does not possess any well-organised force or machinery to enforce international law generally. Despite this, whatever sanctions there are behind international law make impact upon the States and in practice States generally follow international law. "International order, far from perfect though it has, its own sanctions, seldeom imposed by force or command but as it were, natural sanctions slow to mature and gradual in effect but made compelling by the growing interdependence of the world." [62] In fact, "there exist among States rules imposing obligations upon them." [63]

According to Starke,[64] "If the word 'sanctions' to be taken in the larger sense measures, procedures, and expedients for exerting pressures upon a State to comply with its international legal obligations, then the abovementioned provisions of the United Nations Charter are not exhaustive of the sanctions which may become operative in different areas of international law." He cites several illustrations : (i) The Constitution of ILO lays down a procedure for dealing with complaints regarding failure of a member State to secure the effective observance of an International Labour Code. (ii) Article 14 of the Convention on Narcotic Drugs, 1961, provides that if a party to the Convention fails to carry out the provisions of the convention, the International Narcotics Control Board is entitled to call for explanations and if the explanation is unsatisfactory, the Board may call the attention of other competent U.N. Organs to the position, and may even recommend a stoppage of drug imports or exports or both to and from the country or territory in default. (iii) Under Articles 54-55 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, each contracting State is to recognise an arbitral award made pursuant to the convention as binding and is to enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court in that State. (iv)

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60. Ibid. at p. 59-60.
61. I.J.I.L. Vol. 24 (1984) pp. ix-x.
62. J.E.S. Fawcett, the Law of Nations (1961), p. 18.
63. The concept of Law (1961) p. 226 : Rahmatullah Khan has also aptly observed : "Nations obey international law not because of the fear of some brooding omnipresence in the sky threatening retribution to the recalcitrant because they feel obliged (for various reasons) to do so. And the consent of the constituent entities is continually decisive". "International Law—Old and New" I.J.I.L., Vol. 15 (1975) p. 371 at p. 372.
64. Introduction to International Law, Tenth Edition (1989) pp. 28-30.

Acts by a particular State in violation of international law may sometime be regarded by other States as invalid and inoperative. Reference may be made to the Advisory opinion of the World Court on the *Legal Consequences* for States of the continued presence of South Africans in *Nambia (South West Africa)*[65] wherein the court held that South Africa's presence in Nambia was illegal and that the members of the U.N. were under obligation to recognise the invalidity of South Africa's acts in respect of Nambia and should refrain from such acts as may imply acceptance of the legality of its presence in, and administration of Nambia, or lending support to these.

Numerous other sanctions exist under the constituent instruments of different international organisations such as I.C.A.O., W.H.O., I.L.O., U.P.U., I.T.U. etc. These have been briefly discussed in Chapter 1 under the heading "Development of International Law by International organisations." In this chapter, it has already been pointed that there is a special mechanism by which the ILO functions to evaluate its standards. It may be added here that together the whole body of ILO Constitution and Recommendations which the ILO consider, still in effect is commonly known as International Labour Code. This Code and the Organisation have an impact far beyond the number of states which have ratified each Convention. In order to ascertain the organisation's impact, it is important to take into account that the member states which have not ratified Constitution yet have altered their laws or practice in response to the principles established by the ILO, often as a result of sophisticated ILO system of monitoring its standards. Furthermore, national courts, as well as national legislation also relies on the ILO's articulation of legal principles, especially as the area of collective bargaining and freedom of articulation on which the organisation developed a large number of precedents.

Reference may also be made here to Article 26 of ILO Constitution under which any of the members may file a complaint with the ILO office if it is not satisfied that any other member is securing the effective observation of any convention which both have ratified. The Governing Body may, if it thinks fit, refer the complaint to the Commission of Inquiry. After the Commission makes a report under Article 29, the Director-General shall communicate report to the Governing Body. Further, each of the governments within three months shall inform the Director-General whether or not it accepts recommendation contained in the report of the Commission and if not whether it proposes to refer complaint to the International Court of Justice. If Governing Board finds failure, it shall report to the General Conference. Finally if the matter is referred to the International Court of Justice, then under Article 31, the decision of the International Court of Justice in regard to the complaint or matters which has been referred to it in pursuance of Article 29 shall be final. Similarly, under Article 37 of ILO Constitution, any question or dispute relating to the interpretation of the Constitution or of any subsequent convention concluded by members shall be referred for the decision of the International Court of Justice. Advisory opinion of the International Court of Justice shall be binding upon any tribunal. Dispute settlement mechanism under the WTO also deserves mention here.

It has been aptly pointed out, "An emerging system of sanctions for the enforcement of international law is discernible,.........There are also certain other indications of a growing maturity in the international legal order. These include the recognition of certain rules that have the character of *jus cogens* which .... establishes that within the general body of rules of international law there exists superior legal rules, with which rules of a 'lower' order must be compatible." [66]

Apart from the above sanctions, other factors such as adverse public opinion, expediency, possibility of imposition of economic sanctions, fear of suspension or breaking of diplomatic relations, possibility of referring the matter or dispute to the U.N. or specialized agencies of the U.N., fear of suspension or expulsion from the Membership of

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[65] I.C.J. Reports (1971), 16 at pp. 54, 56.

[66] Oppenheim's International law, note 11, pp. 11-12.

U.N. or other International Organisations, fear of punishment of war crimes, fear of payment of reparation etc. also operate as sanctions behind International law. Indeed the most important of these sanctions is public opinion which is the ultimate sanction behind international law, and for that matter behind any law.

Basis of International Law*

After having arrived at the conclusion that International Law is Law in the true sense of the term, it is necessary to see as to what is the true basis of international law. There are two main theories in this connection. They are : (1) Theories as to Law of Nature ; and (2) Positivism.

(1) *Theories as to Law of Nature.*—The jurists who adhere to this theory, are of the view that International Law is a part of the Law of Nature. In their view, States follow International Law, because it is a part of the Law of Nature. Explaining the view point of Natural Law Theorists, Starke has written : "........... States submitted to International Law because their relations were regulated by higher law, the 'law of nature' of which International Law was but a part." [67] In order to understand this theory, it is necessary to understand the meaning of 'Law of Nature'. In the beginning, Law of Nature was connected with religion. It was regarded as the divine law. The jurists of 16th and 17th centuries secularised the concept of Law of Nature. Much of the credit for this goes to the eminent jurist, Grotius. He expounded the secularised concept of the Law of Nature. According to him, natural law was the 'dictate of right reason'. His followers applied the law of nature as an ideal law which was founded on the nature of man as a reasonable being. International law was considered binding because it was in fact, natural law applied in special circumstances. Vattel, a famous jurist of 18th century also expressed the view that natural law was the basis of International Law. Pufendorf, Christian Thomasius, etc. are other prominent exponents of Law of nature.

Criticism.—The exponents of natural law are of the view that it is the basis of international law and has conferred binding force on international law. It may, however, be noted that each follower of the law of nature gives its different meaning. They use it as a metaphor. Different jurists give its different meaning such as, reason, justice, utility, general interest of international community, etc. Hence the meaning of law of nature is very vague and uncertain. Moreover, the main defect of this theory is that it is not based on realities and actual practices of the States.

Influence.—Despite the above criticism, the Law of Nature has greatly, influenced the growth of International Law. "Traces of 'Natural Law' theories survive today, albeit in a much less dogmatic form." [68] The ideal nature of the Natural Law has also greatly influenced the growth of international law.

(2) *Positivism.*** —Positivism is based on law positivum *i.e.* law which is in fact as contrasted with law which ought to be. According to the positivists, law enacted by appropriate legislative authority is binding. The positivists base their views on the actual practice of the States. In their view, treaties and customs are the main sources of International Law. The positivist's view was in vogue in the 18th century. Bynker-Shoek, one of the chief exponents of the Positivist School, wrote several books to popularise his views. In the view of the positivists, in the ultimate analysis, will of the States is the main source of International law. As pointed out by Starke,[69] "........International law can in logic be reduced to a system of rules depending for their validity only on the fact that States have consented to them."*** As pointed out by Brierly, "The doctrine of positivism

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* See for I.A.S. Exam, (1975), Q. No. 3(a) and Q. No. 1 of (1973) : P.C.S. (1977), Q. 1 P.C.S. (1990) Q. 6(a).

[67] Introduction to International Law, Tenth Edition (1989) p. 22.

[68] An Introduction to International Law, Eighth Ed., p. 24.

** See for I.A.S. Exam, (1974), Q. No. 3(a) ; I.A.S. (1965) Q. No. 3 and I.A.S. (1963), Q. No. 6. See also for P.C.S. (1977), Q. 1 ; C.S.E. (1981) Q. 5(a).

[69] Starke supra note 68 at p. 23 ; See also Ago, "Positive Law and International Law". A.J.I.L. Vol. 51, pp. 691-733.

*** Asked in I.A.S. Exam, (1969), Q. No. 1.

teaches that international law is the sum of rules by which States have consented to be bound, and that nothing can be law to which they have not consented to be bound."* The concept of the will of State was first propounded by the German Philosopher Hegel. According to the positivists, international law is a body of rules which has been consented to by the States and accepted as binding by way of voluntary restriction or 'auto-limitation.' The Italian jurist, Anzilotti, one of the chief exponents of the Positivist School deserves a special mention. According to him, the binding force of international law is founded on a supreme principle or norm known, as *pacta sunt servanda*. In his view the basis of each rule of international law is *pacta sunt servanda* in some or the other way. The positivists admit that their view fails to explain the basis of customary international law. In their view, there is an implied consent in regard to customary rules of international law.

Criticism.—The positivist theory is based mostly on the actual practices of States. But this view has been subjected to a lot of criticism. It can be criticised on the following grounds :

(1) The concept of the will of State presented by the positivists is purely metaphorical.

(2) The view of the positivists that the whole of international law is based on the consent of the State is far from truth. As pointed out by an eminent author,[70] 'custom is said to be evidence of a general practice accepted by law'. It is not required that there should be any express recognition by States in order that this practice or international custom shall be binding upon them. The extreme positivist view which seeks to base all international law on the 'consent of states' has tried to establish that the rules of international custom are based on "tacit agreements" between states. But in reality it is not possible to prove that these rules come into existence in such a way. This is shown by among other things, the fact that a new State entering the community of nations at once becomes bound by the international customary rules and it is never suggested that any of these rules would not be binding on it. It never happens that the State consent is sought or that it enters into any agreement on the matter with the already existing States. On the other hand, the new State is not bound by any international convention already in force unless it expressly adheres to it. International custom constitutes general international law, a real law, for the society of States. From this it follows that the dictum *pacta sunt servanda* cannot be the 'basic norm' of international law, it is itself a rule of international custom.

(3) In practice, it is not always necessary to show that in regard to a particular rule of general international law, the State had given their consent.

(4) There are some principles of international law which are applicable on States although States did not give their consent for them. The principle propounded under Article 2(6) provides that the organisation shall ensure that States which are not members of the U.N. act in accordance with the principles (contained in Article 2 of the Charter) so far as may be necessary, for the maintenance of international peace and security.

(5) The norm *'pacta sunt servanda'*, "has been abandoned by most theorists, since it seems incompatible with the fact that not all obligations under international law arise from *'pacta'*, however widely that term is construed, so it has been replaced by something less familiar ; the so-called rule that States should behave as they customarily have." [71]

(6) "Even apart from its lack of accord with reality the theory that international law rests on agreements is problematic in another respect. Declarations of will are, of course, in themselves pure facts which have legal effects only because some rule of law gives them such effects."[72]

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* Asked in I.A.S. (1976), Q. No. 1 ; For further elaboration of the answer see also Chapter 1.

[70] Torsten Gihl, The Legal Character and Sources of International Law (1957), at p. 75.

[71] H.L.A. Hart, the Concept of Law (1961), p. 228.

[72] Gihl, Supra note 70 at p. 60.

(7) According to the positivist view, treaties and customs are the only sources of international law* Grotius made distinction between the *Jus Gentium,* the customary Law of Nations (which he called *Jus Voluntarium* or Voluntary Law) and *Jus naturrae* or natural Law of Nations. He concentrated more on the natural Law and regarded voluntary law of less importance. The Grotians were somewhat between the Naturalists and the positivists. They maintained the distinction between natural and Voluntary Law of Nations but they considered positive or voluntary laws of equal importance to the natural laws. Thus, according to the Grotians, international law has originated not only from customs and treaties but also from natural law. This view, obviously, is not in conformity with the positivist view. The positivist view that treaties and customs are only sources of international law is also not in conformity with Article 38 of the Statute of International Court of Justice according to which "General Principles of Law Recognised by Civilized Nations" are also the sources of International Law. As pointed out Manley O. Hudson,[73] the provision relating to "the general principles of law recognised by civilized nation" serves a useful purpose in that it emphasizes the creative role to be played by the court. It confers such a wide freedom of choice that no fixed and definite content can be assigned to the term employed. It has widely hailed as a *refutation of the extreme positive conception of international law.*[74]

Influence and Contribution.—Despite the above-mentioned defects and criticism, a great merit of this theory is that it is based on the actual practice of the States. It emphasises that only those rules are the rules of international law which have been adopted by the States and are observed in practice. Yet another special feature of this theory is that it has encouraged realistic outlook in international law. In several cases concerning the customary rules of international law, the International Court of Justice has adopted the positivist attitude. The *Asylum* case,[75] the *Anglo-Norweglan Fisheries* case[76] and the *Rights of the U.S. Nationals in Morocco* cases,[77] deserve special mention in this connection. In the *Asylum* case, the International Court of Justice observed : "The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. The Colombian Government must prove that this rule invoked by it is in accordance with a constant and uniform usage practised by States in question, and that the usage is the expression of a right appertaining to the States granting asylum and a duty incumbent on territorial States." **

True basis of International Law.—In the modern period no State can keep itself aloof from the affairs of the world. The means of transport and communication and other scientific inventions have brought the States of World closer to each other. The practices of States are, therefore, of great significance. As pointed out, the positivists have greatly encouraged the realistic outlook in international law have thus rendered a signal service. However no specific theory is capable of explaining the true basis of international law.[78] Indeed no single theory has received general agreement and sanctions. It appears as though there are as many theories as there are scholars.[79] According to Sir Cecil Hurst, no State can escape from the influence of international law. He has rightly pointed out : "International law is in fact binding on States because they are

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* Asked in I.A.S. (1960). Q. No. 3 : see also for I.A.S. (1963) Q. No. 6.

[73] See The Permanent Court of International Justice, 1920-1942 (New York : The Macmillan Company, (1943), pp. 606-620 :

[74] Starke has also rightly observed : "From the theoretical standpoint, the provision for applying the 'general principles' has been regarded as (sounding the death-knell of positivism, inasmuch as it explicitly rejects the broad positivist view that custom and treaties are to be considered the exclusive sources of International Law", An Introduction to 'International Law' Edition (1977), pp. 39-40.

[75] I.C.J. Rep. (1950), p. 266.

[76] I.C.J. Rep. (1951), p. 116.

[77] I.C.J. Rep. (1952), p. 176.

** See also for C.S.E. (1992) Q. 5(C).

[78] See Starke, An Introduction to International Law, Eighth Edition (1977) pp. 34-35.

[79] See O. Schachter, "Towards a Theory of International Obligation" (1968) 8 Virginia JIL, 300, 300-305.

States."[80] Thus States obey international law because they are States. States obey international law because it is in their interest to do so. "The ultimate explanation of the binding force of all law is that man, whether he is single, individual or whether he is associated with other men in a State, is constrained in so far as he is reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live."[81]

Moreover as aptly pointed out in the Ninth Edition of Oppenheim's International Law,[82] "It is, however, in accord with practical realities to see the *basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law—international law—*to govern their conduct as members of that community. *In this sense 'common consent' could be said to be the basis of international law as a legal system.*" Further, "This 'common consent' cannot mean, of course, that all states must at all times expressly consent to every part of the body of rules constituting international law, for such common consent could never in practice be established.... The common consent that is meant is thus not consent to particular rules but to express or tacit consent of States to the body of rules comprising international law as a whole at any particular time."[83] Lastly, "The emergence of 'consensus' as an appropriate procedure for the adoption of many decisions at international conferences and in such bodies as the United Nations General Assembly has mitigated the consequences which would otherwise flow from rigid requirements of consent in an international community now numbering over 150 States, and has permitted the continued development of international law in accordance with the general consent of the international community.[84]

Some other theories. regarding the basis of International Law

Following are some other theories regarding the basis of International Law : (1) Theory of Consent ; (2) Auto-limitation Theory ; (3) *Pacta Sunt Servanda ;* and (4) Theory of Fundamental Rights. The first three theories have been derived from positivism and the fourth has been derived from 'Theories as to Law of Nature.' We will now briefly discuss these theories one by one.

(1) *Theory of Consent.** —In the view of the supporters of this theory, consent of States is the basis of international law. States observe rules of international law because they have given their consent for it. Positivists have given much support to this view. The chief exponents of this theory are Anzilotti, Triepel, Oppenheim,[85] etc. This theory fails to explain the basis of customary international law. In the view of the supporters of this theory, States are bound to observe customary rules of international law, because they have given their implied consent for their acceptance. This theory has been subjected to severe criticism by many jurists, such as, Starke, Brierly, Kelsen, Fenwick, etc. Following are some of the points of criticism levelled against the theory :—

(i) As pointed out by Starke, in practice it is not necessary to prove that the other State or States have given their consent in regard to a specific rule of international law.[86] According to Prof. Smith, all States are bound by international law, no matter whether they have given their consent or not.[87]

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[80] Sir Cecil Hurst, International Law : The Collected Papers, p. 9.

[81] J.L. Brierly, The Law of Nations, Sixth Edition (1968), p. 56.

[82] See Note 11, p. 14 ; emphasis added.

[83] Ibid.

[84] Ibid, at pp. 15-16.

* See I.A.S. (1970), Q. No. 3 ; see also matter discussed under the heading "Positivism," see also for P.C.S. (1970), Q. No. 1, C.S.E. (1981), Q. 5(a).

[85] According to Oppenheim, "If law is............ a body of rules for human conduct within a community which by common consent of the community shall be enforced through external power, the common consent is the basis of all law." International Law, Vol. 1, Eighth Edition Edited by H. Lauterpacht, p. 15 ; Oppenheim further adds, "It will be noted that 'Common consent' is sociological rather than a legal explanation of the validity of the law. In the law the question still arises : Why is consent binding? Probably the answer to that question as the validity of the first source of law cannot itself be a legal one. Its validity cannot be proved as legal proposition ; it must be assumed by reference to what has been called the initial hypothesis ...." L. Oppenheim, International Law, Vol. I, Eighth Edition (1970 Reprint), p. 6.

(ii) In regard to customary rules of international law, the basis of implied consent is far from correct. "The States are bound by general international law even against their will." [88] Professor Kelsen has cited the example of new States, which get rights and duties under international law immediately after becoming the subject of International law.

(iii) In the view of Fenwick, the theory of consent is not correct because it is against the principles and things which the States have been accepting since the beginning of international law.'[89]

(iv) Theory of consent fails to explain the case of recognition of new State. The granting of recognition is the act of other States and hence it would be wrong to say by getting recognition, the recognised State has given its consent in respect of international law.[90]

(v) According to Brierly the theory of consent cannot explain the true basis of international law even if we distort facts and try to fit them in the theory.

Thus we see theory of consent cannot explain the true basis of international law and can be severely criticised. As pointed out earlier, States follow international law for the simple reason that they are States. As an ordinary person has to obey municipal law, even against his will, similarly, States are bound to follow international law. To quote Sir Cecil Hurst again, "International law is, in fact, binding on States because they are States.[91] Thus, "consent can never be the ultimate force of legal obligation".[92] However, as noted earlier 'common consent' can be said to be the basis of international law as a legal system in the sense that we "see the basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law—international law—to govern their conduct as members of that community." This 'common consent' is not consent to particular rules but to the "express or tacit consent of states to the body of rules comprising international law as a whole at any particular time."

(2) *Auto limitation Theory.** —According to this theory, international law is binding upon States because they have restricted their powers through the process of auto-limitation and have agreed to abide by international law. This theory is also based on the view of the positivists. This theory lays great stress on independence and sovereignty of the States Jellinck is the chief exponent of this theory. The basis of this theory is this that each State has a will which is completely independent and free from external influences. But through the process of auto-limitation, State can restrict its powers and thereby limit its will. In short, States are not bound to follow international law because they are independent and sovereign but the States can make themselves bound by rules of international law by restricting its powers.

Criticism.—This theory has also been subjected to severe criticism by the jurists. This theory is based upon a presumption that there exists a State will in fact the will of the State is nothing but the will of the people who compose it. Besides this, auto-limitation is no limitation at all. The auto-limitation theory will imply that the State can free itself from self-imposed restriction at its will. In practice, this is not possible. Brierly, Friedmann and other jurists have severely criticised this theory. "First, these theories fail completely to explain how it is known that States 'can' only be bound by self-imposed obligations, or why this view of their sovereignty, should be accepted, in advance of any examination of the actual character of international law. Secondly, there is some incoherence in the argument designed to show that States, because of their sovereignty, can only be subject to or bound by rules which they have imposed upon themselves"[93] Prof. Hart further points out that this theory fails to explain the case of a new State. "Here the attempt to rest the new state's international law obligations on a 'tacit' or 'inferred' seems wholly threadbare. Secondly, it fails to explain the case of a State acquiring territory or undergoing some other change, which bring with it, for the first time, the incidence of obligation under rules which previously it had no opportunity either to observe or break, and to which it had no occasion to give or withhold consent." [94]

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[86] Starke, Supra note 78 at p. 29.

[87] See H.A. Smith, Great Britain and the Law of Nations, Vol. I (1932), pp. 12-13.

[88] Hans Kelsen, Principle of International Law, 154.

[89] Charles G. Fenwick, International Law (Third Indian Reprint, (1971), p. 36.

[90] According to Prof. Hart, when a new State emerges, as did Iraq in 1932, and Israel in 1948, it is bound by the general obligations of International law including, among others the rules that give binding force to treaties. Here the attempt to rest the new State's International obligations on a 'tacit' or 'inferred' consent seems wholly threadbare so is also the case of State-acquiring territory, [The concept of law (1961), p. 221.]

[91] See Supra note 80.

[92] C. Wilfred Jenks, Law, Freedom and Welfare, p. 85.

* Asked in I.A.S. (1962), Q. No. 1, For answer see also matter discussed earlier under the heading "Positivism".

(3) *Pacta Sunt Servanda.*—In the view of Italian jurist, Anzilotti, the binding force of international law is based on the supreme fundamental norm or principle, known as *pacta sunt servanda*. This means that the agreements entered into by States will be respected and followed by them in good faith. This is a well-established and recognised custom of international law. This customary principle of international law has now been codified and finds mention is Article 26 of the Vienna Convention on the Law of Treaties, 1969. Article 2 provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. According to Anzilotti, this norm is the foundation of the binding force of international law. Like positivism, the principle of *pacta sunt servanda* is also based on the actual practice of States. It emphasises the importance of the agreement entered into by States and regards them as the basis of international law.

Criticism.—It cannot but be admitted that *pacta sunt servanda* is a very important principle of international Law ; States must respect the agreements entered into by them and follow the same in good faith. If it were not so, there would be anarchy and disorder in the international field. But to assert that the binding force of international law based only on the principle of *pacta sunt servanda* is far from truth. It fails to explain the binding force of customary rules of international law which are not based upon agreements between States. It has been rightly remarked[95] : "The realization that international customary law does not rest on agreements and that the tenet *pacta sunt servanda* is itself a rule of customary law led to new formulations of the basic norm. Kelsen himself has decided on a formula which takes into account of usage as the fact which is the origin of the rules of international law. 'States ought to behave as they have customarily behaved'." [96]

(4) *Theory of Fundamental Rights.*—* This theory is based on the naturalistic view point. According to this view-point, prior to the existence of State, man used to live in natural state and even in that state he possessed some fundamental rights, such as, independence, equality, right to self-preservation. Like man, State also possessed these fundamental rights because so far there is, no world institution over and above the States.

Criticism.—This, theory has been severely criticised by jurists. J.L. Brierly[97] has made the following criticism of the theory—

(1) According to this theory when a new State is admitted to the family of nations, it brings with it certain fundamental rights which are inherent. As a matter of fact, such rights are meaningless unless there is a legal system which confers validity on them.

(2) This theory cannot be commended because it is in favour of giving more freedom to the States and lays less emphasis on social relations and co-operation among the States.

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93. Hart, Supra note 71, pp. 219-20 : Torsten Gihl has also remarked : ".... an (obligatiton derived from auto-limitation could never be anything but illusory", (The legal Character and Sources of International Law (1975), p. 57.

94. Supra note 71 at pp. 219-20.

95. Gihl, Supra note 70, at p. 162.

96. Kelsen, Theory of Law and State, p. 369.

* See for I.A.S. (1965), Q. No. 3.

97. See the Law of Nations, Sixth Edition (1963), pp. 50-51.

(3) Last but not the least shortcoming of this theory is that it regards certain fundamental rights, such as, independence, equality, etc, as natural rights. But as a matter of fact, these fundamental rights are as a result of historical development.

New trends regarding basis of obligation in International Law :

Since the beginning of modern international law, consent has been the basis of obligation under international law. Consent played such a predominant role that it was even extended to explain the basis of customary rules of international law. The positivists tried to establish that international customs were based on "tacit-agreements" between states. The unanimity rule was the prevailing rule for every conference and treaty. Only a party to treaty was bound by it. Though the unanimity rule still continued, the United Nations Charter introduced majority rule in all of its organs. In the course of time, General Assembly gained strength and became the most potent organ of the U.N. Though not originally envisaged, General Assembly even started legislative activities and passed a number of resolutions which were considered binding or having legal implications. Thus the fort of unanimity rule seems to be crumbling against the onslaught of majority rule in international organisations.[98] This change has necessiated a change in the theory of obligation in international law.

A unique feature of new international law is that it is found not only in law-making conferences but also in *law creating* conferences such as those of UNCTAZ, GATT, IBRD, IMB, OECD, OPEC etc. It has been aptly pointed out "the G.A. (*i.e.* General Assembly) resolutions constituted the "joint action' and the 'process' through which states and peoples persued their objectives. The point is, it would be naive to ignore such *law creating* resolutions—one may legitimately go a step further to state that given the current concerns of the world community and the versimilitude of joint action being taken, law making conventions and conferences are only tiny episodes in the drama of international law." Further, "And international law would cease to have any validity or relevance if it did not take cognizance of the processes through which the world community pursued its pressing concerns." [99]

One of the most important changes that has taken place is that many a decisions at international conferences and General Assembly of the U.N. are being adopted by 'consensus'. Though the unanimity rule has not been completely defeated, the basis of obligation in international law is changing from sovereignty oriented consent to community oriented consensus.[100] As Fawcett has remarked "we must wait on the future to see whether the requirement of consent of states in international law making can ever become independent of the treaty process and be satisfied by the vote in the General Assembly or an International conference convend by it. In the law of sea conventions at least, the treaty form has already begun to seem a grumbling appendix.[101] Further Resolution 1962 (XVII) which declared Legal Principles on outer space "may fairly claim to have furthered the progressive development of International Law called forth by Article 13(1) because it has formulated general principles of law of international conduct or authoritatively interpreted the United Nations Charter.[102] So is the case with the Resolution 2749(XXV) which declared Legal Principles governing the seabed and ocean floor and Sub-soil thereof beyond the limits of National Jurisdiction. Regarding such type of resolutions McNair has said that "while it is unsafe to generalise upon them, there is no reason or principle why they should not establish obligations.[103] "They are much more than a programme of desireable objectives, they are, an attempt to deduce some of the implications for International Law." [104] As regards Resolution 1962 (XVIII) before the conclusion of outer space Treaty, Prof. Jenks aptly remarked : "The authority of the Declaration of Legal Principles may be expected to grow with the passage of years. While, it is somewhat less than a treaty, it must already be regarded a rather more than a statement of custom.[105]

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[98] See also C.W. Jenks "Some constitutional Problems of International Organisation, BYBIL, Vol. 22(1945) p. 11 at p. 34—

[99] Rahmatullah Khan, "International Law—Old and New" I.J.I.L., Vol. 15(1975) p. 371 at p. 374. See also Rosalyn Higgins The development of International Law through the Political organs of United Nations (1963) p. 2, Guenter Weissnerg "United Nations Movements towards World Law" ICLQ, Vol. 24 Part 3 (July 1975) p. 460, 461, Michel Virally, The sources of International Law" in Sorensen Manual of Public International Law p. 162.

[100] R.P. Anand, "International organisations and the functioning of International Law" I.J.I.L., Vol. 24 No. 1 (1984), p. 51 at p. 63.

[101] International Law and the Uses of Outer Space p. 14.

[102] Ibid at p. 13.

The International Court of Justice has also lent its support to the above-mentioned change (*i.e.* from sovereignty oriented consent to community oriented consensus) in the basis of obligation in international law. In the *case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.)* [106] the world court aptly observed :

"Turning lastly to the proceedings of the Third United Nations Conference on the Law of the Sea and the Final result of that Conference, the chamber notes in the first place that the convention adopted at the end of the conference has not yet come into force and that a number of states do not appear inclined to ratify it. This, *however, in no way detracts from the consensus reached on large portions of the instrument, and above all, cannot invalidate the observation that certain provisions of the convention, concerning the continental shelf and the exclusive economic zone,* which may, in fact, be relevant to the present case, *were adopted without any objections.*

In the chamber's *opinion these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question."* [107]

In the *case concerning the continental shelf (Libyan Arab Jamahiraya/Malta)*[108] also the International Court of Justice took the same position. The Court observed.

"It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinion juris* of states, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom or indeed in developing them.

Nevertheless, it *cannot be denied that the 1982 convention is of major importance, having been adopted by an overwhelming majority of states ; hence it is clearly the duty of the Court even independently of the references made to the convention by the parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law."* [109]

This undoubtedly is a clear triumph of community oriented consensus[110] over sovereignty oriented consent. But the battle has not been finally won and the struggle is likely to a prolonged one. As a matter of fact, consent will continue to be a basis of obligation and there should be no objection to it. But in view of ever widening scope of international law it has become necessary to recognise the importance and utility of 'consensus' as a basis of obligation in international law. The theory of consent as the basis of obligation was developed by European states for their own interests. With the emergence of large number of states and the horizontal as well vertical expansion of international law, the traditional theory fails to cope with the interests and aspirations of international community as a whole and the changes that have taken place. It is, therefore, necessary to enunciate a dynamic and comprehensive theory of basis of obligation so that it may take into account the interests and inspirations of international community as a whole. The international lawyers and jurists can make a significant contribution in this connection.

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[103] International Law and the Uses of Outer Space, p. 7.

[104] C.W. Jenks, Law, Freedom and Welfare, p. 33.

[105] C.W. Jenks, Space Law (Stevens, 1965) p. 185.

[106] Judgement dated 12 October, 1984.

[107] Ibid, para 94, emphasis added.

[108] Judgement of 3 June, 1985.

[109] Ibid, para 27.

[110] By the consensus we mean "a general attitude in favour of a position which may not necessarily be held by all the members of the international community." Obed Y. Asamoah, The Legal significance of the Declarations of the General Assembly of the United Nations (The Hague, 1969) p. 57.

15. Influence of Natural Law*

The origin of natural law can be traced to centuries before the birth of Christ. Probably no other principle or school of law took as much time in its development as the law of Nature. Moreover as aptly remarked by Dias : "no other firmament of legal or political theory is so bejeweled with stars as that of 'Natural law' for it has engaged the attention of some of the greatest, thinkers of all ages." Credit of giving birth to natural law must go to the Greeks. After the Greeks, Romans further developed it. The early and original law of Romans was called '*Jus Civile*'. Later on, they developed another legal system called '*Jus gentium*'. It was called '*Jus gentium*' because it was thought to be the law of universal application. In the republican era of Rome '*Jus gentium*' was reinforced by natural law or '*Jus naturale*' as was commonly called. By *Jus naturale* the Romans meant, as pointed out by Brierly, 'the sum of those principles which ought to control human conduct, because founded in the very nature of man as a rational and social being"[111] The law of nature is the expression of what is just against what is merely expedient at a particular time and place ; it is what is reasonable against what is arbitrary ; what is natural against what is convenient and what is for the social good against the personal will." [112] Thus natural law was based on the rational and reasonable needs of man's nature. Most of the jurists admit that natural law greatly influenced International Law and gave it its binding force.

The writers and jurists of the middle age developed law of nature in accordance with the values and conventions of their age. In this period, natural law was linked with religion. For example, according to St. Thomas Acquinas, natural law is a part of the law of God which man seeks through his reason.

Roman Law in Europe in 16th century contributed much in the beginning in the development of modern International Law. It will be desirable here to refer briefly to the criticism of medieval conception of natural law. In this period it was believed that there existed rationality in the Universe. Besides being an exaggeration, the belief in this conception was not substantiated by the practice of the States. Secondly, according to the writers, of the medieval age, if there was a conflict between positive law and natural law, the latter would prevail. It was a very revolutionary idea and could not be accepted. Despite this criticism, it must be admitted that natural law emphasised the importance of purpose behind law. It stressed that law was not the body of meaningless rules or principles to be enforced by the Courts. In fact, law existed to achieve definite objectives.

In 18th and 19th centuries, the positivists were in vogue. The poitivism was based on the actual practice of States. It was the period of the decline of the Natural Law. The positivists denied the existence of any purpose behind the law. According to the positivists, people would be bound to obey law if it was created by appropriate legislative authority or sovereign irrespective of its being reasonable or unreasonable. They called this law, law positivum, or positive law *i.e.* the law in fact. Thus in the view of the positivists, in the conflict of the positive law and natural law, the former will prevail.

Twentieth century saw the revival of the Natural Law. Positivism was subjected to severe criticism. Once against faith in Natural law was reaffirmed. However, the conception of Natural Law underwent significant changes in this period. Basing their views on Kant and Hegel, the modern writers adopted Natural law in accordance with times and circumstances. The chief exponents of this movement were Stammler and Koheler. For example, Stammler admitted that Natural law could be adopted to the changing times and circumstances although its fundamental principles remained unchangeable. He, therefore, propounded the theory of "natural law which with a variable content." In the recent times, Prof. Fuller of America has emerged as a great exponent of natural law. He has propounded the theory of "inner morality of law". In other words, there is an inner morality of law and there is a definite purpose behind law. Law is not a body of meaningless rules and does not exist for its own sake. Law exists or is created to achieve some purpose.

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* See for Q. No. 2 of I.A.S. Exam., (1971).

[111] See J.L. Brierly, The Law of Nations (1963), p. 17.

[112] J.E.S. Fawcett, The Law of Nations (1968), p. 26 ; see also P.E. Corbett, The Growth of World Law (1971), pp. 177-178.

The concepts of Natural Law developed from time to time have greatly influenced the growth of international law. In the words of Sir Henry Maine, "the grandest function of the 'law of nature' was discharged in giving birth to modern international law." Starke has also remarked : "Traces of natural law, theories survive today albeit in a much less dogmatic form." [113] There are many traces of the influence of natural law on international law. For example, the development of human rights, system of punishment of war crimes, etc. are all due to the influence of natural law. Thus the idealist character natural law has greatly influenced the international law. It may, however, be noted that natural law kept itself aloof from the actual practice of States. This was the main defect of natural law. It was this reason that was responsible for the decline of natural law.

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[113] *Introduction to International Law, Tenth Edition* (1989) p. 22.

CHAPTER 4

SOURCES OF INTERNATIONAL LAW*

Formal and Material Sources**

As pointed out by Starke, "The material sources of international law may be defined as the actual materials from which an international lawyer determines the rule applicable to a given situation."[1] "The term 'source' refers to methods or procedure by which international law is created."[2] A distinction is made between the formal sources and material sources of law. As pointed out by G. Fitzmaurice they may also be described as, respectively, as direct and indirect, as proximate or immediate and remote or ultimate. Material sources may also be described the "origins" of law while the material, historical or indirect sources represent the stuff out of which the law is made, that is to say, they go to form the content of the law, the formal, legal and direct sources consist of the acts or facts whereby this content is clothed with legal validity and obligatory force. The essence of the distinction, therefore, is between the thing which inspires the content of law, and the thing which gives that the content its binding character as law. "The former are those legal procedures and method for the creation of rules of general application which are legally binding on the addressee. The material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application."[3] Further, "The sources of international law must not be confused with the basis of international law; this, ..., is to be found in the common consent of the international community. The sources of law, on the other hand, concern the particular rules which constitute the system, and the processes by which he rules become identifiable as rules of law. The sources of the rules of law, while therefore distinct from the basis of the law, are nevertheless necessarily related to the basis of the legal system as a whole." [4] The sources of international law may be classified into five categories—

(1) International conventions;
(2) International customs ;
(3) General Principles of Law Recognized by civilized Nations ;
(4) Decisions of Judicial or Arbitral Tribunals and Juristic works ;
(5) Decisions or Determinations of the Organs of International Institutions.

The above-mentioned third source *'General Principles of Law Recognised by Civilized Nations'* was first mentioned in Article 38 of the statute of the Permanent Court of International Justice. It was retained in Article 38 of the statute of the International Court of Justice which mentions the following sources of international law : (1) International conventions ; (2) International customs; (3) General principles of law recognized by civilised nations; and (4) Judicial decisions and the teachings of most highly qualified publicists of the various countries as subsidiary means for the determination of rules of law. The above-mentioned Fifth source, *i.e.*, Decisions or determinations of the Organs of International institution does not find mention in Article 38 of the statute of the court but it has now become a well-recognized source.

(1) International Conventions***

In the modern period, international treaties are the most important source of international law. This is because the reason, *inter alia*, that states have found in this source a deliberate method by which to create binding international law. Article 38 of the statute of the International Court of Justice lists 'international conventions whether general or particular, establishing rules expressly recognized by the contesting States' as the first source of international law. As pointed out by Manely O. Hudson, the term '*conventions*' is used in a general and inclusive sense. It would seem to apply to any treaty, convention, protocol, or agreement, regardless of its title or form. A convention may be general, either because of the number of parties to it, or because of the character of its contents; it may be 'particular' because of the limited number of parties, or because of the limited character of its subject-matter. Whenever, an International Tribunal decides an international dispute then its first endeavour is to find out whether there is an international treaty on the point. In case there is an international treaty, the decision of the court is based upon the provisions of that treaty. According to Article 2 of the Vienna Convention on the Law of the Treaties, 1969, "A treaty is an agreement wereby two or more States establish or seek to establish relationship between them governed by international law". But this definition is narrow and does not seem to be correct. As correctly pointed out by Prof. Schwarzenberger, "Treaties are agreements between subjects of international law creating a binding obligation in international law." However, it would be wrong to say that Vienna Convention does not show its awareness to this fact for Article 3 provides that the fact that the present convention does not apply to international agreements concluded between states and other subjects of international law, or between other subjects of international law, or to international agreements not in written form, shall not affect :

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* See for P.C.S (1971), Q. No. 1; C.S.E. (1984) Q. 5 (e); P.C.S. (1983) Q. 1 (a) ; UPPCS (2002) Q. 8 (A); IAS (2008) Q. 5 (a).

** *See* also for IAS (2008) Q. 5(a).

[1] J.G. Starke, Introduction to International Law, Tenth Edition (Butterworth, 1989), Starke's International Law, Eleventh, Edition, Butterworths (September, 1994) p. 28.

[2] Edward Collins, International Law in a Changing World (1969), p. 16.

[3] Ian Brownlie, Principles of Public International Law, Second Edition (Clarendon Press Oxford, 1973), p. 1.

[4] Oppenheim's International Law, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition, Longman Group UK Limited and Mrs Tomoko Hudson, 1992, p.23.

*** See also for P.C.S. (1978) Q. 1, P.C.S. (1995) Q. 5(a).

(a) the legal force of such agreements ;

(b) the application to them of any of the rules set forth in the present convention to which they would be subject under international law independently of the convention ;

(c) the application of the convention to the relations of states as between themselves under international agreements as to which other subjects of international law are also parties.

Vienna Convention on the Law of Treaties, 1969 has 114 parties as of April, 2014.

Reference may be made here to Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (21 March, 1986). Article 1 of this convention provides that the present convention applies to : (a) treaties between one or more states and one or more international organisations; and (b) treaties between international organisations. Further, Article 6 provides that the capacity of an International Organisation is governed by the rules of that organisation. Moreover Article 26 of this convention reiterates the principle of *Pacta Sunt Servanda*. It provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

International treaties may be of the two types : (A) Law-making treaties and (B) Treaty contracts :

(A) *Law-making treaties*.—The provisions of law-making treaty are directly the source of international law. The development of law-making treaties received an impetus from the middle of 19th century. The main reason for this was that in view of the changing circumstances, customs, which were hitherto the most important source of international law, were proving to be inadequate. Consequently, States regarded it necessary and expedient to enter into treaties and thereby established their relations in accordance with the changing times and circumstances. Law-making treaties may again be divided into following two types :—

(a) *Treaties enunciating rules of universal international law*.—United Nations Charter is the best example of such type of treaty.

(b) *International treaties which lay down general principles*.—These treaties are entered into by a large number of countries. 1958 Geneva Conventions on the law of the Sea and Vienna Convention on the Law of Treaties, 1969 are good examples of such type of treaties.

Law-making treaties perform the same functions in the international field as legislation does in the State field. Law-making treaties are the means through which international law can be adapted to in accordance with the changing times and circumstances and the rule of law among the States can be strengthened. Treaty process is also a useful means to develop universal international law. But an international treaty can enunciate universal principle only when it receives the support of the *essential* States.[5] For example a law-making treaty which does not receive the support of nations, such as, Russia, Britain, America, France and China, cannot effectively enunciate general or universal rules.

(B) *Treaty contracts.**—As compared to law-making treaties, treaty contracts are entered into by two or more States. The provisions of such treaties are binding on the parties to the treaty. Such treaties also help the formation of international law through the operation of the principles governing the development of customary rules. This may happen when a similar rule is incorporated in a number of treaty contracts. Beside this a treaty enter into by a few States is subsequently accepted by many other States as they enter into similar treaties. Finally, "A treaty may be of considerable *evidentiary* value as to the existence of a rule which has crystallised into law by an independent process of development." [6]

2. International customs**

International customs have been regarded as one of the prominent sources of international law for a long time. It "is the oldest and the original source, of international as well as of law in general." [7] It is only in the modern period that the importance of customs has suffered a setback. However, even today it is regarded as one of the important sources of international law. Customary rules of international law are the rules which have been developed in a long process of historical development.

Article 38(b) of the Statute of International Court of Justice recognises 'International Custom, *as evidence of general practice accepted as law*', as one of the sources of international law. In order to understand the meaning of 'custom', it is necessary to know the meaning of the word 'usage'. The words 'custom' and 'usage' are often used as synonymous. In fact, there is difference between the usage and custom, and they are not synonyms. Usage is in fact the early stage of custom. By usage we mean those habits which are often repeated by the States. As pointed out by Starke, where a custom begins, usage ends. Usage is an international habit which has yet not received the force of law. In the words of Starke, "Usage represents the twilight stage of custom, custom begins where usage ends. Usage is an international habit of action that has yet not received full legal attestation." Usages may be inconsistent and opposed to each other. But this can never be the case with the custom. When States in their international relations start behaving in a particular way in certain circumstances, it is expected that in the similar circumstances they will behave in the same way. This is called the usage. But when this usage receives the general acceptance of recognition by the States in their relations with each other, there develops a conception that such a habit or behaviour has become right as well as obligation of the States and in this way usage becomes the custom. As aptly remarked by Viner,[8] "A custom, in the intendment of law, is such usage as that obtained the force of law."***

It is not necessary that the usage should always precede a custom. It is also not necessary that a usage must always become a custom. In certain cases a usage may become a custom, in certain other cases it may not become. In this connection Torsten Gihl[9] has summarised his conclusions in the following words :—

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[5] Leo Gross, "Sources of Universal International Law" in Asian States and the Development of Universal International Law" (1972) p. 189 at p. 196.

* See also for I.A.S. (1959) Q. No. 4.

[6] Starke, note 1, at p. 46.

** See also for C.S.E. (1980) Q. 7(a) P.C.S. (1994) Q. 5(a) ; IAS (2007) Q. 6(a).

[7] Oppenheim's International Law, note 4, at p. 25.

[8] Adopted from Starke, note 1, at p. 41; Brierly has also written that "Custom, in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be obligatory one", 'The Law of Nations, Sixth Edition (1963), p. 59; see also Josef L. Kunz, The Nature of Customary International Law, A.J.I.L. Vol. 47 (1953), p. 662 at p. 667.

*** Asked in I.A.S. (1973), Q. No. 69 (a).

(i) In certain cases usage gives rise to international customary law, in other cases it does not. But there is no rule of international law, or indeed any rule at all, which determines when usage shall give rise to custom.

(ii) Together with usage (as a purely factual phenomenon) there are a number of other purely factual phenomenon, State interests, powers, factors, general opinion, historical events, etc., which in various combinations contribute to the creation of international custom, and custom can arise even without any usage. The coming into existence of a customary rule is an historical process which, in certain cases at least, can be demonstrated by purely historical methods, but there is no rule of law which determines when these factors shall give rise to international custom.

(iii) When a usage is combined with *opinio juris sine necessitatis,* a rule of customary law exists, and it is probably justifiable to say that a usage reflects a customary rule if it is connected with a practically universal *opinio juris.*

Thus when a general usage in international sphere, or State practice, is connected with *opinio juris et necessitatis* international customary law exists. This is a statement about a fact and as such almost a truism since a usage of this kind is a general practice accepted as law by, definition a custom. As pointed out by the International Court of Justice in *North Sea Continental Shelf Cases,*[10] for a state practice to constitute *opinio juris* not only must the acts concerned amount to a settled practice, but they must also be such, or be carried in such a way, as to be the evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief *i.e.,* the existence of a subjective element, is implicit in the very notion of the *opinio juris sine necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

For deducing this subjective element, bilateral or multilateral treaties, resolutions of General Assembly of the U.N., international conferences and statements of State representative etc. may be seen.

*Generation by Treaty of Customary Rules of International Law** .—A provision of a treaty may also generate a rule of customary International Law. In *North Sea Continental Shelf* case[11] the International Court of Justice observed that provisions in treaties can generate customary law and may be, in the words of the Court; of a "norm-creating character".[12] In the view of the World Court, the 'norm-creating process' is a perfectly possible one and does from time to time occur; it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed." [13] According to the Court, the first three articles of the Geneva Convention on the Continental Shelf, 1958, are of norm-creating-character.[14] But a treaty provision can generate customary international law only when the provision concerned is "of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law." In the present case the Court was construing Article 6 of the Convention which lays down 'equidistance' principle for demarcation of continental shelf between two coastal States. According to the Court, Article 6 was not intended to be a 'norm-creating character'. One of the reasons given by the Court was that the 'principle of equidistance' was prefaced by the words 'in the absence of agreement'. As pointed out by a writer[15] : "The World Court's decision in the *North Sea Continental Shelf* cases,[16] is a major contribution to that branch of the theory of customary international law dealing with norm creation by means of a treaty. The Court articulated a new methodology for determining which provisions in treaties can form the basis of universally binding customary law. As the spreading network of international convention becomes more fine-meshed the substantive rules of international customary law may be expected to conform more and more closely to the provision in these conventions. The World Court has implicitly recognized this process in many prior opinions, but it was not until *continental shelf* decision that the link between treaty and custom was focussed with precision......... The Court thus recognizes the fact that the conclusion of a treaty is a step of international significance taken by two or more States that would normally have constituted a component of customary law. Not only is there a definite meeting of the minds in a treaty (as we infer from an act involving two or more States that constitutes practice for the purposes of customary law); but also there is the clear articulation of a rule of law that gives the treaty a special impetus towards formulating a general rule. A great many rules of customary international law, perhaps even the majority, had their origin in treaties, and the World Court itself in several cases has used treaties for evidence of rules of law held binding upon non-parties."

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[9] *The Legal Character and Sources of International Law,* (1957), pp. 82-83.

[10] *I.C.J. Rep.* (1969) *pp.* 3, 44.

* See also for P.C.S. (1980), Q. 7 ; C.S.E. (1996) Q. 5(a).

[11] *I.C.J. Rep.* (1969), *p.* 3.

[12] Ibid, at p. 43.

[13] Ibid, at p. 42.

[14] Ibid, at pp. 40, 43. For the provisions of Articles 1, 2 and 3 see matter discussed under "continental shelf" in Chapter on "The Law of the Sea".

[15] Authority D' Amato "Manifest Intent and The Generation by Treaty of Customary Rules of International Law", A.J.I.L., Vol. 64 (1970), pp. 892, 899.

Ingredients or elements of custom*

Following are the main ingredients of an international custom:—

(i) *Long Duration.*—Long duration is generally said to be an essential ingredient of a custom. This is particularly true of a custom in Municipal Law. In Municipal Law, a custom is required to be ancient and immemorial. But this is not necessary for an international custom. Article 38 of the Statute of the International Court of Justice directs the World Court to apply 'international custom, as evidence of a general practice accepted as law'. Emphasis is not given on a practice being repeated for a long duration. What is more important is the practice of States accepting the practice concerned as law. In the field of international law, customs have emerged in a short duration, for example, custom relating to sovereignty over air space and the continental shelf.

(ii) *Uniformity and consistency.*—The custom should also be uniform and consistent. In the *Asylum* case,[17] the International Court of Justice observed that the rule invoked should be 'in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.' This follows from Article 38 of the Statute of the Court which refers to international custom 'as evidence of a general practice accepted as law'. According to Mannley O, Hudson, "The elements necessary are the concordant and recurring action of numerous States in the domain of international relation, the conception of each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time". It may, however, be noted that complete uniformity is not necessary. Nevertheless, there must be substantial uniformity.

In its judgment of 27 June 1986 in the *case concerning Military and Paramilitary Activities in and against Nicaragua*[18] while referring occasional violations of the principle of non-intervention, the International Court of Justice observed :

"It is not to be expected that in the practice of states the application of the rules in question should have been perfect, in the sense that states should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules the court deems it sufficient that the conduct of states should in general, be consistent with such rules and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule not as indication of the recognition of a new rule." [19]

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[16] (1969), I.C.J. Rep. 3 ; 63 A.J.I.L. 591 (1969); 8 Int. Legal Materials 340 (1969).

* See for I.A.S. (1961), Q. No. 5 ; UPPCS (2004) Q. 7.

[17] I.C.J. Rep. (1950), at pp. 276-277.

[18] I.C.J. Reports 1986, p. 14.

(iii) *Generality of Practice.*—Although universality of practice is not necessary, the practice should have been generally observed or repeated by numerous States.

(iv) *Opinio juris et necessitatis.*—According to Article 38 of the Statute of the International Court of Justice, international custom should be the evidence of général practice *"accepted as law"*. In the view of Brierly, "In applying the forms of evidence......... in order to establish the existence of an international custom what is sought for is general recognition among States of a certain practice *obligatory.*" [20] In the *North Sea Continental Shelf* cases[21] the World Court observed, "Although the passage of only a short period of time is not necessarily, one of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as *to show a general recognition that a rule of law or legal obligation is involved*". Thus, "......... customary practice, even when it is general and consistent, is not customary law unless, *opinio juris* is present, that is to say, unless the practice is recognized as being required by international law. It is this sense of legal obligation, as distinguished from motives of fairness, convenience, or morality, that underlies customary law".[22]

Customary rules of international law have developed as a result of (1) Diplomatic relations between States; (2) Practice of international organs; (3) State laws, decisions of State courts and State military or administrative practices, and (4) Treaties between States.

It is an important matter to see as to how international custom will be applied in international law. There are two leading cases on the point :

(a) West Rand Central Gold Mining Company Ltd. v. R[23].—In this case a test regarding the general recognition of custom was laid down. The Court ruled that for a valid international custom it is necessary that it should be proved by satisfactory evidence that the custom is of such nature that it has received general consent of the States and no civilized State shall oppose it.

In *case concerning Military and Para-Military Activities in and Against Nicaragua,*[24] the World Court observed :

"If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then, whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

(b) Right of passage over Indian territory case [Portugal v. India].[25]—In this case the International Court of Justice pointed out that when in regard to any matter or practice, two States follow it repeatedly for a long time, it becomes a binding customary rule. The facts of this case are as follows—

> This case deals with the question relating to the right of Portugal to send its nationals and military through the Indian territory. Until 1954 Portugal possessed the right of passage through Indian territory which was in between Dadra and Nagar Haveli and Daman. The right was however subject to control and regulation

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[19] *I.C.J. Reports* 1986 at p. 98.

[20] J.L. Brierly, The Law of Nations, Sixth Edition, p. 61; emphasis added.

[21] *I.C.J. Rep.* (1969), p. 3 at p. 43 ; emphasis added; See also Lotus case, P.C.I..J, Series A, No. 10, p. 28.

[22] *See also* case concerning Military and Para-Military Activities in and against Nicaragua. I.C.J. Reports 1986 p. 14 at pp. 108-109.

[23] (1905) 2 K.B. 291. For facts of this case see Chapter on "State Succession".

[24] I.C.J. Reports 1986, p. 14 at p. 98.

[25] I.C.J. Rep. (1960), p. 6.

by India. In between October, 1953 and July, 1954, certain incidents took place; the relation between India and Portugal worsened and Portugal claimed that India was exercising excessive control. In July 1954, the people of Dadra (which was a Potuguese Colony) revolted against the Portuguese Government. It naturally had certain repurcussions over the border areas of Indian territory. Consequently, the Government of India suspended the right of passage of Portugal over this area. India contended that it had become necessary due to the special circumstances that had arisen. Portugal took this matter to the International Court of Justice. The International Court of Justice had to decide whether India was entitled to exercise control over the way and whether Portugal could send its military or armed forces through the passage ? The Court had also to give its verdict on the point whether India acted contrary to its obligations ? It may be noted that the claim of Portugal was based on the treaty of 1779. The International Court of Justice decided that Portugal was not entitled to send its armed forces through the way which fell within the Indian territory. The Court ruled that India did not act contrary to its obligations. The Court, however, ruled that the Treaty of 1779 was a valid treaty and Portugal was entitled to get passage through Indian territory in consequence of the provisions of the said treaty. The decision is important in so far as that the International Court of Justice ruled that if under a treaty a State gets right of passage through the territory of another State and if it continues for a long time, then it gains the force of law and thereby imposes the obligation upon he State affected to continue to give right of such passage. It may be noted here that on 31st December, 1974, a treaty was signed between India and Portugal wherein the latter recognised the full sovereignty of India over Goa, Daman and Diu, Dadra and Nagar Haveli.

As pointed out by Brownlie, this case "raised an issue of bilateral relations, the existence of a local custom in favour of Portugal in respect of territorial enclaves inland from the port of Daman (Damao). In this type of case the general law is to be varied and the proponent of the special right has to give affirmative proof of a sense of obligation on the part of the territorial sovereign *opinio juris* is here not to be presumed on the basis of continuous practice and the notion of *opinio juris* merges into the principle of *acquiesenco"*. It may further be noted that in *Asylum* case (1950), also the International Court of Justice held that where a local or regional custom is established in such a manner it has become binding on the other party".

Situation when same principle is found in customary law and is also codified in a treaty.—This was one of the matters, *inter alia,* considered by the International Court of Justice in the *Military and Paramilitary Activities in and Against Nicaragua.*[26] In this case the court was considering the question whether United States' reservation to its acceptance of Court's jurisdiction effectively excluded disputes relating to certain multilateral treaties if claims were also based on rules of customary international law incorporated in those treaties. In the instant case the court found that this identity of content in treaty law and in customary law did not exist in the case of the rule invoked. While clarifying the position of law the world court observed :

"...... even if the customary norm and treaty norm were to have exactly the same content, this would not be a reason for he court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of treaty norm."

Further, "more generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter 'supervenes' the former, so that the customary international law has no further existence of its own."

*Importance of custom as a source of International Law and Evaluation.**—There has been a marked decline in the importance of customs as a source of international law in modern times. This is mainly due to the fact that the process of the development of a new custom is very slow.[27] However, in modern times also the development of new custom is possible and at times customs have developed with accelerated speed. Principles relating to sovereignty over air space and continental shelf are its glaring examples.[28] But, in view of the accelerated speed of the changes in international community, custom has now become an inadequate means for bringing about the changes and development of international law.[29] Thus, the development of a custom is very slow and as compared to it, rapid changes can be effected through treaties and conventions so as to adopt international law in accordance with the changing times and circumstances.[30] The four Geneva conventions on the Law of the Sea, 1958 and now the U.N. Convention on Law of the Sea 1982, to quote only a few examples, bear testimony to this fact.

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[26] I.C.J. Rep. (1986) at p. 94.

* See for I.A.S. (1978) Q. 2. For answer see also matter discussed above regarding custom as a source of International law ; UPPCS (2004) Q. 7.

The Soviet Union regards custom as an inadequate means for the development of international law. In one of his articles,[31] Tunkin has expressed the view that the development of custom also is based on the agreement between States. Consequently, customary rules are binding only on those States who have given their consent for them. According to the Soviet view, therefore, agreement between States is the only adequate means for the development of International Law.[32]

In *South-West Africa* case[33] Judge Tanaka observed : "briefly, the method of generation of customary international law is in the stage of transformation from being an individualistic process to bring a collectivist process. This phenomenon can be said to the adoption of the traditional creative process of international law to the reality of the growth of the organised international community. It can be characterised, considered from the sociological view point, as a transaction from a traditional custom making to international legislation by treaty." Thus in the modern times the importance of custom as a source of law has greatly reduced, with the simultaneous rise in importance of treaties and conventions, for the development of international law.

But as pointed out by Edward Collins,[34] "International organizations also contribute to the development of customary international law by providing a clear, concentrated forum for State practice. Particularly in the General Assembly of the United Nations, where more than 106 (now 185) member States are represented, the Statements and the votes of representatives on legal matters provide evidence of existing customary law, as is illustrated by the discussion on, and the adoption of, the resolution affirming the principles of the Nuremberg Charter and Judgment. Still other resolutions amount to 'an interpretation of the rules and principles which the Charter already contains and which are in consequence binding upon member States, authoritative by reason of the standing of the United Nations.[35]

3. General Principles of Law recognized by civilized states*

Para (1) (C) of Article 38 of the Statute of International Court of Justice lists *General Principles of Law Recognized by Civilised States* as the third source of international law.

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[27] See J.L. Brierly, Supra Note 8, p. 62.

[28] Oliver, J. Lissitzyn ; International Law Today and Tomorrow (New York, 1965), p. 105.

[29] Ibid.

[30] Leo Gross, "Sources of Universal International Law" in Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 189 at pp. 196-197.

[31] See G.I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law", California Law Review, Vol. 49 (1961), p. 421.

[32] In his words, "......... agreement between States lies at the basis of the process by which customary norms of International Law are created.

[33] I.C.J. Rep. (1966), p. 6 at p. 248.

[34] International Law in a Changing World (1969), at pp. 427-28.

[35] Michel Virally, "The Sources of International Law", in Sorensen ; Manual of Public International Law, p. 162.

* See for I.A.S. (1966), Q. No. 3 : I.A.S. (1964), Q. No. 3 ; and I.A.S. (1972), Q. No. 1 P.C.S. (1984) Q. 1 (b) ; P.C.S. (1991) Q. 6(a) ; IAS (2003) Q. 5 (c).

In the modern period, it has become an important source. It "constitutes an important landmark in the history of international law inasmuch as the State Parties to the statute did expressly recognise the existence of third source of international law independent of custom or treaty." [36] This source helps international law to adapt itself in accordance with the changing times and circumstances. As pointed out by G. Von Glahn, renowned author of international law, two views are prevalent about the phrase 'general principles of law recognized by civilized nations'. According to one view the phrase includes such, general principles (such as : both sides of a dispute should be given a fair hearing and no one can sit in judgement in his own case) which are found in domestic Jurisprudence and can be applied to international legal questions. The other view regards the phrase as linked to natural law as interpreted during recent centuries in the western world. According to this view general principle of law recognised by civilized nations have emerged as a result of transformation of broad universal principles of law applicable to all the mankind into specific rules of "international. However law of nature represents at best a vague and ill-defined source of international law, the former or the first view about the general principles of law is generally prevalent today. By general principles of law recognized by civilized States we mean those principles which have been recognized by almost all the States. "Owing to 'the gaps in international law' it was felt that the competence of the Court could not be confined to making judgments according to positive international law, *i.e.* according to custom and conventions but on the other hand, it was not designed to give free rein to the law-making activity of the court and the court had to content itself with applying principles of law which could be established as common to the municipal law of all civilized nations and were therefore positive law, though not positive international law.[37] In the *Lotus* case,[38] the Permanent Court of International Justice also observed : "The Court considers that the words 'principles of international law,' as ordinarily used can only mean international law as it is applied between nations belonging to the community of States".

It may be noted here that a principle of law which is recognised by domestic law of a large number of States does not automatically become a 'principle' of international law. It becomes a principle of international law only when it is recognised as such by the World Court. Judge Lauterpacht has, therefore, rightly remarked that the main function of the 'general principles of law' has been that of a safety-valve to be kept in reserve rather than a source of frequent application. The World Court resorts to the application of this source only when in a case before it, there is neither an international convention nor a custom in respect of the dispute involved. Thus "Article 38, paragraph 1(c) of the Statute of the International Court of Justice .... places on record one of the main sources of the rules of public international law. Indeed, it *describes the inexhaustible reservoir of legal principles* from which the tribunals can enrich and develop public international law." [39]

"By general principles of law we mean 'those rules or standards which we find repeated in much the same form in the developed systems of law, either because they have a common origin, as in Roman law, or because they express a necessary response to certain basic needs of human association. Examples are : the rule of *pacta sunt servanda,* that contracts must be kept ; the principle that reparation must be made for damage caused by fault ; the right of self defence for the individual against attack on his person or family and the community against clear and present danger ; and the principle that no man may be a judge in his own cause, and that he who has to judge must hear both the sides." [40] Further, "we must emphasise that general principles of law, as systems of law, or those derived from them, but can be traced also in Islamic law, customary laws in Africa, religious law in India, and traditional laws in China and Japan.[41] Thus, "General principles of law recognised by civilized nations are indeed ensemble of those general principles which underlie, antedate, vary from and form the model of municipal rules of law, which are same in all jurisdictions and aim at justice in every case.[42] In the view of Judge Chagla, principles of international law can be taken from the municipal law if they have received universal acceptance and are not inconsistent with any rule of international law.[43]

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[36] Oppenheim's International Law, note 4, pp. 38-39.

[37] Torsten Gihl, The Legal Character and Sources of International Law (Stockholm, (1957), p. 86).

[38] P.C.I.J., Ser, A. No. 10, p. 16.

[39] Lord McNair, "The General Principles of Law Recognized by Civilized Nations" BYBIL, Vol. XXXIII (1957), p. 1 at p. 6; See also John Hazard, "The General Principles" 52 A.J.I.L. (1958), p. 85; Wolfgang Friedmann, "The Uses of 'General Principles' in the Development of International Law', A.J.I.L. (1963), p. 279; Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1954; 'General Principles and Sources of International Law' BYBIL, Vol. XXXV (1969), p. 193, G.G. Fitzmaurice, The Law and Procedure of the I.C.J. General Principles and Substantive Law". BYBIL, Vol. XXVII (1950), p. 1.

Res Judicata, estoppel, etc. are examples of the general principles of law recognized by civilized States. These principles are such as have received recognition by almost all the States. They have, therefore, been included as the general principles of international law. General principles of law recognized by civilized States include procedural as well as substantive principles provided that they have received general recognition of civilized States. The development of general principles of law recognized by civilized States as an important source of law has given a death-knell to the positivism.

Following are some of the important cases relating to the general principles of law recognized by civilized States :—

(a) R. v. Keyn.[44]—In this case the Court ruled that international law is based on justice, equality and conscience which has been accepted by long practice of States.

(b) United States v. Schooner.—In this case Justice Storey of United States of America ruled that International law should be based on the general principle of law recognized by civilized States. He was giving decision relating to abolition of system of slavery.

(c) In the case of diversion of water from Muese.[45]—The Permanent Court of International Justice applied *res judicata* and estoppel.

(d) Chorzow Factory (Indemnity) Case.[46]—In this case, the Permanent Court of International·Justice applied the principles of *res judicata* and also held that one who violates a rule is liable to make reparation.

(e) Mavrommatis Palestine Concessions Case.[47]—In this case, the Court applied the general principle of subrogation.

(f) Case concerning the Temple of Preah Vihear.[48]—In this case, the International Court of Justice recognised and applied the principle of estoppel.

(g) Barcelona Traction case, Preliminary Obligation.[49]—In this case International Court of Justice applied the principle of estoppel.

(h) Frontier Dispute (Burkina Faso v. Mali)[50].—In 1983 Burkina Faso and Mali entered into an agreement to refer their Frontier Dispute to the International Court of Justice. During the agreements Mali contended that that form of equity ought to be kept in mind which is an inseparable part of the interpretation of International Law. Though

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[40] J.E.S. Fawcett, The Law of Nations, London, 1968 pp. 24-25.

[41] Ibid, at p. 25; See also B. Cheng, "General Principles of law as a subject for International Codification" C.L.P. Vol. IV, 1951, p.35 at p. 37; Vladimir Paul, General Principles of Law in International Law, I.J.I.L., Vol. 10, 1970, p. 324 at pp. 347-49.

[42] B. Cheng, Supra Note 41 at p. 47.

[43] Right of Passage Over Indian Territory Case, I.C.J. Rep. (1957), p. 177.

[44] (1876) Ex. D. 63.

[45] (1937) P.C.I.J., Series A.B. Case No. 70.

[46] Pub. P.C.I.J., (1928), Series A, No. 17.

[47] Pub. P.C.I.J. (1964), Series A, No. 2.

[48] I.C.J. Rep. (1962), p. 6.

[49] I.C.J. Rep. (1964), p. 6.

[50] I.C.J. Reports (1985) p. 6.

Burkina Faso did not object to the said contention, it said that it was not clear as to what would be its practical objective in this case because in the delimitation of boundary, there is no equivalence of equity principles. The Chamber of International Court of Justice held that it can take the help of that equity which both the parties have accepted or given consent to.

The International Court have recognised as general principles : (i) good faith; (ii) responsibility ; (iii) prescription ; (iv) in the absence of any express provision to the contrary, every Court has right to determine the limits of its own jurisdiction ; (v) a party to a dispute cannot himself be an arbitrator or judge ; (vi) *res judicata* ; and (vii) in any judicial proceeding the Court shall give proper and equal opportunity of hearing to both parties.[51] Since these principles have been recognised and applied by the Courts many a times, B. Cheng has, and rightly too, suggested that these and such other principles should be codified.[52]

In regard to the general principles recognised by civilized nations, the Soviet view is very narrow. According to Kazimierz Grzybowski, "... in a world consisting at this time of two opposed world systems, there are no such general principles except those established by international agreement as part of international law." [53] This view does not seem to be correct because if this view is accepted, the International Court will have no right in respect of recognition of general principles. With the breaking up of Soviet Union and end of communism in Russia, cold war has ceased and hence this view has lost its importance. J.L. Brierly has rightly written that general principles of law is such a source which the Courts have referred in past also and its inclusion in Article 38 (1) (c) of the Statute of International Court of Justice shows clearly that the positivist doctrine, according to which International law is a body of rules on which the States have given consent, has been rejected.[54] "From the theoretical standpoint, the provision for applying the 'general principles' has been regarded as 'sounding the death-knell, of positivism, in as much as it explicitly rejects the broad positivist view that customs and treaties are to be considered the exclusive sources of international law." [55] Thus by recognising general principles of law recognised by civilized States, dynamism of international law and the creative function of the International Court have been ensured. Indeed, it "enables rules of law to exist which can fill the gaps or weaknesses in the law which might otherwise be left by the operation of custom and treaty, and provides a background of legal principles in the light of which custom and treaties have to be applied and as such it may operate to modify their application." [56]

4. Decisions of Judicial or Arbitral Tribunals and Juristic Works*

*International Judicial Decisions.***—In the modern period International Court of Justice is the main International Judicial Tribunal. It was established as a successor of the Permanent Court of International Justice. It may, however, be noted that the decision of International Court of Justice does not create a binding general rule of international law. Article 59 of the Statute of the International Court of Justice makes it clear that the decisions of the court will have "no binding force except between the parties and in respect of that particular case". Earlier decisions of the Court are not binding on the Court itself and the Court is free to deviate from its earlier decisions. However, ordinarily the Court does not deviate from its earlier decisions and it changes its earlier decisions only in very special circumstances. Thus while in principle it does not follow the doctrine of precedent, in practice, it ordinarily follows it. So far as the advisory opinion of the International Court of Justice is concerned, it is not binding at all. But it clarifies the rule of international law on a particular point or matter. According to Article (38)(1) (d), subject to the provisions of Art. 59 judicial decisions are "subsidiary means for the determination of rules of law". Thus judicial decisions, unlike customs and treaties, are not direct sources of law, they are subsidiary and indirect sources of International law.

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[51] B. Cheng, Supra Note 41, at pp. 40-50.

[52] Ibid, at p. 53.

[53] Soviet Public International Law (A.W. Sijthoff Leyden, (1970), p. 30.

[54] The Law of Nations Sixth Edition (1963), p. 63.

[55] Starke, note 1 at p. 35.

[56] Oppenheim's International Law, note 4, at p. 40.

* IAS (2001) Q. 5 (c).

** See for I.A.S. (1974), Q. No. 1(b) ; C.S.E. (1982) Q. 5(a) ; C.S.E. (1993) Q. 5 (a)

State Judicial Decisions.—State judicial decisions may become rules of international law in the following two ways :—

(a) State judicial decisions are treated as weighty precedents. In the words of Chief Justice Marshall of the Supreme Court of America, "The decisions of the court of every country show how the law of the nations in the given case is understood in that country will be considered in adopting the rule which is to prevail in that case." [57]

(b) *Decisions of the State Courts may become the customary rule of international law in the same way as customs are developed.*

Decisions of International Arbitral Tribunals.—In the view of some jurists the decisions of International Arbitral Tribunals cannot be treated as source of international law. These jurists have, rightly too, pointed out that in most of the arbitral cases, arbitrators act like mediators and diplomats rather than as judges. The *Kutch Award* (1968) bears testimony to this fact. Consequently, their decisions should be treated as source of International law. Generally the said criticism is correct. It may, however, be noted that some of the decisions of the Permanent Court of Arbitration are treated as weighty precedent and can be regarded as source of International law. Judge Lauterpacht has aptly written, "One of the reasons usually given for its (*i.e.* Permanent Court of Arbitration) inadequacy was that the awards rendered by its tribunals were not legal in form and substance; that they tend to confuse law with a diplomatic solution aiming at pleasing both parties. It may be difficult to substantiate that charge. An analysis of the awards given by tribunals under the aegis of the Permanent Court of Arbitration, before and after the first world war, must reveal that their decisions were legal awards in form and substance." [58]

Juristic works.—Although juristic works cannot be treated as an independent source of international law, yet the view of the jurists may help in the development of law. The views of the jurists are not direct sources of international law. But they sometimes become instrumental in the development of international customs. According to Article 38 of the International Court of Justice, the works of highly qualified jurists are subsidiary means for the determination of the rules of international law. The importance of the works of the jurists has been stressed by Justice Gray in *Paquete Habana.*[59] In the words of Justice Gray, "...... Where there is no treaty and no controlling executive of legislative act or judicial decision, resort must be had to the customs and usages, of civilized nations and as evidence of these, to the works of jurists and commentators who by years of labour, research and experience have made themselves peculiarly well-acquainted with the subjects which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is". This case deals with seizure of fishing vessels, its cargoes and capture of sailor's during the state of blockade.

The *Paquete Habana* and the *Lola* were two fishing vessels with Spanish flags on them. In 1898, during the war between America and Spain, the warships of America blockaded the northern coast of Cuba, which was then a colony of Spain. The American warships seized these fishing vessels and in order to punish them started proceedings against them in the District Court of America. The District Court declared the fishing vessels and its cargoes as prize. The owners of the ship preferred an appeal in the Supreme Court of America against the said order. The Supreme Court of America reversed the decision of the lower court and ruled that the claimants be given the money derived from the sale of vessels, cost of the case and compensation. On the basis of the precedents and the established rules of international law, the court concluded that the fishing vessels and unarmed sailors who pursued their work honestly and peacefully,

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57. Thirty Hoghsheads of Sugar, *Bentzon* v. *Boyle,* (1815) 9 Cranch 191 at p. 198.

58. Sir Hersch Lauterpacht, The Development of International Law by the International Court (1958), pp. 5-6.

59. (1900) 175 U.S. 677 at p.700.

could not be seized or apprehended during the state of blockade. International Law exempts such fishing vessels and their sailors from seizure during the state of blockade.

5. Decisions or determinations of the organs of International institutions*

Before the establishment of League of Nations, International Customs and International Conventions were recognized as the main source of International Law. In addition to these main sources, juristic works and decisions of judicial and arbitral tribunals were regarded as subsidiary means for the determination of rules of law. The statute of PCIJ under Art. 38 incorporated these sources and also introduced one new source namely "General principles of law recognised by civilized nations". Article 38, however, did not at all mention decisions or determinations of organs of International institution as source of law. The reason for this was quite obvious that by this time International organisations had not assumed such an important role as they have done now.

The evolution of International organisation represents a significant stage in the history and development of International law. International organisation in its wider sense, is the process of organising complexity of International relations. In a narrow sense, it is an International institution based on multilateral international agreement entered into by sovereign states, its organs having autonomy of will, having permanent organs and having distinct entity or personality separate from its total of its membership. Even before the establishment of the League of Nations, some experiments were made for development of international organisations. They can be classified into three stages. The concert of Europe, a loose association of great powers of Europe, represents the first stage and may be said to contain seeds of present Security Council. The second stage is represented by two Hague Conferences (called Hague system) which contains the seeds of present General Assembly of United Nations. Third stage is represented by the establishment of public international unions such as Universal Postal Union and International Telegraph Union (Both of these are now specialized agencies of U.N..), which contains the seeds of present International secretariat and specialized agencies. The League of Nations may be described as the first comprehensive experiment in the development of International organisation which sought to combine all the above-mentioned three different aspects of international organisation. It has been rightly remarked that League of Nations pioneered all aspects of international organisation. The U.N. has simply further developed, elaborated and perfected these systems.

After the establishment of U.N. and of course the establishment of dozens of inter-governmental organisations which were brought into relationship with the U.N. and called specialized agencies of U.N. International Organisations have become a part and parcel not only of international life but also of national life. Their impact is clearly evident on every aspect of our life. For example if there is a scarcity of foodgrains, F.A.O. comes to the rescue of nations and their people ; if there is a health problem *i.e.* spread of diseases etc. W.H.O. comes to our rescue; in respect of problems of workers and labourers, there is I.L.O. which has assumed such a significant role in this field that its conventions taken as a whole, are called International Labour Code, which is said to be generally binding on all states; there is ICAO which regulates relations of states in respect of International Civil Aviation and the Council of ICAO is competent to decide any dispute relating to obstruction to International Civil Aviation. ICAO Jurisdiction case, *India* v. *Pakistan* (1972) is a glaring example of this.

In fact after the establishment of U.N., most of the development of international law and its codification has taken place through the instrumentality of international organisations. General Assembly, one of the principal organs of U.N., has established International Law Commission which not only surveys the whole field of international law but also prepares drafts and make recommendations to these aspects to General Assembly. The General Assembly in its turn adopts its recommendations and recommends the holding of international conferences for adopting international conventions on different topics. A large number of international conventions have been adopted in this way during last three decades. The I.C.J. which has rendered signal service for development of international law is in fact a judicial organ of U.N. Art. 92 of Charter, says : "The ICJ shall be the principal judicial organ of the U.N. It shall function in accordance with the annexed statute, which is based upon the Statute of PCIJ and forms an integral part of the present charter."

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* See also for C.S.E. (1993) Q. 5(a).

In view of these strong reasons, the decisions and determination of organs are now recognised as an important source of international law. Although they do not find mention in Art. 38 of Statute of ICJ but ICJ itself has recognised it in number of cases. For example, in *Certain expenses of U.N.* the ICJ held that the expenses incurred by U.N. in Suez and Congo crisis could be apportioned among the member states of U.N. by General Assembly. It may be noted here that in both these crises, U.N. armed forces were sent under Uniting for Peace Resolution (1950). The ICJ thus, though indirectly, upheld the validity for Uniting for Peace Resolution. Similarly in *South-West Africa Cases* (1966) Judge Jessup of ICJ remarked that numerous resolutions of General Assembly condemning *apartheid* was declared an International crime by International Convention on the Suppression and Punishment of Apartheid adopted in 1973, (which came into force in 1976), the World Court had declared it as violative of international law and obviously this decision was based on resolutions of General Assembly. As pointed out in the Ninth Edition of Oppenheim's International Law,[60] "The fact that the International Court of Justice, in its numerous judgments and opinions relating to international organisations, has always been able, without remarking upon the incompleteness of Article 38, to dispose of the questions arising for decision, is a strong argument for suggesting that their activities are for the moment at least still properly regarded as coming within the scope of traditional sources of international law......... while at present this can be regarded as merely providing a different forum for giving rise to rules whose legal force derives from traditional sources of international law, there may come a time when the collective actions of the international community within the framework provided by international organisations will acquire the character of a separate source of law." In the view of Starke,[61] organs of international institutions may lead to the development of international law in the following ways :

(i) In international matter their decisions are the intermediate or final steps in the development of customary rules. For example, it was ruled by Security Council of the United Nations that if any member absent from the Security Council meeting then it will not be deemed to be a veto. This decision has helped in the development of the international custom on this point. Similarly, the Security Council can decide whether matter is procedural or important. Such decisions may help in the development of an international custom on the point.

(ii) The resolutions of the organs of international institutions may be binding on the members in regard to the internal matters of the institution.

(iii) Organs of international institution can decide the limits of their competence.

(iv) Sometimes the organs of international institution may make the interpretation of the different provisions of their constitutional instruments. This decision becomes a part of the law of international institution which in its turn becomes a part of the international law.

(v) Some organs of international institutions are empowered to give quasi-judicial decisions. European Economic Community deserves a special mention in this connection. Organs of international institutions submit some matters to the Committee of Jurists for their opinion. The opinion of the Committee of Jurists is of great significance and may help in the development of customary rule of international law.

(vi) An organ of international institution may refer a matter to the International Committees of Jurists for its opinion or for investigation of a legal problem. The opinion of such committees "bear some weight and authority."

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[60] See note 4, at p. 46.

[61] Starke, Supra Note 1 at p. 53; see also Openheim's International Law, note 4, at pp. 47-50.

In case concerning *Military and Para-Military Activities in and against Nicaragua,*[62] the International Court of Justice relied on resolutions passed by international organisations, *inter alia,* and cited them as evidence of the existence of customary rules. Thus, as evidence of customary rule prohibiting the use or threat of force in international relations, the court cited the Declaration on Principles of International Law concerning Friendly relations and Cooperation among States in accordance with the Charter of the U.N. As evidence of customary rule of non-intervention, the court cited the said Friendly Relations Declaration, the Declaration on the Inadmissibility of Intervention. As evidence of a customary right of self-defence, the court cited the Friendly Relations Declaration and the General Assembly's definition of Aggression (1974).[63]

Reference may also be made here to the decisions of the U.N. Administrative Tribunal. In the case of *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,*[64] the International Court of Justice held that the Tribunal was independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions and not merely an advisory or subordinate organ. Its judgments were therefore binding on the U.N. organisation and also upon the General Assembly (which established the Tribunal). In other subsequent two cases, namely, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal and Application for Review of Judgment No. 273 of the United Nations Administrative Tribunals* also the International Court of Justice upheld the decisions of the Tribunal.

Ex aequo et bono

After enumerating the sources of International law in Article 38 (1), Article 38(2) of the World Statute qualifies Article 38(1) by providing : "This provision shall not prejudice the powers of the court to decide a case *ex aequo et bono,* if parties are agree thereto." Thus, as pointed out by Manely O Hudson, "In a case where the parties are agreed that it may decide *ex aequo et bono,* the provision in the Statute would seem to enable the courts to go outside the realm of law for reaching its decision. It relieves the courts from the necessity of deciding according to law. It makes possible a decision based upon considerations of fair dealing and good faith, which may be independent of or even contrary to the law. An International Tribunal can decide a dispute *ex aequo et bono,* and go outside the realm of law only if such power has been conferred on it by mutual agreement between the parties.[65]

Some other sources of International Law

Besides the above sources of International law, following are some of the other subsidiary sources of international law :

(1) *International Comity.*—The mutual relations of nations are based on the principle of comity. In other words, when a State behaves in a particular way with other States, the latter have also to behave in the same way. According to Prof. Oppenheim, international comity has helped in the development of international law.

(2) *State Paper.*—In the modern period almost all the civilized States have diplomatic relations with each other. They send letters to each other for mutual interests. These letters are sometimes published. A study of these letters sometime reveals that certain principles are repeatedly followed by States in their mutual intercourse. Sometimes these State Papers help in the solution of a conflict or controversy. In the famous case of *The Caroline (1841),* the note of Mr. Webster, Secretary of State of the U.S. deserves a special mention here. In his note Mr. Webster said that for intervention on the ground of self-defence, the necessity must be "instant, overwhelming leaving no choice of means and no moment for deliberation". Since then it has been recognized as a rule of international law. "Occasionally an international controversy clears up a disputed legal

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[62] I.C.J. Reports, 1986, p. 14.

[63] *See* Michael Akehurst, *"Nicaragua* v. *United States of America"*, I.J.I.L., Vol. 27 (1987), p. 357 at pp. 358-359.

[64] I.C.J. Rep. (1954) p. 47.

[65] See Frontier Dispute case (*Burkina Faso* v. *Mali*), ICJ (1985) Rep. 6.

point or advances the application of principles that have before received little more than an otiose assent." [66]

(3) *State guidance for their officers.*—It is mostly seen that a number of matters of the Governments of respective States are resolved on the advice of their legal advisers. These advices are also, therefore, sometimes treated as sources of international law.

(4) *Reason.*—'Reason' has occupied a special position in all the ages. In modern period also it occupies an important place. It has performed a special role in the development of international law. Whenever there is no rule of international law to guide the court, the matter is resolved on the basis of reason.[67] By reason, we mean the judicial reason through which principles are discovered to face the new situations which are considered valid by the jurists. When there is no treaty or particular rule of international law to resolve any question, the court applies judicial reason. As pointed out by Pollock, "The law of nations is founded on justice, equity, convenience, and the *reason of the thing* and confirmed by long usage.[68]

The view of Pollock seem to be correct in view of the conditions prevalent before the second world war because then most of the rules of International Law were in the form of customs and hence the court could take the help of justice, equity, convenience and the reason of the thing to decide a dispute. The position has, however, changed after the second world war when States entered into a large number of treaties to regulate their relations in different fields. When clear provisions of law are incorporated in treaties, the scope of applying the principles of equity, justice, convenience and the reason of the thing diminishes. The importance of these principles, however, does not completely end because whenever the question of interpretation of any provision of a treaty arises or where there is some ambiguity, the court interprets it on the basis of the principles of equity, justice, convenience, and the reason of the thing. The court gets an opportunity of applying these principles particularly when there is some ambiguity about the meaning of any provision.

(5) *Equity and Justice.**—In the *Barcelona Traction case,*[69] Sir Gerald Fitzmaurice emphasized the need for a body of rules and principles of equity in the field of international law. "Equity" is used here in the sense of considerations of fairness, reasonableness, and policy often necessary for the sensible application of the more settled rules of law. Strictly, it cannot be a source of law, and yet it may be an important factor in the process of decision. Equity may play a dramatic role in supplementing the law or appear unobtrusively as a part of judicial reasoning. The principle of the 'exception' whereby existing rules are qualified to meet special cases, is a form of equity which takes on the form of judicial legislation." [70] Further, "equity, in the present context, is encompassed by Article 38(1)(c) of the statute, and not by Article 38 (2) which provides: "This provision......... shall not prejudice the power of the court to decide a case *ex aequo et bono* if the parties agree thereto". This power of decision *ex aequo et bono* involves compromise, conciliation, and legislation in a friendly settlement, whereas equity, in English sense is applied as a part of the normal judicial function." [71]

In *North Sea Continental Shelf Cases,*[72] the International Court also observed : "Whatever the legal reasoning of a court of justice, its decisions must definitely be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in the consideration lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is subsequently no question in this case of any decision *ex aequo et bono* such as would only be possible under the conditions prescribed by Article 38 paragraph 2, of the court's statute." [73]

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[66] Lawrence, Principles of International Law, Seventh Edition, p. 109.

[67] In such a situation, it is the duty of jurist to resolve the dispute or conflict on the basis of reason, [See the case of the Eastern Extension, etc. Telegraph Co. Ltd., Nelson's Report, p. 75 quoted in Cory's Arbitration, p. 2261.]

[68] See Pollock, Essay in the Law, p. 64.

* See for I.A.S. (1967), Q. 1 : For answer see also matter discussed above under the heading "Reason".

[69] I.C.J. Rep. (1970), p. 3 at p. 5.

[70] Ian Brownlie, Principles of Public International Law, Second Edition (1973), p. 26.

[71] Ibid, at p. 27.

[72] I.C.J. Reports, 1969, p. 3 printed at I.J.I.L., Vol. 10 (1970), pp. 67-99.

In the modern times more attention is being given to the principles of equity and justice.[74] It has been pointed out[75] that there is some evidence of the application of the principles of equity and justice. Three such areas were demonstrated in the *North Sea Continental Shelf cases.*[76] (1) The Practice of States in their International Relations; (2) International Customary Law and (3) the Administration of Justice.

The principles of equity and justice make their contribution in the international law-making[77] and in the codification and development of international law.[78] The principles of equity and justice have been referred again and again in the context of new International Economic Order and new law of the Sea. Following suggestions and conclusions given in a article[79] deserve mention here : (1) The role of equity in international law is a pervasive one, specific areas of application includes: (a) international customary law, (b) the administration of justice; (c) the settlement of disputes, judicial and non-judicial; (d) the practice of states ; (e) international diplomacy; (f) the structure and functioning cf international institutions; and (g) international law-making. (2) There does not exist any universal or widespread agreement regarding the precise meaning of equity......... (3) In the international system, equity as applied to a particular case, situation or circumstance, would usually turn out to mean in effect the view of a decision maker or a consensus of decision-makers as to what is reasonable and just in the particular case, situation or circumstance. (4) A principal objective of international society is to build a more equitable and just society. Law-making should reflect this principal objective of international society and should therefore be guided by the principles of equity and justice......... (5) Governments refer to equity as a flexible general standard. Its invocation is often in general terms and the consequences of its application are not set out in detailed form......... (6) The International Law Commission and the Sixth Committee are also guided by this spirit in their codification and development of International law. However, the International Law Commission, with the support of the Sixth Committee, attempts to go one stage further and to translate this spirit into actual rules. (7) In some instances equity is resorted to where it has proved difficult to agree on a more specific or precise formulation......... Recourse to formulations couched in the language of equity can help to produce agreements and in this sense equity is an important tool of international legislation."

Indeed, "Equity as a legal concept is a direct emanation of the idea of justice." This was observed by the International Court of Justice in *Continental Shelf case* (*Thunisia/Libyen Arab Jamahuriya*) and was afifrned in *Frontier Dispute case* (*Burkina Faso* v. *Mali*)[80].

Thus although equity, and justice have not been enumerated as sources of International law in Article 38(1) of the statute of the International Court of Justice, they play an important role in the international law-making and in the codification and progressive development of international law.

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[73] North Sea Continental Shelf Cases, I.C.J. Reports, 1969, p. 3 printed at IJIL, Vol. 10 (1970) p. 94: See also Advisory opinion in the case of Judgements of the Administrative Tribunal of the I.L.O. upon complaints against UNESCO, I.C.J. Reports 1956, at p. 100; Corfu Channel case, I.C.J. Rep. 1949, p. 249.

[74] See B.G. Ramcharan, "Equity and Justice in International Law-Making". I.J.I.L. Vol. 15 (1975), p. 47; See also B. Cheng, "Justice and Equity in International Law". Current Legal Problems, Vol. 8 (1955), pp. 185-211; G. Schwarzenberger, "Equity in International Law", Year Book of World Affairs, Vol. 26 (1972), pp. 346-369.

[75] See Ibid, at p. 47.

[76] I.C.J. Reports 1969, p. 3.

[77] Ramcharan, note 73, at p. 48.

[78] Ibid, at pp. 49-55.

[79] Ibid, at pp. 61-62.

[80] I.C.J. (1985) Rep. 6.

Resolution and Declarations of General Assembly of the U.N. as the Source of Universal International Law.[81]—There is a great controversy in regard to the legal significance of the resolutions and declarations of the General Assembly of the United Nations. Some jurists are of the view that they are only of political significance and have no legal importance.[82] On the other hand, some jurists hold the view that under certain special circumstances they may have legal implications and some of them may even have binding effect.[83]

Ordinarily, it may be said, as Judge Jessup[84] pointed out, that the resolutions of the General Assembly are not of true legislative character, Judge Jessup has, however, pointed out that if on a particular subject many similar resolutions are passed (as on *apartheid*), then they indicate the contemporary international standard and the court is bound to take them into consideration while giving its decision.[85] Besides this, those resolutions which are of law-making character, serve as an important link in the development of new principles of international law.[86] Ian Brownlie has also written that the resolutions of the General Assembly are not binding upon the members but when they are related to the general rules of international law and are passed by the majority of States, they become the evidence of the view of the States.[87]

The decisions taken by the General Assembly prove to be helpful in the development of International law. These decisions are in the form of recommendations and resolutions and some of them are never implemented yet they are helpful in the agreement between States and contribute in preparing the necessary environment for the development of the rules of International law.[88] The resolutions and declarations of the General Assembly have capacity to become the sources of Universal International law.[89] In *Reservation to Convention on Genocide,*[90] Judge Alvarez aptly remarked, "......... they (*i.e.*, resolutions of the General Assembly) have yet not acquired a binding character, but they may acquire if they receive the support of public opinion......" Further, "in short, the Assembly .... is tending to become an international legislative power. In order that it may actually become such a power, what is needed that governments and public opinion should give it support......". "As pointed out by Rosalyn Higgings, "Collective acts of States, repeated by and acquiesced in by sufficient numbers with sufficient frequency eventually attain the status of law." [91]

Thus we see that the resolutions and declarations may serve as important means for the development of International law. They prove to be greatly helpful in the process of treaty-making and agreements between States on various subjects. They have the capacity to become sources of Universal International law and if wisely used, they can prove to be very effective in the development of international law. In the words of Manfred Laches,[92] the then President of the International Court of Justice : "A new phenomenon in international life is the activity of this Assembly itself. I refer to your resolutions. Among the 3,000 adopted in 27 years, not a few have made history. They have become a stepping stone, a *stage in the political and legal process, a factor in the development of International law.*" Examples of some of the important law-making resolutions of the General Assembly, according to Brownlie, are : the resolution which affirmed the principles of international law recognized by the judgment of the Nuremberg Tribunal, the resolution on prohibition of the use of nuclear weapons for war purposes, the Declaration on the Granting of Independence to colonial countries and peoples, the Declaration on permanent Sovereignty over Natural Resources and the Declaration of Legal Principal Governing Activities of States in the Exploration and use of outer-space.[93] Declaration on principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U.N. (1970). Declaration on Inadmissibility of Intervention (1965), Universal Declaration of Human Rights (1948), Declaration of Principles Governing the sea-bed and ocean floor and the sub-soil thereof (1970) etc. are resolutions which belong to the same category.[94] "All these declarations are not ordinary international treaties or conventions and were not subject to ratification. Nevertheless, there is a wide consensus that these declarations actually established new rules of international law binding upon old States. This is not treaty making but a new method of creating customary international law.[95] Finally, "In a rapidly changing world the United Nations has found a method albeit restricted by the rule of unanimity or quasi-unanimity, to adopt the principles of its Charter and the rules of customary international law to the changing times with an efficiency which even its most founders did not anticipate." [96]

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[81] See also S.K. Kapoor, "Significance of U.N. General Assembly Resolution", II S.C.J. (1972), p. 8.

[82] See J. Castaneda, Legal Effects of U.N. Resolutions (New York, N.Y., 1969), pp. 3-8.

[83] See for example, D.H.N. Johnson, "The Effect of the Resolution of the General Assembly of the U.N." BYBIL, Vol. 32 (1955-56), p. 97.

[84] See Judgment of Judge Jessup in South West African Cases (Second Phase), I.C.J. Rep. (1966), p. 6 at pp. 432, 441.

[85] Ibid., at p. 441.

[86] Leo Gross, "The United Nations and the Role of Law", Int. Orgn. (1956), p. 537 at p. 557.

[87] Ian Brownlie, Principles of Public International Law, p. 11.

[88] See BYBIL (1965-66), p. 201.

[89] Leo Gross, "Sources of Universal International Law", Asian States and the Development of Universal International Law (1972), p. 189 at p. 209.

[90] I.C.J. Rep. (1961), p. 15 at p. 59 : see also Richard A. Falk, on "the Quasi Legislative Function of the General Assembly", A.J.I.L., Vol. 60 (1966), pp. 782-791.

[91] Rosalyn Higgins, The Development of International Law Through the Political Organs of United Nations (London; Oxford University Press, 1963), p. 2, ; see also Michel Virally, "The Sources of International Law" in Sorensen, Manual, of Public International Law, p. 162.

[92] From his commemorative speech delivered at a special meeting of the U.N. General Assembly on 12 October, 1973, appearing in I.J.I.L., Vol. 14 (1974) p. 1 at p. 5.

Order of use of sources of international law

After having discussed the different sources of international law, the next important point that deserves our attention is the order in which these sources of international law are to be used. An authoritative order of the use of sources of international law is given in Article 38 of the Statute of International Court of Justice. The sources of international law have been mentioned in the said Article in the following order : (a) International Conventions, (b) Customs, (c) General principles of law recognized by civilized nations, (d) Judicial decisions and juristic opinion as subsidiary means for the determination of rules of law. The wordings of Article 38 suggest that sources are to by applied in the order in which they are mentioned and therefore treaties will take precedence over the other sources. But as pointed out by Manley O. Hudson, "Yet Article 38 did not establish a rigid hierarchy. In applying a provision in a convention, the court may have to take into account the customary law prevailing when the convention was entered into, or general principles of law, as well as judicial precedents. A distinction may also have to be drawn between the categories listed, for they are not on an equal footing while it is possible to apply conventional or a customary rule of law, it seems more proper to say that general principles of law, judicial precedents, and juristic writings have only the nature of sources from which an applicable rule may be deduced."[97]

In *Nicaragua* v. *U.S.A.*[98] the World Court by majority has taken the view that the sources of international law are not hierarchical but are necessarily complimentary and inter related.

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[93] Ian Brownlie, Principles of Public International Law (1973), p. 14.

[94] See Louis B. John, "The Development of the Charter of the U.N. : The Present State" in the State of International Law and Other Essays (Kluwer—The Netherlands—1973), p. 39 at pp. 50-54.

[95] Ibid at p. 52.

[96] Ibid at p. 53

[97] See Manely O. Hudson. The Permanent Court of International Justice, 1920-1942 : (New York : The Macmillan Company, 1943), p. 606.

[98] I.C.J. (1986) Rep. 14.

CHAPTER 5

HISTORY AND DEVELOPMENT OF INTERNATIONAL LAW INCLUDING SCHOOLS OF INTERNATIONAL LAW

Origin*

International Law as we find today is the product of the experience of the civilized countries of the world and the continuous growth of many centuries. "Rules which may be described as rules of International Law are to be found in the history both of ancient and medieval worlds ; for ever since men began to organise their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations."[1] According to Prof. Oppenheim, "It (*i.e.* International law) is in its origin essentially a product of Christian civilization and began gradually to grow from the second half of the Middle Ages." [2] The claim of the European scholars that the credit of giving birth to International Law as we know today, goes to the European countries, is not correct.[3] : "The allegation of Western Jurists, Oppenheim and others that International Law originated in Europe and is the creation of Western civilization is falsified by a study of the original texts of the "Ramayana' (and of the 'Mahabharata')." [4] "It leads us nowhere to hold that modern international law is only three or four centuries old. Such an attitude is not only too legalistic, but is clearly disproved by the present practice which do take account of history." [5] In India too there can be found in the work of Kautilya in the fourth century B.C. elaborate rules for the conduct of diplomacy, as a means of avoiding conflicts, and the reception and treatment of diplomats." [6] A study of the Ramayana reveals that in the Ramayana period relations of the sovereign rulers were based on the definite rules of International law and these rules were recognised by all sovereign rulers. In his view : "These very principles are the foundation of modern international Law." [7]

Although it is true that the International Law had attained a sufficient stage of development in ancient India, yet it must be conceded, that "......... as a definite branch of jurisprudence the system which we know as International Law is modern, dating from the sixteenth and seventeenth centuries, for its special character has been determined by that of the modern European State system, which was itself shaped in the ferment of renaissance and the reformation." [8]

So far as the origin of the International Law is concerned, almost all the civilized States have made their contributions in its development. In this connection the contribution of Jews, Romans, Greeks, Hindus and Muslims deserves a special mention. A brief discussion of their contribution is being given below.

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* See also for I.A.S. (1978), Q. 1.

[1] J.L. Brierly : The Law of Nations, Sixth Edition (1963), p. 1.

[2] International Law, Vol. I, Eighth Edition, p. 6 ; see also P.E. Corbett, The Growth of World Law (1971), p. 33.

[3] See Nagendra Singh, "India and International Law" in Asian States and the Development of Universal International Law (1972), p. 25.

[4] S.S. Dhawan, "The Ramayana II International Law in the Age of the Ramayana" National Herald Magazine, Sunday, January 21, 1971, p. 1.

[5] J.J.G. Syatauw, Some Newly Established Asian States and the Development of International Law (1961), p. 223 : see also Ibid., pp. 224-25.

[6] J.E.S. Fawcett, The Law of Nations (1968), p. 16.

[7] See Supra Note 4.

[8] J.L. Brierly, The Law of Nations, Sixth Edition (1963), p. 1 ; see also Q Wright, "The Foundations for a Universal International System" in Asian States and the Development of Universal Law (1972), p. 145 at p. 162.

Contribution of Jews, Greeks, Romans, Hindus and Muslims

Jews.—A study of the ancient history reveals that the Jews had relations with other countries. Their relations with other countries were regulated and governed by certain rules. The famous slogan of the Jews "Love the Stranger for ye were strangers in the land of Egypt." It is clear from this slogan that they believed in internationalism. But since they believed in monism in respect of religion, they did not treat those nations on the basis of equality which believed in dualism or plurality of Gods. The Jews strictly followed the treaties entered into by them with other countries and conferred privileges and immunities upon the diplomatic envoys. Thus the Jews made some contribution in the development of International Law in the ancient period.

Greeks.*—It is clear from the study of ancient history that when most of other States of the world were backward and less civilized, the Greek civilization was quite advanced and the Greeks had achieved great advancements in different fields. Socrates, Plato, Aristotle and other Philosophers of Greece enlightended the world through their ideas and philosophies. Greeks lived in small city-States. The mutual relations of these States were regulated and governed by some definite rules and principles. They had formulated definite laws of war and peace. They used to resolve their dispute through arbitration. Prior declaration was made before the commencement of war. There was also provision for the exchange of prisoners of war but there was a custom of ransom for the release of some types of prisoners. The Greeks had formulated many laws relating to war. Oppenheim has rightly remarked that the Greeks had shown to the world how sovereign States could live in mutual co-operation with each other like a single community.[9] It may, however, be noted that the Greeks had more talents for development of art and philosophy than for the development of law. Nevertheless, the Greeks philosophy, ideas and their practices indirectly contributed to the development of International Law.

Romans.**—As compared to the Greeks, Romans were endowed with far greater talents for the development of International Law. Although, modern International Law is ordinarily regarded as dating from the 16th and 17th centuries, it cannot be denied that the Romans contributed much to the development of modern International Law. In its early period, Rome was a small city-State and had relations with other States. These relations were based on the rules of International Law. Subsequently the Roman Empire greatly expanded yet the Romans always considered themselves bound by laws and rules on the basis of laws.

Romans deserved the credit for developing the laws of war. According to them, there were two types of war—just and unjust. Main grounds of waging just wars were (i) Attack on Roman territories; (ii) Disregard or the violation of the privileges of ambassadors ; (iii) Contravention of Treaties ; and (iv) Assistance to enemy States by friendly countries of Rome. According to Romans, the modes of termination of war were (i) Through Treaty of Peace ; and (ii) Through conquest and annexation of the conquered territories. Similarly, the Romans had divided the treaties into three categories (i) Treaty of Friendship ; (ii) Treaty of Alliance ; (iii) Treaty of Hospitality. The Romans strictly adhered to the provisions of the treaty and in their view prior intimation was necessary for termination of Treaties. Thus the Romans made significant contribution in the development of International Law. "The position of Roman Law in Europe in 16th century has important bearing on the beginning of International Law." [10]

Hindus.—As pointed out earlier, some of the rules of International Law were in quite a developed stage in ancient India. A thorough study of the Ramayana, Mahabharata, Manusmriti, Kautilya's Arthashastra will justify the truthfulness of this statement. "The students of International Law will learn from a study of Balmiki Ramayana that the relations between sovereigns in the age of the Ramayana were governed by a Code of conduct based on principles which were recognised and observed by all the sovereigns ; they were rarely violated, and any attempt by an individual sovereign to violate them was condemned by the sovereign's own counsellors. These very principles are the foundation of modern International law."[11] Bhagvat Gita, which is regarded a pious religious text-book by Hindus, has not only classified just and unjust wars but has also made a vivid discussion of them. A study of Bhagvat Gita also reveals that the declaration of war before its commencement was essential. The duties of the State in administrative and external matters have been vividly discussed in Kautilya's Arthashastra. According to Kautilya, just as well as unjust means could be used in wars. The study of the Ramayana and Mahabharata reveals that during that period diplomatic agents enjoyed many privileges and immunities. International Law relating to diplomatic agents was in its developed stage, Manu had propounded many principles and rules in his Code, popularly known as Manu's Code. In his view, wars could be either just or unjust. According to him, to fight and die in a just war was a good deed indeed. In the view of Manu, deceit or poisonous weapons were prohibited in war. To kill wounded or sick soldiers in war was contrary to the rules of war. There were also definite rules relating to the treatment of prisoners of war. Thus, International Law was in a developed stage in India. Thus it may be rightly concluded that Hindus contributed much to the development of International Law.[12]

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* See for I.A.S. (1954), Q. No. 2.

[9] L. Oppenheim, International Law, Vol. I, Eighth Edition by H. Lauterpacht, p. 75.

** See for I.A.S. (1954), Q. No. 2.

[10] J.L. Brierly, The Law of Nations, Sixth Edtion (1963), p. 19.

Muslims.—The Muslim rulers of India had relations with other nations. They received the ambassadors of other States and entered into treaties with them. They had formulated some rules which governed relations with Muslim States. The Muslim rulers recognised the distinction between combatants and non-combatants and had formulated rules for according protection to women and children during war. They observed their treaties in good faith.

Development of International Law during 16th and 17th centuries

As pointed out by Brierly "............as a definite branch of jurisprudence the system of which we know as International Law is modern, dating only from sixteenth and seventeenth centuries, for its special character has been determined by that of modern European State System, which was itself shaped in the ferment of the Renaissance and the Reformation." He has, therefore, rightly added that, "some understanding of the main features of this modern State system is, therefore, necessary to an understanding of the nature of International Law."[13] The Middle Ages witnessed many obstacles in the growth of strong centralised Governments. The two main such obstacles were Feudalism and the Church. Feudalism was a formidable obstacle to the growth of the national State. The other strong influence which retarded the growth of State in the Middle Ages was the Church. However, rapid changes were taking place. A great landmark in this connection was the Treaty of Westphalia of 1648 which ended the thirty years' war of religion and was the beginning of the acceptance of new political order in Europe. Political developments were leading to the separateness and irresponsibility of every State. Meanwhile, there were certain counter-factors leading to intimate and constant relations of states with one another. According to Brierly,[14] the following were such causes : "(1) the impetus to commerce and the new route to Indies ; (2) the common intellectual background fostered by the renaissance ; (3) the sympathy felt by co-religionists in different States of one another, from which arose a loyalty transcending the boundaries of State ; (4) the common feeling of revulsion against war, caused by the savagery with which the wars of religions were waged." Further, "All these causes co-operated to make it certain that the separate

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[11] See Supra Note 4.

[12] For a detailed study see Nagendra Singh, India and International Law (S. Chand & Co., New Delhi, 1969).

[13] J.L. Brierly, The Law of Nations, Sixth Edition, p. 1.

[14] Ibid. at p. 6.

State could never be accepted as the final and perfect form of human association, and that in the modern as in the medieval world it would be necessary to recognise the existence of a wider unity. The rise of International Law was the recognition of this truth. It accepted the abandonment of the medieval idea of a world State and took instead as its fundamental postulate the existence of a number of States, secular, national and territorial ; but it denied their absolute separateness and irresponsibility, and proclaimed that they were bound to another by the supremacy of law. Thus it re-asserted the medieval concept of unity, but in a form which took account of the new political structure of Europe." [15]

Grotius, the Father of Modern Law of Nations*

Hugo Grotius was born in Holland in 1583. At the age of fifteen, he took the degree of Doctor of Laws at the University of Leyden. In 1609, his first work, *Mare Liberum* was published. In this book he strongly argued for freedom of the sea-going. This was very significant because at that time maritime powers were appropriating different parts of the sea. Thereafter, Grotius went to Paris and lived there for ten years and in 1625 published his most famous work, *De Jure Belli ac Pacis* (*i.e.* on the Law of War and Peace). This work earned for him permanent fame. An enlarged edition of this work was issued by him in 1631. As pointed out by Oppenheim, "The science of modern Law, of Nations commences from Grotius's work, *De Jure Belli ac Pacis,* because in it a fairly complete system of International Law was for the first time built up as an independent branch of the science of law." [16] *De Jure Belli ac Pacis* has following four main characteristics : (i) In the first place, Grotius advocated that States should also be subject to the same rules which regulate the individuals ; (ii) secondly he formulated the 'law of peace' which subsequently became the basis of his whole system ; (iii) thirdly he contended that States violating the law may be punished by other States, (iv) fourthly in his view natural law (*i.e.*, right reason) was the basis for determining rules for the rightful conduct of States.[17]

Much of the credit of secularising the concept of natural law goes to Grotius. He expounded the secularised concept of the law of nature. According to him natural law was the "dictate of right reason." [18] "While Grotius did not ignore positive law, which he called 'voluntary law', he kept it distinct from the rules which he took from natural law and he felt it to be of minor importance. He did not originate the concept of natural law, for that was very old but his formulation of the rules of State conduct he felt rested upon or sprang from natural law upon such acceptance by other legal writers dominated thinking on international law for two centuries." [19] Grotius's work, *De Jure Belli ac Pacis,* became very famous also because of the time in which it was published and the circumstances that were prevailing at that time. There were a number of independent States in Europe. These States had certain common interests and aims which knitted them into a community of States. "Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied a legal basis to most of those international relations which were at the time considered as lacking such a basis. The book of Grotius obtained such a world-wide influence that he is correctly styled the *"Father of the Law of Nations."* [20] But as rightly pointed out by Brierly, "Few books have won so great a reputation as the *De*

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[15] J.L. Brierly, The Law of Nations, Sixth Edition, pp. 6-7.

* See for I.A.S. Exams, (1974), Q. No. 1(d) ; (1972), Q. No 2 ; (1967) Q. No. 2 ; (1959) Q. No. 1 ; (1957) Q. No. 1 ; see also for P.C.S. (1988) Q. 10 (b).

[16] International Law, Vol. I, Eighth Edition, p. 89.

[17] See Cornelius Van Vallenhoven, "Hugo Grotius", Encyclopaedia of the Social Sciences (New York : The Macmillan Company, 1937), VII, p. 177.

[18] He defined natural law in the following words : "The dictate of right reason, indicating that an act, from its agreement or disagreement with the rational and social nature of man, has in its moral turpitude or moral necessity and consquently that such an act is either forbidden or commanded by God the author of nature."

[19] Norman D. Palmer and Howard C. Perkins, International Relations (Third Indian Edition, 1970), pp. 279-80.

[20] Oppenheim, Supra Note 16, at pp. 84-85 ; emphasis added.

jure belli ac pacis, but to regard its author as the 'founder' of international law is to exaggerate its originality and to do less than justice to the writers who preceded him ; neither Grotius, nor any other single writer, can properly be said to have 'founded' the system. The reputation of the book was not wholly due to its own merits though these are great ; it was partly due to the time and circumstances of its publication. When he wrote it in 1625 Grotius was already so eminent that anything from his pen would have attracted attention." [21]

According to Judge Lauterpacht, there are a number of factors which in a sense, are external to the substance of Grotius's teaching and which had a share in securing its contemporaneous success and its place in the succeeding centuries. He points out the following four reasons : (1) The timeliness of the publication of his book, *De Jure Belli ac Pacis,* (2) *De Jure Belli ac Pacis* was the most comprehensive and systematic treatise on international law ever published up to that date. (3) Thirdly, substantial portion of the treatise was devoted to matters which had little to do with international law for example the treatise to a great dealt with constitutional law, the theory of state, and the basis of legal and political obligation and jurisprudence. But this very circumstance proved 'weighty contributory factor' in the success which the treaties achieved. It must, however, be noted that though International Law properly forms merely a part, it definitely is the important of the treatise. (4) Lastly, the contemporaneous success of the treatise was to some extent due to the great reputation which Grotius had at that time already earned. It may also be noted as pointed out by Lauterpacht, "principal and characteristic features of *De Jure Belli ac Pacis* are identical with the fundamental and persistent problems of international law and that nearly in all of them the teaching of Grotius has become identified with the progression of international law to a true system of law both in its ethical content.

Grotius was also indebted, to some extent, to his fore-runners such as Lagnamo, Prof. of Law in the University of Bologna, Belli (1502-1575), Brunus (14-1-1563), Vitorial (1480-1546), Ayala (1548-1584), Suarez (1548-1617) and Gentilis (1552-1608). Italian jurist, Gentilis deserves a special mention here. His works, *Legationibus and Commentationes de Jure Belli,* were published in 1588 and 1589, respectively. "Gentilis's book, *De Jure Belli,* supplies, as Professor Holland shows, the model and the framework of the first and third book of Grotiu's *De Jure Belli ac Pacis,* 'The first step'—Holland rightly says—"towards making International Law was taken, not by Grotius, but by Gentilis." "Although Grotius owes much to Gentilis, he is nevertheless the greater of the two, and bears by right the title of 'Father of the Law of Nations." [22] As compared to Gentilis's contribution for the development of International Law that of Grotius is far greater. To conclude in the words of Oppenheim,[23] "Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of Nations as were eternal, unchangeable and independent of the special consent of the single States... the system of the Law of Nature which Grotius built up and from which he started when he commenced to build up the Law of Nations, became the most important and gained the greatest influence as the Father of the Law of Nations.

Whatever may have been the changing fortunes of the doctrine of Law of Nature, the fact remains that for more than two hundred years after Grotius, jurists, philosophers and theologians firmly believed in it. But for the system of the Law of Nature and the doctrines of its prophets, modern Constitutional Law and the modern Law of Nations would not be what they actually are. The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times."*

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[21] Brierly, See supra note 13 at p. 28.

[22] Oppenheim, Supra Note 16, at p. 91.

[23] Ibid, at pp. 92-93.

* See for P.C.S. (1973), Q. No. 1 ; I.A.S. (1958), Q. No. 1.

Development of International Law during 18th century—Contribution of Naturalists and Positivists.*

17th and 18th centuries are conspicuous for giving birth to three different schools of International Law, namely, the Naturalists, the Positivists and the Grotians.

Contribution of Naturalists and Postivists.—The views of the naturalists and positivists and their contribution for the development of International Law have been discussed in detail in Chapter 2 under the heading 'Basis of International Law.' So please see the discussion under the said heading for a critical discussion of the contribution of Naturalists and Positivist.

Grotians.—As pointed out earlier, Grotius was an eminent jurist and contributed much to the development of International Law. He has the credit of secularsing the concept of natural law. He defined natural law as "the dictate of right reason, indicating that an act, from its agreement with the rational and social nature of man has in it moral turpitude of moral necessity, and consequently that such an act is either forbidden or commended by God, the author of nature."

Grotius contributed much for the development of International Law. The followers of Grotius were called Grotians. The more famous among them were Vattel and Christian Wolf. According to Grotians, International Law has originated not only from natural law but customs and treaties are also its sources. Thus, according to Grotians, International Law is the product of natural law as well as customs and treaties. As pointed out by Oppenheim, "The Grotians stand midway between the Naturalists and Positivists. They keep up Grotius's distinction between the natural and voluntary Law of Nations, but in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, interest to both alike." [24]

Distinction Among the Naturalists, Positivists and Grotians**

Naturalists were those writers who were of the view that Law of Nations is only a part of the Law of Nature. They deny that there is any positive Law of Nations. In their view, States obey International Law which is nothing but Law of Nature (applied in different circumstances) which is higher law. The most prominent naturalists who deserve a special mention were Pufendorf, Christian Thomasius, Francis Hutcheson, Thomas Rutherforth and Jean Jacques Burlamaqui. According to Pufendorf, no positive Law of Nations having the force of law exists. The Positivists, on the other hand, contended that it was the positive Law of Nations which had real force of law. According to them, positive Law of Nations was the outcome of custom and International Treaties. During the seventeenth century, the positivists could not exert much influence. Positivism became very popular in the eighteenth century. During the seventeenth century, naturalists and Grotians were in vogue. The Positivists claimed to have based their theory on the actual practice of States and laid emphasis on law positivum, *i.e.* which is law in fact. They emphasized law which is as distinct from law which *ought* to be. In their view, therefore, law enacted by appropriate legislative authority is binding. The prominent Positivists of the eighteenth century were Cornelius, Moser and Martens.

As regards the Grotians, as it has been pointed out earlier that they stood in between the naturalists and the positivists. They maintained the distinction between the natural and voluntary Law of Nations as expounded by Grotius but in contradistinction to Grotius, they gave equal importance to natural and the positive or voluntary Law of Nations. In their view, International Law is the outcome of the Law of Nature as well as custom and International Treaties. Thus they had shared certain things with both the Naturalists and the positivists but differed with them in so far as they gave equal importance to the natural and voluntary Law of Nations. The most prominent among the Grotians were Christian Wolff (1679-1754) and Emerich de Vattel (1714-1767).

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* See for P.C.S. (1965), Q. No. 7(d).

[24] See Supra Note 16, at p. 98

** See for I.A.S. (1960), Q. No. 1 ; For further elaboration see also "Theories As to Law of Nature" and "Positivism Discussed in Chapter 2".

It may be noted that in the nineteenth century it was the positivism which triumphed. As pointed out by Oppenheim, "When the nineteenth century opens, the three schools of the Naturalists, the Positivists and the Grotians are still in the field, but positivism gains slowly and gradually the upper hand ...... positivism was victorious at the end of the nineteenth century and the beginning of the twentieth. In denying the validity of sources of International Law other than the will of States it constituted yet another manifestation of the extreme doctrine of State sovereignty which, at that time, was typical of the science of law and of politics. So uncompromising was the positivist attitude that it denied the character of science to any other than the purely positive Law of Nations." [25] It may, however, be noted that "......rigid positivism can no longer be regarded as being in accordance with existing International Law. Probably ...... the Grotian school comes nearest to expressing correctly the present legal position." [26] Thus there seems to be a revival of the Law of Nature. Article 38 of the Statute of the International Court of Justice by recognising 'General Principles of Law Recognized by Civilized Nations as a source of International Law has sounded a '*death-knell*' of rigid positivism.

Transformation of 'European International Law' into Law of Nations or International Law.* —As noted earlier, modern international law is determined by modern European System. In the beginning, International Law regulated the relations of a few old Christian States of Western Europe and comprised of the customs recognised and treaties entered into by such States. Later on other Christian States joined the Family of Nations and hence during that time it was often called 'European Law of Nations'. In the next stage, certain Christian States outside Europe joined the Family of Nations. America was the most important of such States. Most of such States were previously the colonies of European States. In the next stage of the development of international law, certain non-Christian States joined the Family of Nations. The admission of Turkey into the Family of Nations marked the beginning of this stage. "With the reception of Turkey into the Family of Nations in 1856 International Law ceased to be a law between Christian States only." [27] Turkey was received into the Family of Nations expressly through Article 7 of the Treaty of Paris, 1856. But it was not until 1923 that Turkey was recognised as full-fledged member of the Family of Nations. After Turkey, other non-Christian states including Japan and India joined the family of Nations. The last stage of the development of International Law in this respect was witnessed after the First World War when a number of non-Christian States along with the Christian States joined the League of Nations. Several other non-Christian States such as Egypt, Iraq, Saudi Arabia, Lebanon, and Syria took part in San Francisco Conference. At present no distinction is made between Christian and non-Christian States. Since 1945 (when U.N. Charter was signed and ratified by 51 States) the Family of Nations has more than trebled. The U.N. now comprises of 166 States which may swell to 174 in a near future.

Development of International Law during 19th and 20th centuries :

There were many factors which led to the development of Law in 19th and 20th centuries. The relation of the State and their mutual contacts had greatly increased during the said period and many rules and principles were formulated on the basis of the practice of States and the needs and requirements of the changing times and circumstances. We will discuss them under the following headings :—

(1) *Congress of Vienna, 1815.*—The Congress of Vienna, 1815, was a landmark event for the development of International law. It was the first important European conference where many rules of International law were formulated, *e.g.* rules relating to International rivers, classification of diplomatic agents, etc.

(2) *Declaration of Paris, 1856.*—The Declaration of Paris was a law-making treaty in which many rules relating to the naval warfare were laid down. Attack on undefended

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[25] Oppenheim, See supra note 16, at pp. 106-7.

[26] Ibid. at p. 107.

* See also for I.A.S. (1956), Q. 1 ; For answer see also matter discussed under the heading 6, Emergence of Large Number of New States in Chapter 1 and Chapter on "Subjects of International Law."

[27] Oppenheim, note 16, at p. 49.

people during naval war was prohibited. It was also laid that enemy ships could be sunk or otherwise destroyed during war but before doing so, precautions should be taken to save the life of the crew of the ship.

(3) *Geneva Convention, 1864.*—Many rules relating to the wounded and sick members of the armed forces during land warfare were laid down in Geneva Convention of 1864. Killing of wounded soldiers was prohibited and rules were made for providing certain facilities to them.

(4) *Hague Conferences of 1899 and 1907.*—Hague Conferences of 1899 and 1907 are rightly reckoned as great landmarks relating the development of International Law. They resulted in the adoption of several conventions on various subjects of International concern. These conferences emphasized the settlement of International disputes through peaceful means. Many rules of International Law relating to land warfare and naval warfare were formulated. Bombardment over undefended people was declared illegal. Endeavour was also made to determine the limits of armaments and to achieve ultimately disarmament. Duties and rights of neutral States during naval war were also clearly laid down. Yet another great contribution of the Hague Conferences was the establishment of the Permanent Court of Arbitration. It was a landmark event in the history of the development of International Law. It contributed much in the development of International Law. It contributed much in the attainment of the objective of International Law to settle international disputes through peaceful means.

(5) *The League of Nations.*—After the First World War, the nations of the world felt the need of an International organisation which might be able not only to regulate amicably the mutual relations among the nations but could also prevent future wars. The League of Nations was established under the Treaty of Versailles, 1919. The League of Nations, for the first time, imposed certain restrictions upon the nations' right to resort to war at their will. The Covenant of the League of Nations provided, that before resorting to war, they would first settle their disputes through arbitration, judicial settlement, or enquiry by council. It was also provided that even if their disputes were not solved through these means, they would not go to war until the lapse of three months after such failure. It was further laid down that a member of the League going to war in violation or disregard of the provisions of the Covenant would be deemed to be the enemy of the whole League of Nations. Yet another great achievement of the Legaue of Nations was the establishment of the Permanent Court of International Justice which contributed much to the progressive development of International Law. The covenant of League of Nations was in fact a law-making International Treaty. It was the auspcious beginning of a good trend. "Since the establishment of League of Nations the development of International law has been accomplished primarily through the creation of International organisations by law-making treaties and the conclusion of law-making treaties through International organisations."[28]

(6) *Treaty of Locarno of 1925.*—France, Britain, Germany and Italy, etc., concluded the Treaty of Locarno whereby Germany, France and Belgium undertook the obligation of not using force in the settlement of their boundary disputes. The parties to the treaty also expressed their resolve to settle their disputes through peaceful means. Germany, however, refused in 1936 to follow the provisions of this Treaty.

(7) *Kellog-Briand or Paris Pact of 1928.*—This pact was a landmark in so far as the parties to it renounced war as an instrument of their national policy for the settlement of international disputes. It was a very significant International event for regulation over war.

(8) *Geneva Convention, 1929.*—This convention was signed by 47 States of the world. Many rules relating to the treatment of prisoners of war were laid down in this convention. Reprisal against prisoners of war, cruelty towards them and collective penalties against them were prohibited. Rules were also formulated for providing medical and other facilities to the prisoners of war.

(9) *Second World War.*—Almost all the above-mentioned rules of International Law were flagrantly violated during the Second World War which turned into a 'total war'. It,

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[28] Edward Collins, International Law in Changing World (1969), p. 426.

however, sowed the seeds of a future world organisation because the devastating effects and hair-splitting experiences of the war once more compelled the nations of the world to make their attempts afresh to establish an International organisation which may ensure lasting peace to the world and establish rule of law in the International field. Consequently, the Second World War indirectly led to the eventual establishment of the United Nations.

(10) *The United Nations**.—The United Nations Charter came into force on October 24, 1945 and thus the United Nations was established. In the beginning the number of its members was only 51 which has now swelled to 193. The United Nations is an International treaty which regulates the mutual relations of its members. The development of International Law received a great impetus under the United Nations. Article 13, Paragraph 1 (a) of the Charter provides that the General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and "encouraging the progressive development of International Law and its codification". For this purpose, the General Assembly established the International Law Commission which conducts study and research in different aspects of International Law and submits its reports to the General Assembly. At an early stage attempts were made to set a dividing line between the 'progressive development' and 'codification.' But as remarked by Manfred Lachs, President of the International Court of Justice in his commemorative speech delivered at special meeting of the U.N. General Assembly on 12th October, 1973... "it has become clear that the two processes—progressive development and codification—far from being mutually exclusive, in fact merge. It was found, as was bound to happen, that in some domains the distinction established between the two activities could hardly be maintained."[29] Further "the International Law Commission has performed its task with great distinction. Declarations have been enunciated, important principles have been formulated, new conventions have been drafted, and the ways and means for making evidence of customary law more readily available received the attention of the Commission also."[30] It has also prepared draft articles of several conventions and treaties which have been eventually adopted. It has thus creditably performed the task of assisting the General Assembly in "encouraging the progressive development of International Law and its codification." The more important of such treaties and conventions are Vienna Convention on Diplomatic Relations, 1961, Vienna Convention on the Law of Treaties, 1969, Vienna Convention on State Succession in respect of Treaties, 1978, U.N. Convention Against Removal of All Sorts of Discrimination Against Women, International Convention on Protection and Punishment of Crimes Against Internationally Protected Persons (including Diplomatic Agents), 1973, International Convention on Representatives of International Institutions, 1975,. International Convention on State Property, Archives and Debts, 1983, U.N. Convention on the Law of Sea, 1982, International Convention for the Suppression of Terrorist Bombings, International Convention for the Suppression of Financing of Terrorism, 1999, International Convention for the Suppression of Acts of Nuclear Terrorism, 2005.

Thus after the establishment of the United Nations the development of International Law has been effected mainly through multilateral law-making treaties. The chief objective of International Law is to establish the rule of law in International field and to ensure the maintenance of international peace and security. It is possible only when it adopts itself to the changing times and circumstances. In the words of Edward Collins : "It is equally clear that if International Law is to serve this purpose effectively, it must be continuously developed by revision in content, expansion of scope and improvement of the securing compliance, so that it is kept in accord with the changing needs of the international community." To conclude in the words of Manfred Lachs. "...... it is true that only gradually international law has acquired new dimensions. It has followed man's foot-steps throughout his journey in time and space. It has followed him in his explorations when he crossed oceans and landed on new shores. Such ventures brought Europeans into contact with alien civilizations, giving rise to confrontations, *inter alia,* concerning the nature of the law of nations as seen through different eyes. Owing to the great strides in relations between States, in science and technology, international law has extended its rules until it embraces today all nations in their contracts and into whatever domains and dimensions their activities extend."[31]

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* See also for C.S.E. (1996) Q. 5(b).

[29] "The Twenty-fifth Anniversary of the International Law Commission", I.J.I.L. Vol. (1974), p. 1 at p. 2.

[30] Ibid, at p. 3.

Review of International Law during the Second Millennium

N.B.—For this please *see* Chapter 1 entitled "Introduction"

Challenges before International Law during the Third Millennium—

N.B.—For this also please *see* Chapter 1 entitled "Introduction".

Schools of International Law

The main Schools of International Law which deserve mention are following :

(1) Natural Law School, (2) Grotian School, (3) Positivist School, (4) The so-called Anglo-American and Continental School of Thought in International Law.

(1) Natural Law School.—The view points of naturalists has already been discussed earlier under the heading *"Distinction Among Naturalist, Positivists and Grotians'*

[N.B.—For a further discussion please see also matter discussed above under the heading *"Theories as to Law of Nature" and "influence of Natural Law"* in chapter 2 entitled, *"Definition, Nature and Basis of International Law"].*

(2) Grotian School.—This has been briefly discussed earlier under the heading *"Grotians"* but it needs further elaboration here. The main features of Grotian tradition, as summarised and explained by Lauterpacht in one of his articles are following :

(i) The subjection of totality of International relation to the rule of law.—The central theme and the main characteristic of Grotians' treaties that Grotius conceives of the totality of the relations between states as governed by law.

(ii) The acceptance of the Law of Nature as an indepedent source of international law.—According to Grotius, law which was binding upon states is not solely the product of their express will. He advocated and emphasized the Law of Nature as an independent source of international law. By securing the concept of law of nature, Grotius enhanced authority and dignity by making it an integral part of international law. "By doing this, he laid, more truly than any writer before him, the foundation of international law."

(iii) The affirmation of the social nature of man as the basis of law of nature.—According to Grotius, the social nature of man was the basis of the law of nature. He defined natural law as the dictate of right reason, indicating that an act, from its agreement or disagreement with *the relation and social nature* of man has in its moral turpitude or moral necessity, and consequently that such an act is either forbidden or commanded by God, the author of nature.

(iv) The recognition of the essential identity of States and Individual.—At the end of the nineteenth century, Weslake, observed : "The society of States ...... is the most comprehensive form of Society among men, but it is among men that it exists. States are its immediate men ultimate members. The duties and rights are only the duties and rights of men who compose them." But it was Grotius who was the first to have recognised the essential identity of states and individuals and advocated that rules and principles applicable upon individual should also be applied upon states.

(v) The rejection of the reason of state.—Yet another characteristic feature of Grotius teaching was his denial of the 'reason of State' as a basic and decisive factor of international relations.

(vi) The distinction between just and unjust Wars.—Grotius denied the states of the absolute right of war for he emphasized the distinction between just and unjust wars. According to him, a just war is one which is fought for a just cause. It need not be overemphasized here that Grotius deserves full credit for emphasizing this distinction between just and unjust war which was later on further developed under the Covenant of

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[31] "The Twenty-fifth Anniversary of the International Law Commission", I.J.I.L. Vol. 14 (1974), p. 1 at p. 4.

the League of Nations, the Pact of Paris of 1928 and finally, the charter of the United Nations.

(vii) The doctrine of qualified Neutrality.—The distinction between just and unjust war led Grotius to enunciate the doctrine of qualified neutrality. According to Grotius, "It is the duty of those who keep out of war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or where by the movements of him who wages an unjust war may be hampered." These duties, however, did not include the positive obligation to assist actively the state fighting a just war. Thus, as remarked by Lauterpacht, "with the drastic limitation of the right of war as adopted in the Covenant of the League of Nations and in the General Treaty for the Renunciation of War, the law restored the historic foundations of qualified neutrality as taught by Grotius."

(viii) The binding force of promises.—Grotius emphasized the binding force of promises and held the view that obligation to abide by pacts of the essence of social contract. In modern terminology, it is referred as *pacta sunt servanda* but it is pointed out that the ultimate source of legal obligation cannot logically, be explained in terms of law, Grotius held the view that law of nature was the binding force of the Law of Nations.

(ix) The fundamental rights and freedoms of the individual.—Though it appears alien to the spirit of this teaching, Grotius must be given some share on the development of the concept of fundamental rights and freedoms of the individual. He advocated the right of the individual to refuse to carry arms in an unjust war and championed his claims such as right of expatriation, the rights of economic freedom, right to have plebiscite for transfer of part of national territory.

(x) The idea of peace.—Though he did not deny the right of the state to wage war, he advocated the idea of peace and proposed various methods for the settlement of disputes such as negotiation and arbitration.

(xi) The tradition of idealism and progress.—Grotian tradition is a tradition of idealism and progress. "He initiated or gave support to progressive ideas in various fields in the sphere of international relations. He was one of the first to assist the suppression of crime by urging extradition of criminals as a matter of legal duty. He did more than any of the other founders of international law in developing theory and elucidating the practice of diplomatic immunities. He supplied the basis of modern law of state responsibility founded on fault as distinguished from absolute liability and thus helped to displace the undiscriminating and a chronic practice of reprisals as a normal means of redressing grievances. He urged, and laid down as a rule of law, the principle of freedom of navigation on international rivers and canals. His share in the evolution of the principle of the freedom of the seas needs no elaboration. In all these matters his teaching became part of international practice, wholly or in part. In others, although it has remained a mere postulate or reason, it is not without significance."

To quote Judge Lauterpacht again, "Some of these elements of the Grotian tradition have now become part of the positive law ; others are still an aspiration. But they explain why Grotius's work has remained an abiding force and not merely an episode, however important, in the literature of international law, they explain why writers and statesmen have turned to Grotius not only as a source of the evidence of the law as it is, but also as a well-spring of faith in the law as it ought to be : Grotius did not create international law. Law is not made by writers : What Grotius did was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also a Universal moral code ...... *De Jure Belli ac Pacis* is pre-eminently a treatise which must be judged not by reference to its method but by its influence on the doctrine and on the practice of the Law of Nations : It satisfied the craving in jurist and layman alike, for a moral content in the law. In stressing and, on the whole, maintaining the distinction between law and morality, it vindicated the place of the Law of Nations in legal science : Last but not the least—it became identified with the idea of progress in international law."

The followers of Grotius were called Grotians. The contribution of the Grotians and their distinction with the Naturalistis and Positivists has been discussed briefly earlier in this chapter under the headings *"Grotians* and *Distinction Among the Naturalists, Positivists and Grotians."*

(3) Positivist School of law.—The positivists believe in law *postivum i.e.* law which is fact or that law enacted by appropriate legislative authority is law which exists in fact and is binding. They emphasize law which is in fact as distinct from law which ought to be, the chief characteristic of Law of Nature. Applied to international law, positivists defend the existence of a positive Law of Nations as the outcome of custom or international treaties. A brief reference may be made here to Richard Zourche (1590-1660), Professor of Civil Law at Oxford and a Judge of the Admiralty Court. His book which appeared in 1650 and called the first manual of the positive Law of Nations, earned for him the title of '*Second founder of the Law of Nations*'. As pointed out by Oppenheim, "The stand point of Zouche is totally different from that of Grotius in so far as, according to him the customary Law of Nations is the most important part of that law, although as a child of that time, he does not at all deny the existence of a natural Law of Nations ...... The distinction between the natural Law of Nations, chiefly treated by Grotius, and the customary or voluntary Law of Nations, chiefly treated by Zouche gave rise in the seventeenth and eighteenth centuries to three different schools of writers on the Law of Nations—namely, the 'Naturalists' the 'Positivists' and the 'Grotians'." Further, "The 'Positivists' are the antipodes of the Naturalists. They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche. The Positivist writers had not much influence in the seventeenth century in which the Naturalists and Grotians carried the day, but their time came in the eighteenth century."

[*N.B.*—For further discussion see also matter discussed above under the heading, *Distinctions Among the Naturalists, Positivists and Grotians."* See also matter discussed under the heading 'Positivism' in chapter 2].

(4) The so-called Anglo-American and Continental Schools of thought in International Law.—Some writers have expressed the view that there exist in international law two different schools of thought, the Anglo-American and the continental. Lord Hailsham, the then Lord Chancellor, Prof. Pearce Higgins, Sir John Fischer Wiliams, and Prof. Brierly subscribed to this view which became prevalent in some countries, particularly, England and America. The writers who subscribed to this view in fact based their view on the difference between the Anglo-American and continental practice in respect of certain specific matters relating to the Law of Peace, Law of Peace and doctrines of Municipal Law of possible relevance in International Law.

As regards the Law of Peace, clear examples of topics in respect of which difference existed were those relating to jurisdiction over foreign ships in national waters and jurisdiction over aliens. In respect of the jurisdiction over foreign ships Judge Lauterpacht has rightly observed that the divergence in this respect has been shown to be "a matter of form rather than of substance." Further, "The lawyer surveying this part, of international law will be impressed both by large measure of uniformity with which its rules are understood, and applied throughout the world and by the fact that such differences as exist, far from being reducible to a clash of Anglo-American and continental ideas, over their origin and preservation to altogether different reasons." While in some European Countries like France and Italy, the jurisdictional immunities of diplomatic envoys or public ships are granted on the basis of the question whether the activities in question are of public or private character. But this practice is not followed in Germany. On the other hand, courts in Britain and America do not consider the character of the State activity in question as relevant. As regards jurisdiction over aliens in respect of crimes committed abroad, English and American law do not assume jurisdiction but jurisdiction is assumed by the law of Italy, Turkey, China and Mexico. However, Germany, Spain, France, the Netherlands etc. follow Anglo-American practice in this respect. Therefore it is not proper to say that Anglo-American practice is different from the continental countries.

As regards the Law of War, it is pointed out that differences exist in respect of matters such as blockade and enemy character. According to the practice prevalent in Britain and America, a blockade, breaking vessel was liable to seizure when the master had actual or constructive knowledge of the blockade. On the other hand, in continental countries an actual attempt to break the line of blockade was considered necessary for the infliction of punishment. But in the course of World War most of these differences disappeared as the result of reprisals frequently resorted to, the doctrine of continuous voyage and the extension of the list of contraband goods. Yet another example of the difference pointed out is in respect of enemy character. In U.K., U.S. Japan, Netherlands and Spain, both nationality and domicile were considered relevant for determining enemy character. On the other hand, enemy character was determined on the basis of nationality of the owner in France, Germany, Austria, Hungary, Italy and Russia. But as pointed out by Lauterpacht, "in view of the character of the measures adopted by Great Britain by way of its reprisals and otherwise, the question of enemy character lost much of its importance in relation to liability to capture, it remained important in regard to municipal legislation concerning trading with enemy. It was in this respect that both France and Great Britain, the representative countries of the 'two schools' abandoned their respective position held before the war and cumulative the two tests."

To conclude in the words of Judge Lauterpacht, "...there is no substance in the view that there exist two schools of international law, the Anglo-American and continental either in regard to specific question of International law, or in respect of differences in those questions of municipal law which are of possible relevance in international law, or in the matter of general approach and method. The work of international tribunals shows that international judicial settlement, far from being impeded by the alleged existence of 'two schools of thought' is not actually confronted with the problem. An analysis, ... of the work of the Permanent Court of Justice in general and as the dissenting opinion and observation appended to the Judgments and Advisory Opinions, and observations would show that the question has not arisen there at all."

CHAPTER 6

CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW*

Meaning and definition :

By the term codification we ordinarily mean the process reducing the whole body of law into Code in the form of enacted law. It generally connotes a systematic arrangement of the rules of law which are already in existence. According to Sir H. Lauterpacht, "......The task of codifying International Law, if it is to mean anything, must be primarily one of bringing about an agreed body of rules already covered by customary or conventional agreement of State." [1] But this is the narrow meaning of the term 'Codification.' In its wider sense, it may also mean modification of the existing rules of law ; so as to keep them pace with time and adapt them in accordance with the needs of time. "There is a school of thought which holds that codification in the proper sense of the word can only mean writing down of already existing rules ; though it usually has to be conceded that in practice even a strict codification in this sense may involve the making of few minor changes in the law...... To adopt too strict a definition of the process involved is therefore to defeat the very ends for which the machinery is to be employed." [2] "Codification means any systematic statement of the whole or part of the law in written form, and that it does not necessarily imply a process which leaves the main substance of law unchanged, even though this may be true of some cases. In other words, codification properly conceived is itself a method of the progressive development of law." [3] "...The two processes—progressive development and codification, far from being mutually exclusive, in fact merge." [4]

Reference may also be made here to Article 15 of the Statute of the International Law Commission which provides that "the expression "progressive development of International Law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law yet has not been sufficiently the very ends for which the machinery is to be employed." [2] Therefore, "Codification of International Law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine. It may be noted that "Mere codification without the element of progressive development would defeat the very purpose of law-making by introducing a static concept of law. Thus it is now well recognized by all codifying institutions to consider equally the developmental aspect while engaged in the codification of the law. In fact progressive development is the very life and blood of codification...... In short, therefore, the first essential ingredient of codification is furnished by the aspect relating to 'progressive development' which must always remain the very pith of this theme. This must necessarily be so if the legislative function has at all to be performed for the international community so essential for the maintenance of world public order." [5]

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* See for P.C.S. (1968), Q. No. 4 ; P.C.S. (1971), Q. No. 2 and P.C.S. (1964), Q. No. 3(a).

[1] Codification and Development of International Law, A.J.I.L. Vol. 49 (1955), p. 16 at p. 22.

[2] R.Y. Zennings, "The Progressive Development of International Law and its Codification, BYBIL, Vol. XXIV (1947), p. 301 at p. 302.

[3] Ibid.

[4] Manfred Lachs, "The Twenty-Fifth Anniversary of the International Law Commission", I.J.I.L. Vol. 14 (1974), p. 1 at p. 2 ; see also R.S. Pathak, Law Commission in the Codification and Progressive Development of International Law", I.J.I.L. Vol. XVII (1977), p. 1 at p. 2.

[5] Judge Nagendera Singh, "Codification and Progressive Development of International Law : The Role of the International Court of Justice." I.J.I.L., Vol. 18 (1978), p. at pp. 2-3.

History of codification.—The history of codification dates back to the end of the 18th century when the idea of codification of international law was conceived by Bentham. Before him an unsuccessful attempt was made by the French Convention to draw up a declaration of the Rights of Nations in 1792.

Declaration of Paris, 1856.—The Declaration of Paris occupies a place of significance in the development of International Law. This Declaration was signed by Britain, France, Austria, Russia, Turkey, Prussia and Sardinia after the end of the Cremean War in 1856. This declaration laid down the principles relating to (a) abolition of privateering ; (b) non-capture of neutral goods except contraband of war, under enemy flags ; (c) Blockade to be binding must be effective ; and (d) except contraband of war, enemy goods cannot be captured under neutral flag.

Codification by individual writers.—Some individual writers also contributed to the codification of International Law. The first important attempt in this connection was made in 1861 by an Austrian jurist, Alfons Von Domin-Petrushnveez who for the first time showed the possibility or the codification of International Law. In 1863, Prof. Trancis Liber of Columbia University Law School, New York, attempted to codify the laws of war. Besides this, Swiss Jurist Bluntshii in 1868, David Dudley Field in 1872, Levi in 1887, Italian Jurist Paspuale Fiore in 1890, E. Duplexis in 1906 and Jerome Internescia in 1911 published their Codes of International Law. Moreover Oppenheim, Hall, Phillimmore and Hyde also deserve the credit of bringing out the rules of International Law in a systematised form of a Code.

The Two Hague Conferences.—The First Hague Conference, which was convened by Emperor Nicholas II of Russia in 1899 resulted in the adoption of following two conventions in the form of a Code : (a) Convention on the Pacific Settlement of International Disputes ; and (b) Convention on the Laws and Customs of War on land. These conventions proved to be great milestones in the field of codification of International Law. Being encouraged with the results of the First Hague Conference, the Second Hague Conference was convened in 1907. This conference produced as many as thirteen conventions relating to warfare and neutrality in war on land and sea, the status of enemy merchantmen at the outbreak of war, bombardment by naval forces, conversion of merchantships into men-of-war. This conference was attended by 44 States.

Declaration of London.—A naval conference was held in 1909 at London to draw up an agreed list of contraband goods. The agreement reached was incorporated in a Declaration known as Declaration of London, 1909. But it never came into force as it was not ratified. It lost all its importance on account of the development of First World War, 1914, into a total war.

Codification under the League of Nations.—The work of codification of International Law received a great impetus under the League of Nations. "It was left to the League of Nations, to approach in a systematic manner the problem of codification properly called." [6] The League Council appointed a Committee of sixteen Jurists in 1924 to report to Council subjects which were ripe for codification. The Committee recommended that the following subjects were ripe for codification : (1) Nationality ; (2) Territorial waters ; (3) State responsibility for damage done in their territory to the persons or property of foreigners ; (4) Diplomatic immunities and privileges ; (5) Procedure of International Conference and Procedure for the conclusion and drafting of treaties ; (6) Exploitation of the products of the sea ; and (7) Piracy. On the recommendation of the said Committee, the Assembly decided that a conference should be held at Hague for the purpose of codifying the topics of (a) nationality ; (b) territorial waters ; and (c) responsibility of States for the damage done to foreigner in their territories. The Committee of experts did not cease its work ; it continued its work and reported in 1928 to the Council that the following two topics were also ripe for codification : (1) Law relating to functions and competence of Consuls ; and (2) the competence of courts regarding foreign States.

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6. L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 60.

The Hague Codification Conference of 1930.—Hague Conference of 1930 may be said to be the first conference on the codification of International Law. Three committees were set up for each of the topics, *i.e.* nationality, territorial waters and responsibility of States for the damage done to foreigners in their territories. No general agreement could be reached in regard to territorial waters and responsibility of States for the damage done in their territories to the property and person of foreigners. But the Committee on nationality adopted several conventions on questions relating to the conflict of Nationality Laws and Statelessness.

Codification under the United Nations.*—Article 13(1) (a) of the U.N. Charter lays down that the General Assembly shall initiate studies and make recommendations for the purpose of "promoting international co-operation in the political field" and "encouraging the progressive development of International Law and its codification." "The most important task of codification is the systematisation and the progressive development of this amorphous and relatively unorganised body of law. It is surely evident that the implementing of Article 13 of the Charter is a task of urgency and importance of which yield place to none of the other problems that face the international law today." [7] The U.N. General Assembly took the task of "encouraging the progressive development of international law and its codification" in all seriousness. On December 11, 1946, the General Assembly appointed a committee for the progressive development of International Law and its codification. In 1947, the General Assembly decided to set up an International Law Commission, an International Law Commission was elected and it met on April 11, 1949. As provided under Article 1 of the Statute of the International Law Commission, the Commission shall have for its object the promotion of the progressive development of international law and its codification. The distinction between the two terms has been explained earlier. The Commission also considers proposals and draft multilateral conventions submitted by the Members of the U.N., the principal organs of the U.N. other than the specialized agencies, or official bodies established by inter-governmental agreement to encourage the progressive development of International Law and its codification and transmitted to it for that purpose by the Secretary-General.[8] It is provided that the Commission shall survey the whole field of International Law with a view to selecting topics for codification having in mind existing drafts whether governmental or not. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly. The Commission shall give top priority to requests to the General Assembly to deal with any question.[9] Further, Article 24 provides that the Commission shall consider ways and means for making the evidence of customary international law more readily available, such as, the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

International Law Commission consists of 34 members elected for a period of five years.

Work of the International Law Commission.**—"The establishment of ILC represented a turning point in the 'codification movement', understood as the movement for the systematic presentation of international law in the form of written rules representing a restatement of existing rules of international customary law or the formulation of new ones." [10] On November 21, 1947, the General Assembly directed the International Law Commission : (a) to formulate the principles of International Law recognised in Charter as well as in the judgment of the Nuremberg Tribunal ; (b) to prepare a draft code of offences against the peace and security of mankind ; (c) to prepare a draft declaration on the rights and duties of States ; and (d) to suggest the desirability and possibility of establishing an international judicial body for the trial of genocide and certain other crimes. The Commission began its work in 1949 and since then it has done commendable work in respect of the codification of International Law. It decided to give priority to the following three topics : (i) Law of Treaties ; (ii) Arbitral Procedure ; and (iii) Law Relating to the High Seas.

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* See for I.A.S. (1966), Q. No. 11 ; P.C.S. (1978), Q. No. 1.

[7] Zennings, see Supra Note 2, at p. 329.

[8] Article 17(1) of the Statute of the International Law Commission (I.L.C.).

[9] Article 18 of the Statute of the I.L.C. 1 ; C.S.E. (1987) Q. 5 (a).

** See for P.C.S. (1973), Q. No. 1.

[10] Carl—August Fleischhauer, "The United Nations and the Progressive Development and Codification of International Law". I.J.I.L., Vol. 25 (1985) p. 1.

By the year 1971, the Commission submitted final drafts or reports relating to : (1) Regime of the High Seas ; (2) Regime of Territorial waters ; (3) Nationality (including statelessness) ; (4) Law of Treaties ; (5) Diplomatic Intercourse and Immunities ; (6) Consular Intercourse and Immunities ; and (7) Arbitral Procedure. In addition to this, the Commission has also worked on the following topics : (1) Draft Declaration on Rights and Duties of States ; (2) Formulation of the Nuremberg Principles ; (3) Draft code of offences against the Peace and Security of Mankind ; (4) Question of Definition of Aggression,[11] (5) Question of International Criminal Jurisdiction ; (6) Question of Reservation of Multilateral Treaties ; (7) Extended Participation in General Multilateral Treaties concluded under the auspices of the League of Nations ; (8) Nationality including Statelessness ; (9) Special Missions ; (10) Representatives of States of International organisations ; (11) Prevention and Punishment of crimes against Diplomatic Agents and other Internationally Protected Persons ; (12) The Most-Favoured-Nation clause ; (13) State Responsibility ; (14) Succession of States in Respect of Treaties ; (15) Succession of States in Matters other than Treaties ; and (16) The Law of Non-Navigational Uses of International Watercourses.

It may be noted here that although the Commission has dealt with a large number of topics as noted above, since 1949 its major contribution has so far been in the fields of the (i) law of treaties, (ii) law of diplomatic and consular relations, and (iii) the law of Sea. In addition to this, in pursuance to Article 24 of the Statute as noted above, the Commission made useful recommendations on making the evidence of customary international law more readily available, pursuant to which the United Nations Juridical Year Book has been published since 1963 as well as U.N. Legislative Series, and Report of International Arbitration Awards. These publications along with the Year Book of the International Law Commission itself serve as rich source-material.[12] The more important of the subjects presently under the consideration of the Commission are—(i) The Most-favoured Nation Clause ; (ii) State Responsibility ; (iii) Succession of States in Matters other than Treaties ; and (iv) Law of Non-Navigational uses of International water-courses.[13]

It may also be noted that the term of earlier Commission expired on 31 December, 1976 and on 17 November, 1976, the General Assembly elected by secret ballot the entire membership of 25 legal experts of the new Commission for five years beginning from 1st January, 1977. Dr. S.P. Jagota of India was also elected as one of the members of the Commission.[14] On 18 November, 1981, the General Assembly adopted a resolution (36/39) enlarging the membership of the Commission from 25 to 35, according to the following pattern : (a) eight nationals from African states ; seven nationals from Asian states ; three nationals from East European states ; six nationals from Latin American states ; and eight nationals from Western Europe or other states. In fact, "...... the International Law Commission has performed its task with great distinction. Declarations have been enunciated, important principles have been formulated, new conventions have been drafted and the ways and means for making evidence of customary law more readily available received attention of the Commission also......... The work of the Commission has been of great importance to the world Court (*i.e.*, International Court of Justice), for in administering law and justice the Court has frequently relied upon it." [15]

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[11] The definition of aggression was finally adopted in 1974 ; For a discussion of the definition of Aggression see Chapter on "The Security Council".

[12] S.P. Jagota, "The Role of the International Law Commission in the Development of International Law", I.J.I.L., Vol. 16 (1976), p. 459 at p. 461.

[13] Ibid at p. 463 ; U.N. Monthly Chronicle, Vol. XIII No. 8 (Aug.-Sept., 1976), pp. 49-50 ; Richard D. Kearney, "The Twenty-fifth Session of the International Commission", A.J.I.L., Vol. 68 (1974), pp. 454-74.

[14] U.N. Monthly Chronicle, Vol. XIII, No. 11 (December 1976), p. 57.

"The record of ILC activities over 36 years of its existence includes no less than 13 multinational conventions adopted on the basis of drafts worked out in the ILC by specially convened United Nations conferences or, in two cases, by the sixth committee. The ILC conventions comprise such landmark instruments as the 4 Geneva Conventions on the Law of the Sea, 1958, the Convention on Diplomatic Relations of 1961, on Consular Relations, 1963 and on the Law of Treaties, 1969." [16]

Fifty-seventh session of the Commission was held from 2 May to 3 June and 11 July to 5 August, 2005. The Agenda of the this session was as follows :—

1. Organisation of the work of the session;
2. Diplomatic protection;
3. Responsibility;
4. Shared natural resources;
5. Unilateral acts of state;
6. Reservation to treaties;
7. Expulsion of Aliens;
8. Effects of armed conflict on treaties;
9. Fragmentation of international law—Difficulties arising from the diversification and expansion of international law;
10. Progress, procedures and working methods, Commission and its documentation;
11. Co-operation with other bodies;
12. Date and Place of 58th Session;
13. Other business.

Throughout the year the Commission has maintained a close relationship with the International Court of Justice. The Commission is informed by the President of the Court of its recent activities and of the case currently before it and the members of Commission are given opportunity to have an exchange of views with the President of the Court.

Fifty-eighth session of the Commission was held from May 1 to 9 June and July 3 to August 11, 2006.

Recent Conventions and Treaties.—Geneva Conventions on the Law of Sea, 1958, Vienna Convention on Diplomatic Relations (1961), 1965, Convention on Settlement of Investment Disputes between the States and Nationals of other States, Vienna Convention on the Law of Treaties, 1969 are some of the landmarks in the field of codification and progressive development of International Law. Besides these, Vienna Convention on Consular Relations, 1963, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973, International Covenants on Human Rights, 1966, Convention on Registration of Objects Launched into Outer Space, 1974, International Convention on the Elimination of All Forms of Racial Discrimination, 1966, International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, the Vienna Convention on the Representation of States in their Relations with International organisations of universal character (1975) ; Vienna Convention on the Succession of States in Respect of Treaties (1978) ; U.N. Convention on the Law of the Sea (1982) ; Vienna Convention on State Property, Archives and Debts, 1983 ; Convention on the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and Their Destruction, 1971; U.N. Convention on the Rights of the Child, 1989; U.N. Convention on Bio-Diversity, 1992; U.N. Convention on Forestry, 1992; U.N. Convention on Climate Change, 1992; International Convention for the Suppression of

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[15] Manfred Lachs, "The Twenty-fifth Anniversary of the International Law Commission", I.J.I.L., Vol. 1 (1974), p. 1 at pp. 3-4.

[16] Note 10, p. 2.

Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); International Convention for the Suppression of Acts of Nuclear Terrorism (2005) etc. also deserve a special mention. Moreover, for the progressive development and codification of International Trade Law, a United Nations Commission has been established.[17] These Conventions and Treaties had provided the International system with a legislative machinery which, though not equivalent to Municipal Legislative system, yet to some extent, may be said to be the counterpart of the legislative machinery of State legal system. As aptly remarked by Javier Perez De Cuellar, Secretary-General of the United Nations, "......the magnitude of the achievements of the U.N. in codifying, and progressively developing international law has no precedent in history. On land and sea, as well as in outer space, the United Nations, in the past 70 years, has helped to construct a legal network to regulate a wide range of international activities and to set forth international laws, rights and duties."[18]

Merits and Demerits of Codification

Merits of Codification :

(1) One of the defects of International Law is obscurity and uncertainty. Codification not only makes rules clear and certain but also reconciles conflicting and divergent views.

(2) Codification will be helpful in filling numerous gaps existing in International Law and also by providing for rules where there is none.

(3) Yet another merit of codification is that it will bring uniformity in the International legal system.

(4) Codification will also go a long way to end or at least greatly minimise the disagreement and confusion that prevails on many important matters.

(5) Codification will enhance the efficacy of International Law by increasing its binding force.

(6) The International Court of Justice and other Tribunals will find it easier to apply and enforce codified International Law.

(7) It will be easier and convenient to amend the codified International Law so as to keep it at pace with the tide of time.

Demerits of Codification :

(1) Codification is detrimental for the natural growth and future development of International Law. This defect can be remedied by a regular and scientfic revision of codes in order to incorporate changes in international conditions.

(2) Yet another disadvantage of codification is that it makes the system of law too rigid and unadaptable to new situations.

(3) Codification also makes the law too formal and conservative. This defect can be removed by progressive interpretation of International Law.

(4) New controversies arise due to codification.

(5) It gives rise to controversies in interpretation because of the hair-splitting tendency of Judges to interpret the law.

(6) International Law still being in its infancy, only a partial codification is possible.

(7) Last but not the least disadvantage of codification is that customary rules still form the bulk of International Law and many of them are not yet fully settled.

It may be noted that "Codification has ceased to be a technical task which can be entrusted to lawyers, it has become a political matter, a task of law creation, and in the absence of any International organ of legislative powers, the contents of the Code can be settled only if the representatives of the Governments can be made to agree upon them".[19]

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[17] As written by J.A.C. Gutteridge : "The Commission......will have an important part to play in the progressive development of International Law and its codification in the field of International trade, as well as its unification'. The United Nations in a Changing World (Manchester University, 1969), p. 85.

[18] "The Role of the United Nations in World Affairs", International Affairs (Moscow, October 1988), p. 88 at p. 89.

Conclusion.—A critical perusal of the advantages and disadvantages of codification, will lead as to irresistible conclusion that the advantages outweigh the disadvantages. Codification will make the law certain, simple, intelligible and, above all easily accessible to all. Many of disadvantages of codification may be removed by carefully planning and regular and scientific revision of the Code to incorporate changes in international conditions. "The objective of codification announced in the Charter of the United Nations can be attained without great difficulty in respect to certain less important relations of States, where the conflict of interests is not acute. In respect of other relations much will depend upon the mutual confidence that may result from the successful operation of collective security." [20] "Products of codification, even if initially approved or accepted only by a limited number of Governments, constitute a positive and tangible achievement and a starting point for a gradual extension of their operation." [21] In the clarification, development and codification of public International Law, and United Nation's performance already exceeds the entire record of the nineteenth century *plus* that of the League of Nations." [22] It has been aptly remarked,[23] "The role of 'codification' and 'progressive development' assumes profound significance also because of the complex nature of growing international relations, which call for particular formulation and enactment. The articulate and specific instruments of law-making bilaterial or multilateral treaties, constitute the effective vehicle for regulating international or transnational interests concerning communications, health, conservation of resources, labour and social matters, marine resources and space law.[24] 'Codification, and 'Progressive' development therefore, play an important and vital role in the promotion of world peace, International development and progress. To conclude in the words of Judge Nagendra Singh "In the international field there is no law-making chamber or a legislature as such in the sense as it exists in the municipal shpere of the State and hence the function of codification in the inter-State context has not only the objective of scientfic determination of the law but also its formulation to meet the new needs of its Universal acceptance as required by the ever-changing demands of the world society of Sovereign States. Thus unlike codification in other fields it has to be admitted that as far as Codification of International Law is concerned it has to be substantially legislative in character. The process of codification must essentially embrace the need to change the law and to induce government to accept the revision of old laws and the formulation of new ones." [25]

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[19] J.L. Brierly, The Law of Nations, Sixth Edition (1963), p. 80.

[20] Fenwick, International Law, (Third Indian Reprint, 1971), p. 105.

[21] H. Lauterpacht. "Codification and Development of International Law", A.J.I.L. Vol. 49 (1955), p. 16 at p. 39.

[22] P.E. Corbett, The Growth of World Law (Princeton New Jersey, 1971), p. 180.

[23] R.S. Pathak, "The Role and means of Codification and Progressive Development of International Law", I.J.I.L. Vol. 17 (1977), p. 137 at p. 145.

[24] See Wolfgang Friedmann : The Changing Structure of International Law, 1964, pp. 122-123.

[25] Judge Nagendra Singh, supra, note 5 at p. 2.

CHAPTER 7

RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW[*]

Certain theories have been propounded to explain the relationship between International Law and Municipal Law. Following are some of the prominent theories in this connection : (1) Monism ; (2) Dualism ; (3) Specific Adoption theory ; (4) Transformation theory ; and (5) Delegation theory. These theories have been put forward to explain the relationship between International Law and State Law. Of all these theories the most popular are 'Monism' and 'Dualism' and they are diametrically opposed to each other.

Main Theories[**] :—

(1) Monism.[***]—The exponents of this theory emphasise the scientific analysis of the internal structure of law. According to them law is a unified branch of knowledge, no matter whether it applies on persons or other entities. "According to monist belief, international obligation and municipal rules are facets of same phenomenon, the two deriving ultimately from one basic norm and belonging to the unitary order comprised by the conception of law." [1] "In their (*i.e.*, monists) view the science of law is a unified field of knowledge, and the decisive point is, therefore, whether or not international law is true law. Once it is accepted as hypothesis that international law is a system of rules of truly legal character, it is impossible, according to Kelsen (1881-1973) and other monistic writers to deny that the two systems constitute part of that unity corresponding to the unity of legal science. Thus any construction other than monism, and in particular dualism, is bound to amount to a denial of the true legal character of international law." [2] It has already been pointed out in the Third Chapter that international law is a law in the true sense of the term and keeping this view in mind, monism seems to be reasonable and correct theory. Wright, Kelsen and Duguit, etc. are some of the prominent exponents of monism.

According to the exponents of Monism International Law and Municipal law are intimately connected with each other. International Law and Municipal Law are the two branches of unified knowledge of law which are applicable to human community in some or the other way. In the view of the monistic writers, in the ultimate analysis of law we find that man is at the root to all laws. All laws are made for men and men only in the ultimate analysis.

Criticism.—Monism is a very sound theory. It is very difficult to disprove the view of Kelsen that man lies at the root of all laws. But in actual practice states do not follow this theory. They contend that Municipal Law and International Law are two separate systems of law. Further, each state is sovereign and as such is not bound by international law. States follow international law simply because they give their consent to be bound and on account of other reasons.

(2) Dualism.[****]—In the view of the dualistic writers, international law and State law are two separate laws. "The Monist view of law is part of philosophy according to which totality is a single structure. But within the framework of the unitary universe is diversity of phenomenon ...... Differences are significant and the dualist considers that Municipal law differs markedly from international precepts." [3] Monism remained in vogue for a long time. Monism exercised a great influence upon international law, because it had close association with natural law. In the 19th century, however, the existence of State-will and complete sovereignty of the State were emphasized. The conception of State-will was taken from Hegel, a German scholar and was further developed. Dualism is based on the complete sovereignty of States. The chief exponents of this theory are Triepel and Anzilloti. Triepel has pointed out the following differences between International Law and State law :

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[*] See for I.A.S. (1957), Q. No. 2 ; I.A.S. (1968), Q. No. 2 ; I.A.S. (1963), Q. No. 5 ; P.C.S. (1976), Q. No. 10(e) ; P.C.S. (1974), Q. No. 5 ; P.C.S. (1972), Q. No. 3 ; P.C.S. (1985) Q. 2. ; P.C.S. (1995) Q. 7(b) ; C.S.E. (1995) Q. 6(a).

[**] See also for P.C.S. (1977), Q. No. 1 ; P.C.S. (1987), Q. 2 ; C.S.E. (1986), Q. 5(a).

[***] See also for UPPCS (2004) Q. 8; UPPCS (2008) Q. 5.

[1] D.J. Latham Brown, Public International Law, London, Sweet & Maxwell, (1970), p. 265.

[2] J.G. Starke, Introduction to International Law Tenth Edition (Butterworths, Singapore, 1989) pp. 73-74.

[****] See for I.A.S. (1973), Q. No. 11 (c).

[3] D.J. Latham Brown, Supra Note 1, at p. 266.

(a) *Regarding subject.*—Individual is the subject of State law, whereas State is the subject of international law.

(b) *Regarding origin.*—Origin of State law is the will of the State whereas origin of the international law is the common will of States.

Criticism.—It is not correct to contend that International Law is binding only on States. In the modern period, International Law is applicable on States, individuals and certain other non-State entities. Besides this, the conception of State-will as the source of State law is incorrect. In fact State-will is nothing but the will of the people who compose it. Similarly, it is not correct to say that the origin or source of international law is common will of the States. There are certain fundamental principles of international law which are binding upon the State, even against their will. "Furthermore, it may be objected to Triepel's theory that it does not explain the existence of a general International law. Even international customary law becomes particular law for Triepel, its rules apply only to the State which by conclusive acts have declared adherence to the 'tacit' agreements' upon which they rest—a view that is at variance with reality." [4] Anzilloti has tried to explain the difference between international law and State law in a different way. According to him, there is a difference between the fundamental principles of international law and State law. The fundamental principle of the State law is that laws enacted by appropriate legislative authorities are to be obeyed. The fundamental principle of international law is *pacta sunt servanda,* namely, agreement between States are to be respected. On this basis, Anzilloti contends that the legal systems of international law and States laws are different. It cannot be denied that *pacta sunt servanda* is an important fundamental principle of international law. But to assert that it is the only basis of international law seems to be far from truth. In fact, it is an important illustration of all the important fundamental principles of international law. It fails to explain the binding force of customary rules of International Law in regard to which the States have not given their consent.

Whether Monism or Dualism is the correct theory[*] .—On the basis of above discussion, monism appears to be the correct theory but no theory can be complete in itself and it is not possible to include all the elements in it. The practice of States indicates that sometimes there is the primacy of international law, sometimes there is the primacy of the Municipal law and sometimes there is mixture of different legal system. For example in the *Greco-Bulgarian Communities* case,[5] The permanent Court of International Justice held, "it is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of the municipal law cannot prevail over the treaty." On the other hand, when the Municipal Courts find that the conflict between the International law and Municipal law is of such nature that cannot be avoided, they give primacy to the Municipal law. In this connection, *Mortensen* v. *Peters*[6] and *Sri Krishna Sharma* v. *The State of West Bengal*[7] deserve a special mention. From the technical point of view, Municipal law cannot give direction for any act which is prohibited under International law but in practice individuals are compelled to follow such laws.[8] Gould correctly observes : "As matters stand, each situation must be analysed by itself, including the tribunal before which litigation, if any, is brought in order to settle the question of which two conflicting rules of law of different orders prevail in the concrete dispute." [9]

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[4] Torsten Gihl, "The Legal Character and Sources of International Law" (Stockholm, 1957), p. 59.

[*] See also for UPPCS (2002) Q. 7(b) ; IAS (2003) Q. 8 (d).

[5] P.C.I.J. (1930), Series Bo. No. 17.

[6] 8, Sessions Cases (5th Series), 93 (1906).

[7] A.I.R. 1954 Cal. 598.

[8] Edwin Corchard, "Relation between International Law and Municipal Law", Virginia Law Review. Vol. 27 (1940), p. 137.

(3) Specific adoption Theory.—According to the positivists, international law cannot be directly enforced in the field of State law. In order to enforce it in the field of Municipal Law, it is necessary to make its specific adoption. In short International Law can be applied in the field of Municipal law only when Municipal law either permits it or adopts it specifically. This view is generally followed by States in respect of International Treaties. It is argued that unless there is specific adoption of the International Treaties (such as Tokyo Convention Act, 1975 and Vienna Convention of Diplomatic Relations Act, 1972 enacted by Indian Parliament) or there is some sort of transformation, International Treaties as such cannot be enforced in the municipal field. While considering the International Covenants on Human Rights, the Supreme Court of India observed, in *Jolly George* v. *The Bank of Cochin,*[10] "The positive commitment of the States Parties ignites legislative action at home but does not automatically make the covenant enforceable part of the *corpus juris* of India."[11] As regards specific adoption of international treaties by Indian Parliament, the Anti-Apartheid (United Nations Convention) Act, 1981, the Anti-Hijacking Act, 1982, the Suppression of Unlawful Act against the safety of Civil Aviation Act, 1982 and the International Monetary Fund and Bank (Amendment) Act, 1982 deserve a special mention.

Criticism.—This view is not correct in respect of the whole of international law because there are many principles of international law (especially customary rules) which are applied in the field of municipal law without specific adoption.

(4) Transformation Theory.—The exponents of this theory contend that for the application of international law in the field of municipal law, the rules of international law have to undergo transformation. Without transformation they cannot be applied in the field of municipal law.

Criticism.—This theory is based an consensual theory which has already been criticized. It may also be noted that it is not necessary for all treaties to undergo the process of transformation for their application in the field of municipal law. There are several law-making treaties which become applicable to the States even without undergoing the process of transformation. This theory has been severely criticized by the critics. It is, therefore, incorrect to consider that the transformation from one to other is materially essential.[12]

(5) Delegation Theory.—As pointed out earlier, transformation theory has been severely criticized by a number of jurists. The critics of transformation theory have put forward a new theory called Delegation theory. These critics point out that the constitutional rule of international law permit each State to determine as to how international treaties will become applicable in the field of State law. Thus, in fact, there is no transformation nor is there specific adoption in every case. The rules of international law are applied in the field of State law in accordance with the procedure and system prevailing in each State in accordance with its Constitution.

Criticism.—This theory can be regarded simply as a reaction against the theory of "dualism" and other theories based on positivism, one may ask where are and what are the constitutional rules of international law? When and how these rules have delegated power to state constitutions? This theory is far from true. In fact, each state is equal and sovereign and does not recognize any authority over and above it.

Thus there is a great controversy in regard to application of international law in the field of municipal law. In order to arrive at the right conclusion, it is necessary to go through the practice of States in this respect. But before we do so, it will be desirable first to consider the question of primacy. In other words, if there is a conflict between international law and State law, which will prevail ?

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[9] Gould, An Introduction of International Law, Seventh Edition, at pp. 161-62.

[10] A.I.R. 1980 S.C. 470.

[11] Ibid at p. 474, per Krishna Iyer, J. for facts of the case see Appendix II.

[12] Starke, Supra Note 2, at p. 76.

*Question of primacy.**—After discussing the different theories in regard to the relationship of State law and international law, it is necessary to conclude as to which will prevail in case of conflict ? According to the exponents of dualistic theory, there will be primacy of the State law. The basis of their view is that State is independent and sovereign. On the other hand, there is no uniformity of views among the writers of monistic theory. Some are of the view that there will be the primacy of international law. But some other jurists, such as Kelsen maintains that, in accordance with the facts and circumstances, there may be primacy of State law as well as international law. "Kelsen asserted a scientific indifference, though not a moral or political indifference, as between international and State monism, but contemporary jurisprudence for the most part deplores this indifference and posits the limitations of State Sovereignty by international law." [13]

Thus the view that State law will prevail in case of conflict between State law and international law is not correct. If we accept this theory, it will mean that there will be the primacy of more than 193 state legal systems. Acceptance of such theory will create anarchy and disorder in the international field. Besides this, this view is subject to the following criticism :

(a) If it is accepted that international law derives validity from the State Constitution, it will mean that with the disappearance of the State Constitution, the validity of the rules of international law will also disappear. This is a very absurd suggestion and cannot be accepted. Almost all the jurists are agreed on the point that the disappearance of State Constitution will not affect the validity of the rules of international law. Thus, the theory that international law is not necessarily binding on States sustained by so many theorists and jurists, though founded on essential error, can only aggravate this weakness in the system and postpone the maturity of that international legal order for which most of them profess to be working. It may also be noted that International Law exerts a definite check upon municipal law and holds the State responsible to the State whose nationals are injured by excesses in conflict with international law. There are innumerable precedents which have held States liable for their failure to perform international obligations." [14]

(b) When a new State is admitted to the family of nations, it becomes bound to obey the rules of international law even against its will. In fact, the duty of each State is to adopt its law and Constitution in accordance with the rules and principles of international law.

(c) Most of the States have accepted the supremacy of international law in their Constitutions.[15]

Thus, "since no doctrinal position seems to encompass all facts, it is likely that this controversy will continue indefinitely. Practice suggests that, in fact, a mixture of international law supremacy, municipal law supremacy and co-ordination of legal system exists." [16] In view of the prevailing controversy, each situation must be analysed by itself to decide as to whether there will be primacy of International Law or that of the municipal law.[17] In practice, national courts endeavour to interpret Statutes in such a way as not to conflict the provisions of international law.[18]

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* See for I.A.S. (1971), Q. No. 4 ; see also the British and Indian Practice discussed later on in this Chapter, C.C.S. (1981) Q. 6 ; see also theories discussed above.

[13] P. E. Corbett : The Growth of Law., (1971), p. 47.

[14] See Edwin Borchard, "The Relation between International Law, and Municipal Law". Virginia Law Review, Vol. 27 (1940), p. 137.

[15] See Felice Morgenstern, "Judicial Practice and Supremacy of International Law". BYBIL. Vol . XXVII (1950), p. 42 at p. 92. As pointed out by C.W. Jenks : "Where the doctrine of incorporation applies and International Law is accepted as part of law of the land, the clarification of international law by an international court or tribunal may be self-executory not only, in the sense that it determines the point of law at issue between the parties to the particular case but equally in the sense that the law as clarified becomes a part of law applicable as the law of the land in virtue of incorporation". The Prospects of International Adjudication (1964), p. 690 ; see also Christoph H. Schreuer, "The Authority of International Judicial Practice in Domestic Courts", I.C.L.Q., Vol. 23, Part 4 (1947), p. 681 at pp. 645-86.

[16] Edward Collins, International Law in a Changing World, p. 45.

STATE PRACTICES REGARDING THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND STATE LAW*

(1) British Practice.**—For the application of international law in Britain, distinction is maintained in regard to the customary rules of international law and the rules laid down by treaties. It will, therefore, be desirable to discuss them separately.

(A) *British practice in regard to customary rules of international law.*—In Britain, customary rules of International Law are treated as a part of British laws. British courts treat customary rules of international law as a part of their own law subject however to the following conditions. (a) Rules of international law should not be inconsistent with the British Statutes ; and (b) If the highest Court once determines the scope of a customary rule of international law, then all the courts in Britian are bound by it.[19]

Influence of the above practice.—Following is the influence of the British practice in regard to the customary rules of international law :—

(*a*) *Rules of Construction.*—The British Courts interpret the Parliamentary Statutes in such a way that they should not go against international law. In this connection the presumption is that Parliament never intends to violate international law. This rule is applicable only when the provisions of the Statutes are ambiguous. In case the provisions of the Statutes are clear and unabmiguous, they prevail over the rules of international law.

(b) *Rule of Evidence.*—In Britain, the rules of international law need not be proved through evidence.

Following are the exceptions of the British practice in regard to customary rules of international law :

(i) Acts of State do not come within the purview of the British courts, irrespective of the violation of international law.

(ii) *Prerogative powers of Crown.*—In some matters the British courts are bound to obey the prerogative powers of Crown. For example, if the Crown grants recognition to any State, the British courts are bound to accept it. They cannot question the matters coming within prerogative powers of the Crown.[20]

(B) *British Practice as to Treaties.*—In Britain the practice regarding the rule laid down by treaties is different from the practice in regard to the customary rule of international law. In regard to treaties, the British practice is based on the constitutional principles governing the relationship between Executive or Crown and Parliament. In regard to treaties, the matters, relating to negotiations, signatures, etc. are within the prerogative powers of the Crown. In Britain it is necessary that some type of treaties should receive the consent of Parliament. Either the Parliament accords its consent or adopts it in State law through the help of a statute. Such type of treaties are : (a) Treaties which affect the right of British citizens ; (b) Treaties which amend or modify common law or Statute law of Britain ; (c) Treaties which confer additional powers on Crown ; and (d) Treaties which impose additional financial burden on the Government. In addition to these, treaties which expressly provide that for their application the consent of the Parliament is required, consent of the Parliament is essential for their application. The consent of the Parliament is also necessary for the treaties which cede the British territory. Other types of treaties do not require the Parliamentary consent. Now the question arises if there is a conflict between a law enacted by Parliament and treaty, which will prevail. In this connection the House of Lords declared in *Ostime* v. *Australian Mutual Provident Society,*[21] that if a treaty has been enforced through law enacted by Parliament, then this will prevail over an earlier inconsistent British Law.

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[17] See Supra Note 9.

[18] See Mac:Leod v. U.S. 229 U.S. 434 (1913). See also *Mortensen* v. *Peters,* 18 Sessions Cases (5th Series) 93 (1906) ; *Shri Krishna Sharma* v. *The State of West Bengal,* A.I.R. 1954 Cal. 598.

* See also for P.C.S. (1987) Q. 2. (1963), Q. No. 5 ; I.A.S. (1954), Q. No. 1 ; P.C.S. (1968), Q. No. 6 ; P.C.S. (1985) Q. 2.

** See for I.A.S. (1974), Q. No. 1 (c) ; I.A.S. (1968), Q. No. 2 ; I.A.S. (1963), Q. No. 5 ; I.A.S. (1954), Q. No. 1 ; P.C.S. (1968), Q. No. 6 ; P.C.S. (1985) Q. 2.

[19] Starke, see supra note 2 at p. 78.

[20] See Starke, ibid, p. 80.

In *Solomon* v. *Commissioners of Customs and Excise,*[22] Diplock, L.J. observed that where by a treaty, the British Government undertakes to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can be achieved by legislation, the treaty, since in the English law is not self operating, remains irrelevant to any issue in the English wit until Her Majesty's Government has taken steps of legislation to fulfil its treaty obligations. Once the Government has legislated, the court must in the first instance construe the legislation. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out U.K.'s treaty obligations. But if the terms of the legislation are not clear and are reasonably capable of more than one meaning, the treaty becomes relevant for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including there in specific obligations; and if one of the meanings which can reasonably be ascribed to the legislation in consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption.

Reference may also be made to a more recent case namely. *International Tin Council case* (*J. H. Rayner Ltd.* v. *(Mining Law) Department of Trade and Industry*[23] This case relates to the claims of creditors against International Tin Council (ITC) after it failed to meet its depts. I.T.C. was an international organisation established by tin producing and tin importing States for regulating international marketing and production of tins. ITC was established by a treaty, the Sixth International Tin Agreement (ITA6) and it operated in United Kingdom because of a Headquarters Agreement between the ITC and the U.K. But these treaties were not incorporated in the national law of the U.K. although by an order of 1972, passed under the International Organisations Act, 1968, it was provided that the ITC would have the legal capacities of a body corporate. One of the creditors prayed that the U.K. Court, in view of the obligations of the State Parties to ITA 6, to enable claimants to recover directly against those States. Another creditor sought the appointment of a receiver of ITC so as to claim against the State Parties to ITA 6. Both these claims were rejected by the House of Lords unanimously.

Delivering the judgement Lord Oliver observed that treaties are not self executing. A treaty is not a part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned they cannot derive rights by treaties nor can they be deprived of the rights or subjected to obligations, and it is outside the purview of the courts not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant. However, it does not follow that the courts must never look at or construe a treaty. Where, for example, a treaty is directly incorporated into English law by Act of the Legislature its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature.[24]

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21. (1960) A.C. 459 at p. 476 ; (1959) 3 All E.R. 245 at p. 248.
22. (1967) 2 Q.B. 116.
23. (1990) 2 AC 418.
24. *Fothergill* v. *Monarch Airlines Ltd.*, (1981), AC 251 relied upon.

Moreover, it is well established that where a statute is enacted in order to give effect to U.K.'s obligations under a treaty, the terms of the treaty may have to be considered as to the meaning or scope of the statute. Besides this, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called upon to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract.[25]

In the instant case, the creation and regulation by a number of sovereign states of an international organisation for their common political and economic purposes was an act *jure imperii* and an adjudication of the rights and obligations between themselves and that organisation or, *inter se*, can be undertaken only on the plane of international law. Since ITA6 is an unincorporated treaty, there is simply no way in which the case can be put for a claim by ITC against its members for an indemnity or contribution which does not, in the ultimate analysis, involve a reliance upon, and the interpretation of its provision, so that the claim is equally incapable of adjudication under the limb of the principle of non justiciability.

(2) American Practice.*—In America also, the practice regarding customary rules of international law and the rules laid down by treaty is different.

(A) *American practice regarding customary rules of international law.*—The American practice regarding customary rules of international law is more or less same as the British practice. In America also customary rules of international law are treated as a part of American law. In the leading case *Paquete Habana,*[26] Justice Gray remarked, "International law is a part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of rights depending on it are duly presented for their determination." For this purpose, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations ; and, as evidence of these, to the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for the trustworthy evidence of what the law really is." [27] Besides this the American courts also interpret the Statute of the Congress in such a way that may not go against international law.

(B) *American practice regarding rules laid down by Treaties.*—American practice regarding rules laid down by treaties is different from British practice. In case of international treaties, the American practice is not based on the constitutional rules governing the relationship of the executive and Congress. In America, everything depends upon the provisions of the Constitution. Article VI of the American Constitution provides that Constitution of the United States, all laws made in pursuance thereof and the international treaties entered into under the authority of the United States shall be the supreme law of the land. Thus international treaties have been placed in the same category as State law in America. It may, however, be noted that in America the practice is that if there is a conflict in between international treaty and a State law, whichever is later in date shall prevail. If there is a conflict between American Constitution and an International Treaty, the former (*i.e.* the Constitution) will prevail. Besides this, in America treaties have been divided into two categories—self-executing treaties and non-self-executing treaties. Self-executing treaties are those treaties which become applicable in America without any Act or consent of the Congress. On the other hand non-self-executing treaties are those which can become applicable in America only after the consent of the Congress or through its adoption by a specific Statute.

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[25] *Philppson* v. *Imperial Airways Ltd.*, (1939) A.C. 332 relied on.

* See for I.A.S. (1974), Q. No. 1(c) ; P.C.S. (1968), Q. No. 6 ; P.C.S. (1980) Q. No. 2.

[26] (1900) 175 U.S. 677 at p. 700 ; see also *U.S.* v. *Melekh*, (1960) 190 F. Supp. 67.

[27] *Hilton* v. *Guyot*, 159 U.S. 113, 163, 164, 214, 215.

(3) Israeli Practice.—In *Eichman* v. *Attorney-General of the Govt. of Israel*,[28] the Supreme Court of Israel said that according to the law of Israel, which is identical on this point with English law, the relationship between municipal and international law is governed by the following rules :—

"(1) The principle in question becomes incorporated into the municipal law and a part of that law only after it has achieved general international recognition.

(2) This, however, only applies where there is no conflict between the provisions of municipal law and a rule of international law. But where a conflict does exist, it is the duty of the court to give preference to and apply the laws of the local legislature. True, the presumption must be that the legislature strives to adjust the laws to the principles of international law which have received general recognition. But where a contrary intention clearly emerges from the Statutes itself, that presumption loses its force, and the court is enjoined to disregard it.

(3)............ a local statutory provision, which is open to equivocal construction and whose content does not demand another construction, must be construed in accordance with the rules of public international law.[29]

(4) Greek Practice.—Article 28(1) of the new Constitution[30] of Greece provides that the generally accepted rules of international law, as well as international conventions from the time they are sanctioned by law and enter into force according to each one's own terms, shall be an integral part of internal Greek Law, and they shall prevail over any contrary provision of law. It, however, adds that the applications of the rules of international law and international conventions to aliens is always subject to the condition of reciprocity. As regards treaties, Article 36 of the Constitution provides that in respect of treaties on commerce, as well those on taxation, economic cooperation, and participation in international organizations or Unions, and any others that contain concession as to which under other provisions of the Constitution no provision can be made without a law, or that impose a burden upon the Greeks individually, shall have no force without sanctioning by a law voted by Parliament.[31]

(5) The French Practice.*—According to Articles 53 and 55 of the Constitution of the Fifth French Republic, international law is treated as a part of the law of France. The rules of customary international law are part of the law of France. Thus in this respect, the French practice is similar to those of the U.S. and U.K. As regards treaties, the French practice differs from the American practice. In France, international treaties and agreement concluded by France with other States, which are duly published, are administered and applied by the French Courts even though they are in conflict with the provisions of the Municipal Law of France and irrespective of the fact that they have been entered into earlier or later than the Municipal law in question. But like the American practice, the international agreement should not conflict with the French Constitution. In case there is a conflict between the two, the latter shall prevail.

(6) Soviet Practice.**—Article 29 of the draft Soviet Constitution provides : "The relations of the U.S.S.R. with other States shall be based on the observance of the principle of mutual renunciation of the use or threat of force, and of the principles of sovereign equality, inviolability of frontiers, territorial integrity of States, peaceful settlement of disputes, non-interference in international affairs, respect for human rights and basic freedoms, equality and the right of peoples to decide their own destiny, co-operation between States, scrupulous fulfilment of commitments arising from universally recognized principles and norms of international law, and the international treaties signed by the U.S.S.R.[32] According to Soviet author,[33] a notable feature of the Soviet Constitution is that it formulates the principles underlying the Soviet Union's relations with other nations of particular importance is the principle of non-interference in internal affairs[34] and respect for human rights and basic freedoms. The Constitution puts on record the basic principle of modern international law that the co-operation of States in different spheres including that of human rights should not be misused for interference in each other's internal affairs. This principle is generally recognised and is contained in the U.N. Charter and many international agreements.

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[28] (1962) 136 I.L.R. 277.

[29] See L.C. Green, International Law Through Cases, Third Edition (1970), pp. 239-40.

[30] Which came into force on June 11, 1975.

[31] For detailed study see A.A. Fatouros, International Law in the New Greek Constitution" A.J.I.L., Vol. 70(1876), p. 492.

* See for I.A.S. (1963), Q. No. 5.

** See also for I.A.S. (1963), Q. No. 5.

According to the principles of the Civil Legislation and Civil Procedure of the Soviet Union, in the case of conflict between international law and Soviet Federal Statute, the former shall prevail. But if there is a conflict between an international treaty and the provisions of the Soviet Constitution, the latter shall prevail over the former. The Soviet writers severely criticize the principle of the primacy of international law. So far as the question of the conflict between the Soviet Internal Statutes and the provisions of the international law is concerned, Soviet writers contend that in view of special nature of the State of Soviet Union, conflict of this type is not possible. As one Soviet author[35] puts it : "In the practice of the Soviet Union and of the countries of people's democracy, conflicts between rules of international law and those of the Internal Statutes are not possible. Socialist States, while strictly observing international law, can neither impose nor accept obligations which would be contrary to the principles of international law of the contracting parties. On the other hand, while strictly observing international agreements, they are unable to enact provisions of municipal law, which would be contrary to international agreements." It may, however, be noted that later on Soviet writers have accepted that the conflict is possible and in such a situation, as compared to international law, the provisions of the later internal statutes shall prevail.[36] In the view of some Soviet writers, in Soviet Union, international law is, in fact, the extension of the Soviet policy. According to the Soviet jurist, Vyshinsky, it is wrong to say that historically international law is a body of binding rules of conduct. In his view, international law is the external law of the State.

In Soviet Union, generally international treaties and international statutes are given almost the equal statuts. But the position is different in regard to customary rules of international law. In England and America, the general principle is that customary rules of international law are generally the part of the municipal law. But the Soviet Union gives more importance to the agreements and treaties. The customary rules of international law are regarded valid only after they have been approved by the Soviet Government. "The Soviet Government claimed the right to choose international obligations which were to constitute in force and to reject those which for various reasons were not to be honoured. The same also applied to international custom, international agreements, bilateral and multilateral, and international practice as evidence of customary law required confirmation by the Soviet Government even by the United States of America.[37] But the position has changed significantly after the breaking up of the Soviet Union and end of Communism over there. Consequently, the Soviet practice is likely to be revised in view of the rapid changes that are taking place in Russia and other former Soviet Republics.

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[32] See New Times No. 24 (June, 1977) at p. 37 ; for full draft Constitution of the U.S.S.R. See Ibid, at pp. 34-48.

[33] Vladimir Kartashkin, "The Draft Constitution of the U.S.S.R. and International Law", New Times, No 29 (July, 1977), p. 4 at p. 6.

[34] For further elaboration of this principle see also Valentin Yaroslavtsev, "Non-Interference—A Basic Principle, New Times, No. 20 (May, 1977), p. 18.

[35] See Kazimierz Grzybywski, Soviet Public International Law (A.W. Sijthoff, Leyden, 1970), p. 31.

[36] Ibid. at p. 32.

[37] Grzybywski, see supra note 35 at p. 28.

Yet another significant thing to be noted is the supremacy of Communist Party of the Soviet Union (CPSU) even in respect of external affair and hence its importance in the field of international law.[38] The supremacy of the CPSU in the U.S.S.R. in terms of internal law seems to have been recognised even by the United States of America.[39]

(7) The Chinese Practice.[40]—In the words of a Chinese writer[41]...... regardless of what the Bourgeoisic says—supremacy of international law over municipal law, supremacy of municipal law over international law, monist theory or dualist theory—all these theories concretely reflect the will of the Bourgeoisic and their historical changes are "solely determined by class interest." The Chinsese authors have never accepted the supremacy of international law over municipal law and have vehemently criticized this view.[42] But as pointed out by Jerome Alan Cohen and Hungdah Chiu, "The relation of international law to municipal law is not only of basic theoretical importance in the conduct of international activity. Yet Chinese writers rarely discuss this problem, and those who do, like Ying T'ao, almost exclusively confine themselves to criticisms of relevant Western theory and practice. These criticisms follow the arguments set forth in the Soviet legal literature." But Soviet authors have in addition, attempted to construct their own specific explanations of relationship between international law and municipal law.[43] Thus China has yet not articulated a definite theory to explain the relationship between International Law and Municipal Law.

(8) Austrian Practice and Practice in Netherlands and Switzerland.—Article 9 of the Austrian Constitution provides that the generally recognised rules of international law are part of Austrian law. This has been interpreted to mean the general recognition need not necessarily be universal and that the changes in these rules are automatically reflected in internal law. However, these rules may be overridden by ordinary laws. The same attitude prevails in countries like France. As regards the abrogation of treaties, like Switzerland and the U.S., Austria adheres to the view that laws enacted in violation of prior treaty, obligations are internally valid although they constitute an international tort. However, in case the ordinary rules referred to in Article 145 of the Austrian Constitution were enacted, the constitutional court can declare any law violating existing rules of international law invalid, whether embodied in treaties or not. It may also be noted that unlike in the U.S. the constitutional court of Austria refuses to review the constitutionality of international agreements. Thus, as pointed out by Ignaz Hohenveldern[44]............ the Austrain Constitution may be described as following a middle course between extrinsic monistic theory of the absolute supremacy of international law, over internal law and the principles according to which, in internal law, the will of the people, as expressed at any given moment by the majority of the *Nationalrat* should be supreme."

(9) Indian practice.*—Before the adoption of Indian Constitution the Indian practice in respect of relation of international law to internal law was similar to the British practice. After the adoption of the Constitution of India everything depended upon the provisions of Constitution. In order to know the position of International Law in the post-Constitution period, it is necessary to examine the relevant provisions of the Constitution of India. The most relevant provision is contained in Article 51 which runs as follows :

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[38] See Dieter Schroder "Supremacy of the Communist Party of the Soviet Union Recognized in International Law." A.J.I.L. Vol. 70 (1976), p. 322 at pp. 326-27.

[39] Ibid, at p. 328.

[40] See also Chinese definition and approach to International Law discussed earlier in Chapter 2.

[41] Ying Tao, "Recognise the true Face of Bourgeoisic International Law from a Few Basic Concepts" KCWTYC No. 1 ; 47-49 (1960) in Jerome Alan Cohen and Hungdah Chiu, People's China and International Law, (Princeton, New Jersey, 1974), at p. 101 at p. 104.

[42] Ibid, at pp. 103-104.

[43] Ibid, at p. 104.

[44] Ignaz Seidl-Hohenvelden, "Relation of International Law to Internal Law in Austria", A.J.I.L., Vol. 49 (1955), p. 45 at p. 476.

* See for I.A.S. (1960), Q. No. 2 ; P.C.S. (1968), Q. No. 6 ; I.A.S. (1963), Q. 5 ; I.A.S. (1968), Q. No. 2 ; P.C.S. (1988) Q. 5.

"The State shall endeavour to—(a) promote international peace and security ; (b) maintain just and honourable relations between nations ; (c) *foster respect for international law and treaty obligations in the dealings of organised peoples with one another* ; and (d) *encourage settlement of international disputes by arbitration.*"

For the purposes of the present discussion, the most important provision is contained in Articles 51(c) noted above. It is, however, significant to note that this article specifically mentions "international law" and "treaty obligations." "It seems somewhat paradoxical that separate mention should be made of 'treaty obligations' as they undoubtedly constitute integral part of international law. No explanation is to be found in the Constituent Assembly debates either as to intent of Article 51 or the meaning and scope of the treaty 'international law' and treaty obligations. Prof. C.H. Alexandrowicz says that the expression "international law" in this paragraph connotes customary international law and that 'treaty obligations' stand for treaties. This interpretation would seem to be the most logical in the context of the article as well as of attitude of the Indian Courts to questions of international law." [45]

But Article 51 does not give any clear guidance regarding the position of international law in India as well as the relationship of municipal law and international law because this article is contained in Part IV of the Constitution of India. Part IV of the Constitution deals with the *Directive Principles of State Policy*. Article 37 of this Part clearly provides that the provisions contained in this Part shall not be enforceable by any court. "This Article (Article 51) falls in the Chapter on *'Directive Principles of State Policy'* which are non-justiciable. Secondly, it is doubtful if the expression State includes the courts also within its ambit and if the Directive Principles have been addressed to them too." However, it would be wrong to contend that Article 51 is of no relevance and provides no guidance at all. Article 37 which provides that provisions contained in Part IV of the Constitution are non-justiciable, adds in unmistakable terms that the principles therein laid down are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." The majority of constitutional experts in the country now subscribe to the view that simply because the principles contained in Part III are non-justiciable, it cannot be successfully contended that they are of no significance or even of less significance than the fundamental rights contained in Part IV which are justiciable. Amendments of the Constitution particularly XXIV and XXV Amendments, confirm this view. As noted above, the term "International Law' in Article 51 refers to international customary law. It is thus significant to note that both international customary law and treaty law have been treated on the same footing in Article 51. It may also be noted here that an analysis of judicial decision shows that in India dualism is followed. Nevertheless, a pertinent question arises as to whether the Constitution of India has altered the position prevailing in pre-Constitution period. In this connection, Article 372 (1) clearly provides : "Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to other provisions of this Constitution, all the *laws in force* in the territory of India immediately before the commencement of this Constitution, shall continue in force thereinbefore until altered or repealed or amended by a competent Legislature or other competent authority." [46]

Before the adoption of the Constitution of India, the British practice that customary rules of international law are part of the law of the land, applied in India also. This practice continued even after the adoption of the Constitution by virtue of the provisions of Article 372 until it was altered or repealed or amended by a competent Legislature or other competent authority.[47] It has, therefore, been aptly remarked : "It does not mean that the doors of Indian Courts are entirely closed to the wide absorption of international customary law into municipal law. Under the British rule in India, the English Common law doctrines widely applicable in many fields. The Constitution of India did not alter that position for it provided for the continued operation of the 'law in force' immediately preceding the commencement of the Constitution. Therefore, on the analogy of the English Common law, the municipal courts of India have applied the provisions of the treaties entered into by India if they have been incorporated into municipal law through legislation, and the well recognised principles of international customary law have been applied because they are supposed to form part of the law of the land. It is thus the dualist view of international law which has been commenced by the British and Indian courts, *viz.*, that international law can become a part of municipal law only by specific incorporation." [48] Thus, Article 51 of the Constitution of India, in so far as it requires the various organs of State, to foster respect for international law and treaties would seem to strengthen rather weaken the legacy of the common law principle that international law is a part of the law of the land. This is so, notwithstanding, the imprecise formulation of Article 51. And constitutional declarations in India are not mere embellishments on paper. They reflect "law in action." [49]

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[45] M.K. Nawaz, "International Law on the Contemporary Practice of India : Some Perspective", Proc. ASIL. April 25-27 (1963), p. 275 at p. 278 ; see also C.H. Alexanderowicz, "International Law in India", ICLQ (1952), p. 292.

[46] S.K. Agarwala, "India's Contribution to the Development of International Law—Role of Indian Courts" appearing in Asian States and Development of Universal International Law, Ed. by R.P. Anand (1972), p. 73.

[47] See *T.K. Varred* v. *State of Travancore-Cochin*, A.I.R. 1956 S.C. 142 at p. 145.

Thus, so far as customary rules of international law are concerned, the position prevailing immediately preceding the commencement of the Constitution continues even after the coming into force of the Constitution. In India also customary rules of international law are part of the municipal law provided that they are not inconsistent with any legislative enactment or the provisions of the Constitution of India. As regards the treaty rules also, India follows more or less the British dualist view. That is to say, ordinarily, international law can become part of municipal law of India if it has been specifically incorporated. In *State of Madras* v. *G.G. Menon*,[50] the Supreme Court held : "The Indian Extradition Act, 1903, has been adopted but the Fugitive Offenders Act of the British Parliament has been left severely alone. The provisions of the Act could only be made applicable to India by incorporating them with the appropriate changes into an Act of Indian Parliament and enacting on Indian Fugitive Offenders Act. In the absence of any legislation on these lines it seems difficulties to hold that sections of the Fugitive Offenders Act, have force in India by the reason of the provisions of Article 372 of the Constitution.[51] In this case, Mr. and Mrs. Menon were Advocates in Singapore (then a British colony). Mrs. Menon had also served as a member of the Legislative Council of Singapore. They came to India in July, 1952. The Colonial Secretary of Singapore requested the Government of India for their extradition for there were certain charges against them according to the law of Singapore. Rejecting the request for their extradition, the Supreme Court held : "The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone ; India is no longer a British possession, no order-in-council can be made to group it with other British possessions. Those of the countries which still form part of British possessions and which along with British India were put into a group may legitimately decline to reciprocate with India in the matter of surrender of fugitive offenders on the ground that notwithstanding Article 372 of our Constitution, India was no longer a British possession and, therefore, the Fugitive Offenders Act, 1881, did not apply to India and they were not bound in the absence of a new treaty to surrender their nationals who may have committed extraditable offences in the territories of India." [52] The Supreme Court, therefore, concluded, "In these circumstances, it is not possible to work out the sections of the Fugitive Offenders Act and apply them to the situation that has arisen after the coming into force of the Constitution of India." [53]

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[48] S.K. Agarwala, "India's Constitution to the Development of International Law—the Role of Indian Courts" in Asian States and the Development of International Law (1977), p. 73.

[49] M.K. Nawaz, "International Law in the Contemporary Practice in India : Some Perspectives" Proc. ASIL, April 25-27 (1963), p. 275.

[50] A.I.R. 1954 S.C. 517.

[51] Ibid. at p. 519.

[52] Ibid. at p. 519.

[53] Ibid, at p. 520.

Reference may be made here to Article 253 of the Constitution which provides : "Notwithstanding in the foregoing provisions of this chapter *i.e.*, Chapter XI of Part XI, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at an international conference, association or other body." It would, however, be wrong to contend that the implementation of every treaty would require legislative aid. This was held by the Delhi High Court in *Shiv Kumar Sharma and others* v. *The Union of India and others*.[54] This case dealt with the implementation of the "Kutch Award" and the question was whether it involved cession of Indian territory. It also dealt with the question whether a constitutional amendment or legislation was necessary for implementation of the "Kutch Award." The court held that there was no cession of any territory belonging to India and no constitutional amendment was necessary for the implementation of the Kutch Award.[55] As regards the question if legislation was necessary for the implementation of treaty, Mr. S.K. Kapur, J., of the Delhi High Court made it clear that every treaty does not require legislative aid. His Lordship observed, "............ In India treaties do not have the force of law and consequently obligations arising therefrom will not be enforceable in Municipal Courts unless backed by legislation. Settlement of dispute as to boundary arises no such obligation requiring implementation in Municipal Courts. Cases may arise where a domestic law is in express terms extended to a named city and that city as a result of treaty settling a dispute like the present, has to be handed over to another country. In that case legislation may be necessary." [56] The same view was taken by the Supreme Court in *Maghanbhai Ishwarbhai Patel and others* v. *Union of India*." [57] The Supreme Court said that a settlement of a boundary dispute cannot be held to be a cession of territory. The Supreme Court observed : "Ordinarily an adjustment of a boundary which international law regards as valid between two nations, should be recognised by the courts and the implementation thereof can always be with the Executive unless a clear case of cession is involved when Parliamentary intercession can be expected and should be had. This has been custom of nations, whose Constitutions are not sufficiently elaborate on this subject.[58] In this case Supreme Court seems to have followed the American practice regarding the distinction between 'self-executing' and 'non-self-executing' treaties.[59] While elaborating the law, the Supreme Court observed : "A treaty really concerns the political rather than the judicial wing of the State. When a treaty or award after arbitration comes into existence it has to be implemented and this can only be if all the three branches of Government to wit the Legislature ; the Executive and the Judiciary, or any one of them, possesses the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power. In some *jurisdictions the compromise read with the Award acquires full effect automatically in the Municipal Law, the other body of Municipal Law*

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[54] A.I.R. 1969 Delhi 64.

[55] Ibid, at p. 72.

[56] Ibid, at p. 74.

[57] A.I.R. 1969 S.C. 783 ; also appearing in I.J.I.L., Vol. 9 (1969), at pp. 234-278.

[58] IJIL Vol. 9(1969) at p. 255 ; In re-Berubari Union and Exchange of Enclaves, A.I.R. 1960 S.C. 845, the Supreme Court had to decide whether any legislation was necessary for the agreement relating to Berubari Union. Since it involved the cession of Indian territory, the highest tribunal answered in affirmative. The Supreme Court observed :".........the question as how treaties can be made by a sovereign State in regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country. Stated broadly, the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by the constitutional amendments will naturally depend on the provisions of the Constitution itself." Ibid, at p. 857.

[59] Besides the provisions of the American Constitution according to which all treaties entered into under the authorities of the U.S. are the Supreme Law of the Land (along with the provisions of the American Constitution and all laws made in pursuance thereof), in America treaties, are divided into two categories-'self-executing' and 'non-self'executing' treaties. Self-executing treaties are those which do not require any specific adoption and directly become applicable in the field of municipal law. Non-self-executing treaties are those treaties which can be applied in the field of municipal law only after their specific adoption by the Congress.

notwithstanding. Such treaties and awards are self-executing. Legislation may nevertheless be passed in aid of implementation but is usually not necessary." [60]

In *A.D.M. Jabalpur* v. *S. Shukla*[61] one of the questions, *inter alia*, for consideration of the Supreme Court was whether Universal Declaration of Human Rights and the two International covenants on Human Rights, 1966 were part of Indian municipal law. By majority the Supreme Court held that they were not part of Indian municipal law. In his dissenting opinion, however, H.R. Khanna, J. held that if there was a conflict between the provisions of an International treaty and the municipal law, it is the latter that will prevail. But if two constructions of the municipal law were possible the court should give that construction as might bring about harmony between municipal law and International law or treaty. In his view, the constitutional provision should be construed in such a way as to avoid conflict with the Universal Declaration of Human Rights. The view expressed by H.R. Khanna, J. seems to be rational and better.

Thus, in case of conflict between a provision of an International Treaty such as Article 11 of International Covenant on Civil and Political Rights to which India is a party and a provision of a State statute (such as section 51, (Proviso) and Order 21, Rule 37, Civil Procedure Code) it is the latter which shall prevail if the International Treaty in question has neither been specifically adopted in the municipal field nor has gone under transformation. This was held by the Supreme Court of India in *Jolly George Varghese* v. *Bank of Cochin*.[62] Krishna Iyer, J., who delivered the judgment of the Court quoted with approval the observation of A.H. Robertson in his book, "Human Rights in National and International Law" at p. 13. Iyer, J., added that Robertson rightly points out that international conventional law must go through the process of *transformation* into the municipal law before the international treaty can become an internal law.[63] His Lordship further observed : "The remedy for breaches of International law in general is not to be found in the law courts of the State because International Law *per se* or *proprio vigore* has not the force of law or authority of civil law till under its inspirational act actual legislation is undertaken. I agree that the Declaration of Human Rights merely sets a common standard of achievement for all people and all nations but cannot create a binding set of rules. Member States may seek through appropriate agencies, to initiate action when these basic rights are violated but individual citizens cannot complain about their breach in municipal courts even if the country concerned has adopted the covenants and ratified the operational Protocol. The individual cannot come to the Court but may complain to the Human Rights Committee, which in turn will set in motion other procedures. In short, the basic human rights enshrined in the International covenants ...... may at best inform judicial institutions and inspire legislative action with member States, but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority."[64] His Lordship added, "The positive commitment of States parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the *corpus juris* of India."[65] Justice Krishna Iyer, however, construed section 51 of the Civil Procedure Code in such a way as to avoid conflict with Article 11 of the International Covenant on Civil and Political Rights, 1966. He observed :

"Article 11 of the International Covenant on Civil and Political Rights only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation. Section 51 of Civil Procedure Code also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under

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[60] I.J.I.L. Vol. 9(1969), p. 244 ; emphasis added.

[61] A.I.R. 1976 S.C. 1207.

[62] A.I.R. 1980 S.C. 470 ; (1980) 2 SCC 360.

[63] See ibid, at p. 473.

[64] A.I.R. 1980 S.C. 474.

[65] Ibid.

Section 51 of the Code, but this does not violate the mandate of Article 11 of the Covenant on Civil and Political Rights. However, if he once had the means but now has not or if he has the money now on which there are other pressing claims, it is violative of the spirit of Article 11 of the Covenant to arrest and confine him to jail so as to coerce him into payment."

Thus Justice Iyer seems to reaffirming the above view of H.R. Khanna, J. in *A.D.M. Jabalpur* v. *Shukla*. This shows that in case there is no conflict between municipal law and International law or where two constructions of municipal law are possible, Indian Courts can give effect to International law by giving harmonious construction.

In *Civil Rights Vigilance Committee, S.L.S.R.C. College of Law, Bangalore* v. *Union of India and others*,[66] the Kerala High Court followed and quoted the above observation of the Supreme Court in *Jolly George's* case. The facts in this case were as follows :

Geof Boycott and Geof Cook, the two cricket players of U.K. were included in the M.C.C. team scheduled to visit India between November 1981 and February 1982 to play six matches at different places in India. These two players had links with South Africa which practised policy of *apartheid*. The Government of India was a party to the Gleneagles Accord of June 12, 1977, entered into by the member countries of the Commonwealth wherein they reaffirmed their full support for the international campaign against *apartheid*. Boycott and Cook, as seen from the booklet issued in May 1981, by the U.N. under the title "Centre against the *Apartheid* "were among the sportsmen blacklisted by the U.N. for having participated in sports events in South Affrica. However, the Government of India allowed the English Cricket team including those two players to come to the country and to play matches as scheduled.

The Civil Rights Committee presented a writ petition impugning the said action of the Government of India but the learned single Judge dismissed it holding, *inter alia*, that such impugned action being an act of state the Court had no jurisdiction to examine its validity and to grant the relief sought in the writ petition. Hence the present appeal was made. The Division Bench of the Karnataka High Court dismissed the appeal. Venkatchalaiah J. who delivered the judgment for himself and D.M. Chandrashekhar, C.J. observed "...... that the provision in Article 51 is not enforceable by any Court and if the Parliament does not enact any law for implementing the obligations under a treaty entered into by the Government of India with foreign countries, courts cannot compel Parliament to make such law. In the absence of such law, court cannot also, in our view enforce obedience of the Government of India to its treaty obligations with foreign countries...the Government of India's obligations under the Cleneagles Accord and obligations attached to its membership of United Nations, cannot be enforced, at the instance of citizens of this country or associations of such citizens, by Courts in India, unless such obligations are made part of the law of this country by means of appropriate legislation."

In *Gramophone Company of India Ltd.* v. *Birendera Bahadur Pandey*,[67] Chinnappa Reddy, J. of the Supreme Court observed that if in respect of any principle of international law the Parliament says 'no', the national court cannot say 'yes'. National court shall approve international law only when it does not conflict with national law. In case however the conflict is inevitable, the national law shall prevail.[68]

Present Legal Position.—But the position will be different when there is no conflict between International Conventions and the domestic law. As pointed out by the Supreme Court in *Vishaka* v. *State of Rajasthan*,[69] in the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality and right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards of sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing International Conventions, and norms by virtue of Article 253 read with Entry 14 of the Union List in the Seventh Schedule of the Constitution.

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[66] A.I.R. 1983 Kant. 85.

[67] A.I.R. 1984 S.C. 667.

[68] Ibid. at p. 671.

[69] AIR 1997 SC 3011.

In this case, the Apex Court was dealing with the problem of harassment of working women. Delivering the judgement of the Three Judge Bench, J. S. Verma, C.J.I., observed that the meaning and content of the fundamental rights guaranteed in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment abuse. Independence of judiciary forms a part of our constitutional scheme. The International Conventions (especially Convention on the Elimination of All Forms of Discrimination Against Women) and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to International Conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

In *Vineet Narain* v. *Union of India*[70] speaking for the Three Judge Bench, J. S. Verma, C.J.I., observed that there are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of the Supreme Court as provided in Article 144 of the Constitution. In a catena of decisions of the Supreme Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps is to cover the gap or the executive discharges its role.[71] Further, J. S. Verma, C.J.I., referred to *Vishakha* v. *State of Rajasthan*,[72] wherein it was pointed out that it is the duty of the executive to fill the vacuum by executive orders because its field is counterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions, to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.[73]

In *Apparel Export Promotion Council* v. *A. K. Chopra*[74] once again referred with approval the decision in *Vishaka* v. *State of Rajasthan*[75] for its "innovative judicial law making process". In the present case, a superior officer of the Corporation was found guilty of molesting and of having tried to physical assault a subordinate female employee. As a punishment, he was dismissed from service. But the High Court held that the occurrence as alleged had not taken place. Though the High Court did not find any fault with the finding as the unbecoming act of delinquent officer or with the conduct of inquiry yet the High Court interfered with punishment of dismissal on the ground that since the delinquent had not "actually molested" and had "not managed" to make physical contact with her, the punishment of removal was not justified. The Supreme Court held that what punishment was required to be imposed in the facts and circumstances of the case was a matter which fell exclusively within the jurisdiction of the competent authority and did not want any interference by the High Court. The entire approach of the High Court had been faulty. The impugned order of the High Court cannot be sustained on this ground alone. Reversing the order of the High Court, the Supreme Court further observed that there is another aspect of the case which is fundamental and goes to the root of the case and concerns the approach of the High Court while dealing with cases of sexual harassment at the place of work of female employee.[76]

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[70] AIR 1998 SC 889.

[71] Ibid. at pp. 914-915.

[72] 1997 SC 3011 : 1997 AIR SCW 3043.

[73] AIR 1998 SC 889 at p. 916.

[74] AIR 1999 SC 625, 633.

[75] AIR 1997 SC 3011.

Dr. Anand, C-J.I., further observed :

"In cases involving violation of human rights the courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the international conventions and norms while dealing with the case."[77]

Earlier in the judgement Dr. Anand, C.J-I., observed :

"There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty—the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO seminar held at Manila, it was recognised that sexual harassment of woman at work place was a form 'of gender, discrimination against woman'. The contents of fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facts of gender equality, including prevention of sexual harassment and abuse and courts are under a constitutional obligation to protect and preserve those fundamental rights. The sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admit of no debate. The message of the International instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Bejing Declaration which directs all State Parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at place of work which may vitiate working environment. *These international instruments cast an obligation on the Indian State to gender sensitise its laws and the courts are under an obligation to see the message of the international instruments is not allowed to be drowned.* The Supreme Court has in numerous cases emphasized that while discussing constitutional requirements, *Court and Counsel must never forget the core principle embodied in international conventions and instruments and as far as possible give effect* to be principles in those international instruments. The *Court are under an obligation to give due regard to International conventions and norms for construing domestic laws more so often when there is no inconsistency between them and there is a void in domestic law.*"[78]

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[76] AIR 1999 SC 625 at p. 632.

[77] AIR 1999 SC 625 at p. 634.

[78] Ibid; see also with advantage *Prem Shankar* v. *Delhi Administration*, AIR 1980 SC 1535; *Mackninnon Mackenzie & Co.* v. *Andrey D. Costa*, (1987) 4 SCC 469: (1987) 2 JT (SC) 34, AIR 1987 SC 1281; *Sheela Barse* v. *Secretary Children's* Aid Society (1987) 3 SCC 50, 54; AIR 1987 SC 656, 658-659; *Vishaka* v. *State of Rajasthan*, (1997) 7 JT (SC) 384: 1997 AIR SCW 3043 : AIR 1997 SC 3011. *People's Union for Civil Liberties* v. *Union of India* (1997) 2 JT (SC) 311 : 1997 AIR SCW 1234 and *D. K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416, 438 : 1997 AIR SCW 233, 248-249.

Last but not the least in *Chairman, Railway Board & others* v. *Mrs. Chandrima Das and others,*[79] the Supreme Court aptly observed that the International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory states and the meaning given to the words in such declarations (for example Universal and Declaration and Declaration on the Elimination of Violence Against Women) and covenants have to such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.[80]

On the basis of the above discussion the legal position may be summarised as follows :

It is the obligation of the courts not to ignore and to apply the provisions of International Conventions and Instruments on Human Rights in general and International Covenants in particular to interpret the constitutional provision relating to human rights. If there is a conflict between a provision of an international treaty and a provision of domestic law, the provisions of the domestic law shall prevail. But if two constructions of the provision of domestic law are possible, the court should give harmonious construction so as to be in accord with international treaty. If no domestic law is occupying the field or there is void in domestic law, and the constitutional provisions (fundamental rights) are of sufficient or wide amplitude to encompass the provision of international treaty, the provisions of international treaty can be read into the constitutional provisions. It may be noted here that what is true of human rights is also true of international law in general. It is on the basis of the above legal position that the relationship between the International Conventions or treaties and Indian law including the Constitution of India, which is the supreme law of the land, has to be appreciated and understood.

From the above discussion the following conclusions may be derived .[81]

(1) Customary rules of international law are treated to be part of domestic law in a large number of states and in case they do not conflict with existing municipal law, there is no need of their specific adoption.

(2) Only in a few states, customary rules of international law, without specific adoption are applied by municipal courts even in case of conflict with municipal statute or judge-made law.

(3) As regards practice relating to the application of treaties within the municipal sphere practice of state is not uniform.

(4) In large number of states, municipal courts give priority to the application of municipal law, irrespective of the applicability of rules of international law and the question of any breach of international law is left to be settled at the diplomatic level.

Concept of opposability.—The concept of opposability has been explained by Starke[82] with the help of the following illustration :—

"In a dispute before an international tribunal between two states, *A* and *B*, where State *A* relies upon some ground in support of its claim, State *B* may seek to invoke as against *i.e.* 'oppose' to State *A* some rule, institution or regime under State *'B'* domestic law in order to defeat the ground of claim set up by the State *A*. As a general principle, if the domestic rule, institution or regime is in accordance with international law, this may be legitimately 'opposed' to State *A* in order to negate its ground of claim but if not in accordance with international domestic rule, institution, or regime may not be so 'opposed'.

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[79] AIR 2000 SC 988.

[80] Ibid at pp. 996-997.

[81] See J.G. Starke, Introduction to International Law (Butterworths, Singapore, 1989) pp. 86-87.

[82] Ibid. at p. 90.

But for the applicability to this rule in respect of a treaty rule, it is necessary that the state against which rule is being invoked must be a party to treaty. In *North Sea Continental Shelf case*,[83] it was held that Article 6 of the 'Geneva Convention on the Continental Shelf, 1958 containing the rule of equidistance for the delimitations of continental shelf common to adjacent states, was not opposable to German Federal Republic which had not ratified the convention. But in a subsequent case if a state which had ratified the convention including Article 6 without reservation, Article 6 would be opposable to such a state.

It may be noted here that even if a rule of domestic law is held to be non-opposable, the rule concerned will not cease to be valid rule in the domestic domain. The position will, however, be different if the domestic rule itself is held to be unconstitutional.

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[83] I.C.J. Reports 1969 p. 3 at p. 41.

Part II

THE LAW OF PEACE

CHAPTER 8

SUBJECTS OF INTERNATIONAL LAW AND THE PLACE OF INDIVIDUAL IN INTERNATIONAL LAW

Subjects of International Law*

"A subject of rules is a being upon which the rules confer rights and capacity and imposes duties and responsibility ; whereas an object enjoys and is burdened by no such competence. The law commands its subjects but it merely regulates the use and disposition of objects"[1] Ordinarily international law deals with the rights and duties of the States. Ordinarily its rules are for States. Generally it is the States who enter into treaties with each other and are thus bound by its provisions. This does not, however, mean that other entities or individuals are outside the scope of international law. International law applies upon individuals and certain non-State entities in addition to States.

Various theories regarding subjects of International Law

Following are the three main theories prevalent in regard to the subjects of international law :

(1) States alone are subjects of international law.

(2) Individuals alone are the subjects of international law.

(3) States are the main subjects of international law, but to a lesser extent individuals and certain non-State entities, have certain rights and duties under international law.

*1. Only States are subjects of International Law.***—Some jurists have expressed the view that only States are the subjects of international law. In their view, international law regulates the conduct of States and only States alone are the subjects of international law. As pointed out by Percy E. Corbett : "The triumph of positivism in the late eighteenth century made the individual an object, not a subject of international law. This law more and more emphasised the separateness of States, making their sovereignty, indeed its basic principles." [2]

Criticism.—This view has been subjected to severe criticism by jurists. This theory fails to explain the case of slaves and pirates. Under international law, slaves have been conferred upon some rights by the Community of States. Similarly pirates are treated as the enemies of mankind and they may be punished for piracy by the States. But the jurists who subscribe to the view that only States are subjects of international law to reconcile these exceptions by contending that they are not the subjects, but objects of international law. They have argued that the treaties which confer certain rights over slaves and pirates impose certain obligations upon the States. If there is no such obligation of the States, the slaves cannot have any rights under international law. Hence the exponents of this theory regard pirates, slaves, etc., as the objects of international law. Prof. Oppenheim also subscribes to this view. In his view : "Since the Law of Nations is primarily a law between States, States are to that extent, the only subjects of the Law of Nations." [3] This view finds mention in the eighth edition of Oppenheim's book. In the ninth edition, the editors of his book have changed this view. According to the view expressed in the ninth edition, "States are primarily, but not exclusively, the subject of international law. To the extent that bodies other than States directly possess some rights, power and duties in international law they can be regarded as subjects of international law, possessing international personality." [4] Further, "International law is no longer if ever was concerned solely with states. Many of its rules are directly concerned with regulating the position and activities of individuals, and many more indirectly affect them." [5] Thus, it is wrong to say that individuals are not the subjects to international law. In the view of Prof. Schwarzenberger, it is contradiction in terms to say that individuals are not the subjects but objects of international law because how can it be expected that individuals who are the basis of society may only be objects of international law. Thus, as a matter of fact, individuals are also the subjects of International law. In *Reparation for injuries suffered in the service of the U.N.*,[6] the International Court of Justice held "that the United Nations has the capacity to bring an international claim against the State for obtaining reparation when an agent of the U.N. suffers injury in the performance of his duties in circumstances involving the responsibility of State". The "Court, by implication, rejected the proposition that only States are subjects of international law".[7] Thus the traditional view that States only are the subjects of international law is not a rule of modern international law.[8]

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* See for I.A.S. (1971), Q. No. 3 ; P.C.S. (1984) Q. 10(a) ; P.C.S. (1985) Q. 1 ; IAS (2007_Q. 5(d).

[1] D. J. Latham Brown, Public International Law (London, 1970), p. 234.

** See for PC.S. (1972), Q. No. 2, C.S.E. (1992) Q. No. 5(b) ; UPPCS (2007) Q. 5.

[2] Percy E. Corbett, The Growth of World Law (Princeton, New Jersey, 1971), p. 178.

[3] L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 636.

It is now generally recognised that besides States, public international organisations, individuals and certain other non-State entities are also the subjects of international law.

2. *Only individuals are the subjects of international law**—Just contrary to the above theory, there are certain jurists who have expressed the view that in the ultimate analysis of international law it will be evident that only individuals are the subjects of international law. The chief exponent of this theory is Prof. Kelsen. Even before Kelsen, Westlake had remarked, "The duties and rights of the States are only the duties and rights of men who compose them." [9] Kelsen has analysed the concept of State and expressed the view that it is a technical legal concept and includes the rules of law applicable on the persons living in a definite territory. Hence, under international law the duties of the States are ultimately the duties of the individuals. Truly speaking there is no difference between international law and State law. In his view, both laws apply on the individuals and they are for the individuals. He, however, admits that the difference is only this that the State law applies on individuals 'intermediately' whereas international law applies upon the individuals 'mediately'.

Criticism.—Kelsen's views appear to be logically sound. But so far as the practice of the States is concerned it is seen that the primary concern of the international law is with the rights and duties of the States. From time to time certain treaties have been entered into which have conferred certain rights upon individuals. Although the statute of the International Court of Justice adheres to the traditional view that only States can be parties to international proceedings, a number of other international instruments have recognised the procedural capacity of the individual. This was the case not only in the provisions of the Treaty of Versailles relating to the jurisdiction of the Mixed Arbitral Tribunals, but also in other treaties such as the Polish-German Convention of 1922 relating to Upper Silesia in which—as was subsequently held by the *Upper Silesians Mixed Tribunal*—the independent procedural status of individuals as claimants before an international agency was recognized even against the State of which they were national. In the sphere of substantive law, the Permanent Court of International Justice recognized, in the advisory opinion relating to the *Postal Service in Danzig* that there is nothing in international law to prevent individuals from acquiring directly rights under a treaty provided that this is the intention of the contracting parties. A considerable number of decisions of municipal courts rendered subsequently to the advisory opinion of the Permanent Court expressly affirmed that possibility.[10] Reference may be made to the 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of other States*. Through this convention it is provided that disputes between the States and nationals of other States who invest money will be resolved in accordance with the provisions of the said Convention. It is clear from this example that the view of Kelsen that international law applies upon the individuals only 'mediately' does not seem to be correct. There are many examples wherein international law applies upon individuals not only 'mediately' but also directly. It is wrong to say that pirates, slaves, etc. are only objects of international law. To say that they are only the objects of international law is nothing but to distort the facts.

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[4] Oppenheim's International Law, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition, Longman Group UK Limted and Mrs. Tomoko Hudson, 1992, p. 16.

[5] Ibid, at p. 846.

[6] I.C.J. Rep. (1949), p. 174.

[7] A.O. Obilade, "The individual as a Subject of International Law", I.J.I.L. Vol. 14 (1974), p. 90 at pp. 91-92.

[8] Ibid, at p. 98.

* See for I.A.S (1969), Q. No. 2 ; I.A.S. (1966), Q. No. 2 ; for elaboration see also the third view and conclusion given below ; P.C.S. (1988) Q. 1. See also matter discussed under the heading "Place of Individuals in International Law" ; C.S.E. (1987) Q. 5.

[9] Collected Papers (1914), Vol. I, p. 78.

But as Philip C. Jessup has aptly remarked : "But while I agree...that States are not the only subjects of international law, I do not go to the other extreme and say...... that individuals are the only subjects." [11] Although, individual possesses a number of rights under international law, his procedural capacity to enforce the observance of these rights is grossly deficient. In most of the cases claim on his behalf can be brought only by the State whose national he is and as pointed out by the Permanent Court of International Justice. "It is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects respect for the rules of international law"[12] one may, however, still argue that the substantive right belongs to the individual because the amount of the claim is based on the injury suffered by the individual and normally the award is given to him. It may, therefore, be concluded that the extreme view that the individuals alone are the subjects of international law cannot be accepted. Individuals are now recognized as subject of international law and they can now (although in a very few rather negligible cases) even claim rights against States (including his own),[13] but their procedural capacity to enforce their rights is grossly deficient. In practice, International law for its major part still deals with the rights and duties of States. Therefore, it would be absurd to contend that States are not the subjects of international law. The correct position therefore is that besides States, individuals, public international organisations and some non-State entities are also the subjects of International law.

(3) *States, individual and certain non-State Entities are Subjects.**—The third view not only combines the first and second views but goes a step ahead to include international organisations and certain other non-State entities as subjects of international law. This view undoubtedly appears to be far better than the first two views. Following arguments may be put forward in support of this view :

(i) In the present time, several treaties have conferred upon individuals certain rights and duties. International Covenants on Human Rights and 1965 Convention on the

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[10] See Survey of International Law in Relation to the Work of Codification of the International Law Commission, Memorandum submitted by the Secretary-General of the U.N. Document A/CN. 4/1, Rev. I, Feb. 10, 1949, pp. 19-20.

[11] Transnational Law (New Haven, Yale University Press, 1956), p. 3. In a later article, Judge Jessup wrote : "......Our international legal realm no longer concentrates on relationship between States themselves. The break-through began, perhaps when it was recognised that 'international law', like national law, must be directly applicable to the individual, it must not continue to be insulated through the tradition that it dealt only with the rights and duties of States". "The Present State of Transnational Law", in the Present State of International Law (1973), p. 339 at p. 343.

[12] The Mavrommatis Palestine Concessions Case (1924). Manely O. Hudson, World Court Reports (1934), Vol. I, p. 297.

[13] See for Example European Convention on Human Rights, 1950 and International Covenants on Human Rights, 1966 and the Optional Protocol and also U.N. Commission on Human Rights.

* See also P.C.S. (1978), Q. No. 2.

Settlement of Investment Disputes between States and Nationals of other States deserve a special mention in this connection.

(ii) In *Danzing Railways Official Case*,[14]* the Permanent Court of Justice ruled that if in any treaty the intention of the parties is to confer certain rights upon some individuals, then international law will recognize such rights and will enforce them. In this case, Poland had acquired, under an international agreement, *Danzing Railway Co*. Under the said agreement Poland had agreed to provide certain facilities to the officials of the said railways company. Subsequently, Poland refused to provide those facilities to the officials of the Company. Poland argued that since the said agreement was in the form of an international treaty, it created rights and duties only in respect of the parties to the treaty and hence the individuals as such cannot possess any rights under the said treaty. The Permanent Court of International Justice rejected the contention of Poland and ruled that if the intention of the parties is to confer certain rights upon individuals then international law will not only recognize such rights of the individual but may also enforce them.

(iii) 1949 Geneva Convention on the Prisoners of War has conferred certain rights upon the Prisoners of War. These rights have been mentioned in Chapter on "Laws of Land Warfare."

(iv) The Nuremberg and Tokyo Tribunals propounded the principle that international law may impose obligations directly upon the individuals. As observed by the Nuremberg Tribunal, "Crimes against International law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced."**

(v) The Genocide Convention of 1948 has imposed certain duties directly upon the individuals. According to the convention, persons guilty of crime of genocide may be punished, no matter whether they are the head of the State, high officials or ordinary individuals.

So far 146 countries have become parties to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

(vi) In addition to the above example, a new trend or movement has started in the international field under which some rights are conferred upon individuals even against the States. A glaring example of this is the European Convention on Human Rights in 1950. Under the provisions of the said convention, European Commission and the European Courts were established. The European Commission is entitled to investigate the violation of human rights. It may, however, be noted that the case may go to the European Court on Human Rights only with the consent of the State concerned. The International Covenants on Human Rights, 1966, and the Optional Protocol represent the culmination of the benign trend (so far as human rights are concerned) that individual can claim rights directly (*i.e.* without the medium of the State) under international law.[15] It may also be noted that an individual who is the victim of the violation of human rights and whose State is the member of the U.N. may send a petition regarding violation of human rights by his own State to the U.N. Commission on Human Rights.

(vii) It is now generally agreed that international organisations are also the subjects of international law. In this connection the advisory opinion of the International Court of Justice in the case of *'Reparation for Injuries Suffered in the Services of United Nations'* may be cited. In this case the International Court of Justice decided that the United Nations is an International Person under international law. In the words of the Court "...... what it does mean is that it (U.N.) is a subject of international law and capable of possessing rights and duties and it has capacity to maintain its rights by bringing international claims." [16]

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[14] P.C.I.J. (1928), Series B. No. 15.

* See for I.A.S. (1974), Q. No. 3(b) ; I.A.S. (1963), Q. No. 12 (d).

** Asked in I.A.S. (1973), Q. No. 2 ; For answer see also the two views regarding the subjects of international law discussed earlier in this Chapter.

[15] For a detailed study of these covenants and the Optional Protocol ; see Chapter on "Human Rights" (Chapter 25).

(viii) In regard to the international criminal law, the law-making treaties have imposed certain obligations upon the individuals and the States have consented to it. In this connection, Narcotic Drugs Convention, 1961, Hague Convention for the Suppression of Unlawful Seizure of Aircrafts, 1970, etc. deserve special mention.

(ix) There are certain international treaties in regard to the minorities. These treaties have conferred upon minorities certain rights. The example of Articles 297 and 304 of the treaty of Versailles, 1919, may be cited in this connection. In some cases the protectorate States may also be treated as subjects of international law. Article 8 of the Constitution of the World Health Organization permits such States to become associate member. International Law also permits the recognition of insurgents. Bangladesh became a member of WHO long before it was admitted as a member of the U.N.

Percy E. Corbett has rightly written : "To me it has long meant that we are witnessing a transition in international legal development from a prolonged stage in which the predominant, not to say exclusive, concern was the regulation of the conduct of States as distinct entities, to one in which equal attention is given to promoting the growth of a body of world law transcending States, and applicable on a footing of equality to individuals, corporations, international organisations, and State"[17] Thus States are not the only subjects of international law. No doubt they are still the main subjects and the bulk of international law concerns with their conduct and relations but in view of the developing and changing character of international law, international organisations, some non-State entities, individuals are also the subjects of international law.

Place of Individuals in International Law*

As pointed out earlier, individuals are also treated to be the subjects of international law although they enjoy lesser rights than States under international law. Thus, "It is no longer possible, as a matter of positive law, to regard states as the only subjects of international law, and there is an increasing disposition to treat individuals, within a limited sphere, as subjects of international law." [18] In the beginning they were accepted as subjects of international law as an exception of the general rule, and number of jurists treated them as objects rather than the subjects of international law. This view has now been discarded. In the recent times, several treaties have been concluded wherein rights have been conferred and duties have been imposed upon the individuals. Some of the provisions of the international law under which rights have been conferred upon individuals and obligations that have been imposed upon them are as follows :—

(1) *Pirates.*—Under International law pirates are treated as enemies of mankind. Hence every State is entitled to apprehend them and punish them. Thus under international law it is the obligation of the parties not to commit piracy.

(2) *Harmful acts of individuals.*—For the amicable and cordial relation of the States it is necessary that the individuals should not be involved in such acts as may prove detrimental for the good relations among States. Therefore, under international law there are several such provisions which provide that the persons who commit such crimes may be punished. For example, if a person causes harm to the ambassador of another State, then under international law he deserves to be given stringent punishment. A leading case on the point is the *Ex parte Petroff,* 1971, decided by the Supreme Court of Australia, wherein two persons, who were found guilty of throwing explosive substances on the Soviet Chancery, were convicted.

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[16] I.C.J. Rep. (1949) p. 174.

[17] Percy E. Corbett, The Growth of World Law (1971), p. 184 : see also W. Friedmann, Law in a Changing Society (First Indian Reprint, 1970), p. 331.

* See for P.C.S (1972), Q. No. 2 : For answer see also the theories regarding subjects of International law discussed earlier, P.C.S. (1985) Q. 10(a) ; C.S.E. 91987) Q. 5(b) ; UPPCS (2001) Q. 5(c) ; IAS (2003) Q. 5 (a).

[18] Oppenheim's International Law, note 4, at pp. 848-849.

(3) *Foreigners.*—To some extent international law also regulates the conduct of the foreigners. According to international law, it is the duty of each State to give to them those rights which it confers upon its own citizens.

(4) *War criminals.*—War criminals can be punished under international law. This conception is based on the principle that rules relating to war crime are not only for the States, but individuals are also bound by them. Nuremberg and Tokyo Tribunals have established the principle in unequivocable and unambiguous terms that since crimes under international law are committed by individuals, only by punishing them the provisions of international law can be enforced.

(5) *Espionage.*—Espionage is a crime under international law. Hence, when the spies are apprehended, they may be punished.

(6) Under some treaties individuals have been conferred upon some rights whereby they can claim compensation or damages against the States. For example, the Treaty of Varsailles, 1919, provided under Art. 297 that any individual could file suit against Germany for compensation or damages.

(7) The United Nations Charter has also given a place of importance to the rights of individuals. The preamble of United Nations Charter begins with the words, "Peoples of the United Nations". This is not incidental but deliberate and meaningful. There are a number of provisions of the U.N. Charter such as Article 1(3), Article 13(1)(b), Article 55(c),Article 62(3), Article 68 and Article 76 (c) which deal with individuals. Besides this, the United Nations adopted the Universal Declaration of Human Rights in 1948. This Declaration mentions in detail the fundamental rights and freedoms of the individuals. Moreover, in 1948, the General Assembly of the United Nations adopted the Genocide Convention. This convention imposes an obligation upon the individuals in respect of the crimes of genocide. It is, therefore, clear that the United Nations Organisation has given much significance to the rights of individuals.

(8) Besides the above-mentioned examples, some very important steps are being taken in respect of the rights of individuals under international law. International law now confers upon the individuals certain rights not only 'mediately' but 'immediately'. An example of this is Convention on the Settlement of Investment Disputes between States and the Nationals of other States. As is clear from its very name, the persons who invest their money in foreign countries have been conferred upon certain rights against the State concerned.

(9) The International Covenant on Civil and Political Rights, 1966 and the Optional Protocol confer rights directly upon the individuals. International Covenant on Civil and Political Rights, 1966 has been ratified by 168 countries. Besides this, optional Protocol to Civil and Political Rights has been ratified by as many as 115 countries as of September, 2013. The U.N. Commission of Human Rights (which has now been replaced by Human Rights Council) have enabled the individuals to send petitions even against their own States. The Human Rights Council has replaced U.N. Commission of Human Rights. Human Rights Council consists of 47 members. It has come into force since 19 June, 2006.

Conclusion : "States are becoming increasingly realistic in acknowledging the position of the individual in the legal order. It seems that the basis of law is being shaken. International law today cannot without qualification be described as the law between States .... The individual has become a subject of international law not having the same quality as a State but capable of asserting his rights himself before some international tribunals although lacking procedural capacity to bring actions in most cases. Article 34 of the International Court of Justice should be amended in order that individuals may have access to the court." [19] Further, "The legal order will continue to be imperfect as long as it faces new challenges such as apartheid and modern technological advance, and the individual as subject of international law will continue to play an important role in the development of the law." [20] Thus slowly and gradually individuals are occupying place of importance under international law. They are no more mere objects of international law. They are in fact the subjects of international law. It cannot, however, be denied that even today States are the main subjects of international law and the bulk of international law deals with their rights and duties. To conclude in the words of Wright, "Justice requires that the power of the States be curbed so far practicable in consideraiton of these other interests. In a distant future, these interests, especially the interests of the individuals for whose welfare other institutions exist in both democratic and socialist theory, may achieve a better balance in Universal Law with the national interest of Sovereign States." [21]

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[19] A.O. Obilade, "The Individual as Subject of International Law", I.J.I.L., Vol. 14(1974) p. 90 at 98.

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[20] A.O. Obilade, "The Individual as Subject of International Law", I.J.I.L., Vol. 14 (1974) p. 90 at 98, 99.

[21] Q. Wright, "Towards a Universal Law or Mankind", Columbia Law Review, Vol. 63 (1963), pp. 445-46.

CHAPTER 9

NATURE OF STATE AND DIFFERENT KINDS OF STATES AND NON-STATE ENTITIES

State is the main subject of international law. It is very difficult to define the term 'State', but certain jurists have made their endeavours to this respect. According to Salmond, State is a community of people which has been established for some objectives such as internal order and external security.[1] In the view of Lawrence, State is a society which is politically organised and its members are bound with each other by being under some central authority and most of the people automatically follow the rules of this central authority.[2] As pointed out by Oppenheim, the existence of State is possible only when people of State have settled under highest government authority and habitually follow its orders.[3] According to Prof. H.L.A. Hart, "The expression 'a State' is .... a way of referring to two facts : First, that a population inhabiting in a territory live under that form of ordered government provided by a legal system which its characteristic structure of Legislature, Courts, and primary rules ; and secondly, that the government enjoys a vaguely defined degree or independence." [4] Starke has rightly pointed out that an ideal definition of the term 'State' is not possible. But in the modern period it is finally settled as to what are the essential elements of State.[5]

Essential Elements of a State.—According to Article 1 of Montevideo Convention, 1933, "The State as a person of international law should possess the following qualifications : (*a*) A permanent population ; (*b*) A defined territory ; (*c*) A Government ; and (*d*) Capacity to enter into relations with other States". Oppenheim[6] has pointed out the following essential elements of a State : (1) Population ; (2) A definite territory ; (3) Government ; and (4) Capacity to enter into relation with other States. The famous jurist Holland has added one more essential element, namely, to some extent, 'civilization' because of which the State becomes the member of international community. Article 4 of Montevideo Convention on the Rights and Duties of States provides that States are juridically equal, enjoy the same rights and have equal capacity in their exercise. The rights of each one do not depend upon power which it possesses to assure its exercise, but upon the simple fact of existence of a person under international law. Further Article 6 provides that the recognition of a State merely signifies that the State which recognises it accepts the personality of the other with all the rights and duties determined by International Law. Recognition is unconditional and irrevocable.

Functions of States.—Modern period has witnessed revolutionary changes in regard to functions of a State. Previously there was the conception of a police State, according to which, the essential functions of a State were to maintain internal peace and order and to defend it from external aggression. It cannot be denied that even today these are the essential functions of a State but in the present period the conception of State has undergone significant changes. Instead of the conception of police State, the present conception is that of a welfare State. That is to say, for the benefit of the people, State has to perform many social, economic, educational and cultural functions. But these functions do not come under the category of essential functions. They are in fact subsidiary functions. Nevertheless, these are also the functions of a State in the modern time and the importance of these functions is constantly increasing.

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[1] *Op.* cit. Salmond on Jurisprudence, pp. 129-30.

[2] T.J. Lawrence. The Principles of International Law, Seventh Edition, p. 48.

[3] L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 118.

[4] H.L.A. Hart, The Concept of Law (Oxford, 1961), p. 216.

[5] J.G. Starke, Introduction to International Law, Tenth Edition, (Butterworths, Singapore 1989), p. 95.

[6] Oppenheim, *Supra* Note 3, at pp. 118-19.

Concept of Sovereignty*

In the view of jurists, only sovereign States are entitled to be the members of the Family of Nations. According to Austin, "If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society, (including determinate superior) is a society political and independent". In relation between States, 'Sovereignty has been defined by Max Huber in *Island of Palmas Arbitration*. In his words : "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State." [7] In the modern period the credit of propounding the concept of sovereignty goes to John Bodin who in 1576 in his book, *"De-Republic"* has put forward the conception of sovereignty. According to him, the essential element of sovereignty is the law-making power of the sovereign. Since the sovereign makes the law, he does not intend to bind himself by that law. But he hastened to add that the sovereign is however bound by the Divine Law. Slowly and gradually this concept of sovereignty became distorted and it became synonymous with absolution. In sixteenth century, Hobbes expressed that by sovereignty is meant the absolute and complete power of the sovereign. It came to be defined as the Supreme power over a definite territory unrestricted by any earthly power. Every sovereign State can exercise the functions of State, to the exclusion of all other States. In other words, it exercises complete sovereignty within its territories. Since territories of a State are circumscribed by its boundaries, it has been rightly said, "Boundaries are one of the most significant manifestation of State territorial sovereignty". According to Austin, sovereignty is indivisible and illimitable.

In International law of a good example of the application of the principle sovereignty is the 'Theory of auto-limitation'. According to the theory, States follow international law because they have by their consent reduced their powers. This principle is based on the principle of State sovereignty. The chief exponents of this principle were Anzilotti and Triepel. It has been pointed out in an earlier chapter that the theory of auto-limitation suffers from several defects and does not appear to be correct. It has been severely criticized by many jurists. In the modern period, there have been revolutionary changes in respect of the theory of sovereignty of States. In the present time it is not proper to say that State sovereignty is indivisible and illimitable. Ordinarily over one and the same territory there can be only one sovereign. In practice, however, there can be several exceptions such as[8]—

(1) the first and probably the only real exception is the condominium which exists between two or more States exercising sovereignty jointly over a territory, *e.g.*, condominium of Austria and Prussia over Schleswig Holstein Lanenburg from 1864 till 1866, condominium of Great Britain and Egypt over Sudan from 1898 to 1955 and condominium of Great Britain and France over the New Hebrides (now the independent State of Vanuatu) can be cited as example.

(2) One State exercising sovereignty which is, in law vested elsewhere, *i.e.*, where a territory is administered by a foreign power with the consent of the owner State. For example, Great Britain exercised sovereignty over Turkish Island from 1878 to 1914.

(3) The third exception is that of giving territory on lease or pledge by the owner State to a foreign power. For example, in 1998 China leased the district of Kiaochow to Germany, Wei-Hai-Wei and the land opposite the Island of Hongkong to Great Britain, Kuang Chouwan to France and Port Arthur to Russia.

(4) Where the use, occupation and control of the territory are granted in perpetuity by the grantor State to the other State. For example, in 1903 the Republic of Panama

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* See also for C.S.E. (1991) Q. 6(a) ; C.S.E. (1993) Q. 5(c).

[7] See A.J.I.L. (1928), Vol. 22 at p. 875.

[8] See Oppenheim's International Law, Vol. I, edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition, Longman Group UK Limited and Mrs. Tomoko Hudson, 1992, pp. 565-572.

transferred to the United States of America a ten-mile territory for construction, administration and defence of the Panama Canal.

(5) The next exception is that of a federal State because sovereignty is divided between a federal State and its member States.

(6) The last exception is that of a mandated or trust territory. The State, which is given a mandate or a trust territory, exercises sovereignty over it although the territory is not its own.

In the present time, States have accepted many restrictions under international treaties and in international institution whereby they have impliedly surrendered a part of their sovereignty. For example, the members of the United Nations and International Labour Organization, have accepted many obligations because of which their sovereignty has ceased to be illimitable and indivisible. Thus, "Sovereignty" has a much restricted meaning today than in eighteenth and nineteenth centuries, when, with the emergence of powerful highly nationalised States, few limits on State's autonomy were acknowledged. At the present time there is hardly a State which in the interests of the International community, has not accepted restrictions on its liberty of action. Thus most states are members of the United Nations and the International Labour Organisation (ILO), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a State means the *residuum* of power which it possesses within the confines laid down by international law." [9] Judge Lauterpacht has also rightly remarked : "International Law, whether codified or not, implies essentially a restriction of the sovereignties of States whose relations it governs." [10] Though this is true, even new States do not accept this sound proposition in theory as well as practice. There is much force in the following words of Prof. Edward Hambro : "In the world of the twentieth century no frontal attack on national sovereignty will avail. The charter is based on the Sovereign equality of the Members. But—and this is very important indeed—no rule prevents the States from disposing of part of their freedom of action for the common good." [11] 'Sovereignty has been defined[12] as "the supreme authority" in an independent political Society. It is essential, indivisible and illimitable. However, as remarked by Sabyasachi Mukharji, C.J. in *Uhion of India* v. *Sukumar Sen Gupta.*[13] "it is now considered and accepted as both divisible and limitable and we must recognise that it should be so. Sovereignty is limited externally by the possibility of general resistance. Internal Sovereignty is paramount power over all action within, and is limited by the nature of power itself."

His Lordship quoted with approval the above-mentioned passage from Starke's book and observed : "Any State in the modern times has to acknowledge and accept customary restraints on its sovereignty inasmuch as no State can exist independently and without reference to other States. Under the general international law the concept of inter-dependence of States has come to be accepted." [14]

Further, "......... the complexities of modern developed societies need peaceful co-existence, if the world is to survive. Amicable and peaceful settlement of boundary disputes are in the interest of international community. The older and absolute ideas of sovereignty and independence has thus necessarily to be modified in the dawn of the 21st century." [15]

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9. Starke, *Supra* Note 5, at 100 ; see also Oppenheim, *Supra* Note 3, at p. 123.
10. H. Lauterpacht, "Codification and Development of International Law", A.J.I.L., Vol. 49 (1955), p. 16 at p. 38.
11. Edward Hambro, "International use of the sea bed" in the Law of the sea, edited by Lewis M. Alexander (1973), p. 216 at 219.
12. See P.G. Osborne, A Concise Law Dictionary, 5th Edition, p. 297.
13. AIR 1990 SC 1692 at p. 1701.
14. *Ibid*, at p. 1706.
15. Ibid. at pp. 1707-1708.

It may be noted that the world today (*i.e.* in 1994) bears little resemblance to the world of 1945 when the U.N. system was set up. A recent study, "Tomorrow's United Nations" has pointed out : "We live in a period when governments, the basic units of the U.N. system, have less and less control over the forces that are shaping the future. Nationalism and sovereignty are increasingly problematic concepts. Their relationship to international responsibility and to the realities and hard facts of contemporary life are inevitably changing."

Since the Gulf War (1991) attempts have been made to bring about changes in the traditional concept of national sovereignty. Being encouraged by the United Nations intervention on behalf of the Kurdish people of Iraq, several western countries have expressed the view, in the last session of the General Assembly, that internal disorder and violations of human rights by Governments should warrant collective international action through the United Nations. France went a step ahead and suggested that the charter of the United Nations be amended to accommodate the envisaged activist role of the world body. But this view found enthusiasm for the U.N. as an agent of collective security in the quicksilver of shifting international relations is being viewed with alarm by developing countries including India and China. Both India and China did their best to dissuade the Security Council from passing a resolution allowing the Security Council interference in the civil war in Yugoslavia under the reasoning that it was a threat to international peace and security.

In his address to the U.N. General Assembly, Mr. Roland Dumes, Foreign Minister of France, cited the example of the U.N. intervention on behalf of the Kurdish people and said that every people that requested the right to self-determination and Sovereignty were entitled to it so long as they did it through forums like the U.N. He added that the European Community had showed that lasting peace could be established only through "the sharing of national sovereignties". The developing countries, however, view with alarm and fear this new found enthusiasm of the western countries for the activist role of the U.N. because in their view, and rightly too, the new ideas contains too many elements from the concept of "empire" and its mission of civilizing the Colonized world. Thus the traditional concept of national sovereignty is under a serious strain. It is in the interest of the developing countries to watch and respond continuously the new ideas relating to sovereignty especially the enthusiasm for activist role of the U.N. in respect of human rights.

Principle of the Equality of States*

As the members of the international community, in principle, all States are equal. This equality is due to their international personality. Despite the dissimilarity in respect of their territories, population, power, civilization, prosperity etc. all States as international persons are equal. According to Oppenheim,[16] following are the consequences of this legal equality :

(a) When any question is to be decided by consent, each State is entitled to have one vote. (But there are exceptions to this rule, such as the veto of the permanent members of the Security Council).

(b) Legally, the importance of the votes of the weak as well as strong nation is same. There are some exceptions of this rule also.

(c) No State can exercise jurisdiction over another State. The Courts have enforced this rule in many cases such as *Duff Development Co. Ltd.* v. *Govt. of Kelantan.*[17] *The*

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* See for I.A.S. (1975), Q. No. 8(a) ; I.A.S. (1958), Q. No. 4 ; P.C.S. (1966), Q. No. 7 ; For Sovereign equality under the U.N. See also matter discussed under the heading "Principles of the United Nations" under the Chapter "Principles, Purposes, Membership, etc. of the U.N." ; See also for P.C.S. (1978), Q. No. 4.

[16] See Oppenheim, *Supra*, note 3, at pp.263-67.

[17] (1924) AC 79.

Parliament Belge,[18] *Mighell* v. *Sultan of Johore,*[19] *De Haber* v. *The Queen of Portugal.*[20] *The Exchange* v. *McFaddon,*[21] *Vavasseur* v. *Krupp,*[22] *and, The Constitution.*[23]

(d) Generally, the Courts of a State cannot challenge the validity of the official acts of another State so far as these acts are related to the jurisdiction of that State. *A.M. Luther Co.* v. *Sagor & Co.,*[24] *Russian Commercial and Industrial Bank* v. *Comptosird Escompte,*[25] *Banque Internationale* v. *Goukassow,*[26] and *Underhill* v. *Hernandez,*[27] deserve mention in this connection.

Although in principle all States are equal, in reality they are not equal. They are unequals in respect of their respective power, territory, property, etc.[28] The U.N. Charter is based on the principle of 'sovereign equality' of States but as pointed out by P.A. Sorokin, in reality great powers are unequal to small States (and legally also because they possess the power of veto under the charter).[29] Thus the equality of States is a general principle but there are several important exceptions of this principle.

A significant departure from the principle of equality was made under the Covenant of the League of Nations. It manifested itself in the composition of the Council and to some extent, in the principles relating to the membership of the Governing Body of the International Labour Organisation. The principle of 'the sovereign equality of its members' constitutes a significant landmark in the gradual modification of the traditional doctrine of equality of States, while the principle of equality of States has been strictly adhered to in the composition of the General Assembly, it has been greatly diluted in the composition of the Security Council. The principle of sovereign equality of States has also been modified significantly in the Constitution of the World Bank, International Monetary Bank and some other specialized agencies. The principle of sovereign equality of State under the U.N. Charter has been discussed in a little greater detail under the heading 'Principles of the U.N.' under the chapter entitled Purposes, Principles, Membership, etc. of the U.N."

Rights and Duties of States*

The doctrine of basic or fundamental rights and duties was enunciated by the *naturalist* writers. In their view, the doctrine of fundamental rights and duties owns its existence to the Law of Nature. There are certain rights which are inherent in the very nature of States and may, therefore, be regarded as the fundamental rights of States. As pointed out by Oppenheim, "Until the last two decades of the nineteenth century there was general agreement that membership of the international community bestowed so-called fundamental rights of State. Such rights were chiefly enumerated as the rights of existence of self-preservation, of equality, of independence to territorial supremacy, of holding and requiring territory, of intercourse, and of good name and reputation. It was maintained that these fundamental rights are a matter of course and self-evident since the community of nations consists of sovereign States. But no unanimity existed with regard to the number, the appellation and the contents of these alleged fundamental rights."[30] Further, "they are rights and duties which do not arise from treaties between States, but which the States customarily enjoy and are subject to simply as international persons, and which they grant and receive reciprocally as members of the community of nations."[31] It may be noted here that the theory of fundamental rights has been subjected to severe criticism.[32] According to the positivist writers, there are no fundamental or inherent rights and duties of States. The rights so referred are not inherent but have arisen out of historical development and their growth can be traced. In the view of the positivists, rights and duties of States have arisen only out of customs and treaties. In their view, consent is the basis of international law. They also contend that the distinction between fundamental and non-fundamental rights and duties of States is unjustified. Rights and duties of the States are in fact the rights and duties which have been recognised by the community of States. Although there is much force in the above criticism, it cannot be accepted as a whole. Whether we call them basic or fundamental, there seems to be a general consensus in respect of certain rights and duties. Some of the more important of such rights include (*i*) sovereignty and independence of States ; (*ii*) equality of States ; (*iii*) territorial jurisdiction ; and (*iv*) right to self-defence and self-preservation. So is the case with certain duties which include (*i*) duty not to resort to war ; (*ii*) to fulfil treaty obligations in good faith, and (*iii*) the duty of non-intervention. At present sovereignty is deemed neither to be indivisible nor unlimited. In the interest of international community and on the basis of reciprocal rights and duties, no State can now claim absolute sovereignty. Independence of States denotes certain rights, powers and privileges under international law. Some of the rights, associated with the independence of a State are (*i*) power exclusively to control its own domestic affairs; (*ii*) power to admit or expel aliens ; (*iii*) privileges and immunities of diplomatic envoys in other States, and (*iv*) exclusive jurisdiction over crimes committed within its territory. Certain duties are also associated with the independence of States. The duty not to perform act of sovereignty on the territory of another State, duty not to allow in its territory preparations which are prejudicial to the security of another State, duty not to intervene in the affairs of another State etc. are such duties.[33]

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[18] (1880) 5 PD 197.

[19] (1894) 1 QB 149.

[20] (1851) 17 QB 171.

[21] (1812) 7 Cranch 116.

[22] (1878) LR 9 Ch. D. 351.

[23] (1879) 4 PD 39.

[24] (1921) 3 KB 532.

[25] (1923) 2 KB 630.

[26] (1923) 2 KB 682.

[27] (1897) US 250, 11 Sup. at 83.

[28] As pointed out by Oppenheim "Legal equality must not be confused with political equality. The enormous differences between States as regards their strength are the result of a natural inequality which, apart from rank and titles, finds its expression in the Province of policy. Politically, States are in no manner equals......... But, however, important the position and the influence of the Great Powers may be, they were not before the establishment of the League of Nations derived from a legal basis of rule. Great powers did not enjoy any superiority of right, but only a priority of action. Nor has a State the character of a Great Power by law. It is nothing else than actual size strength, and economic influence which makes a State a Great Power......... apart from the covenant of the League of Nations, hegemony of the Great Powers was prior to the charter of the United Nations, a political and not a legal one". *Supra* note 3 at pp. 275-277.

[29] See P.A. Sorokin, "The Reconstruction of Humanity"; pp. 12-17; see also Kelsen, Yale Law Journal, Vol. 53 (1944), pp. 207-220.

* See for IAS (1974), Q. No. 3(c).

Several efforts have been made to formulate and codify rights and duties of States. Some of the more important efforts which deserve a special mention are : 'Declaration of rights and duties of Nations' proclaimed by the American Institute of International Law in 1916; Montevideo Convention of 1933, relating to the Rights and Duties of States, and the Bogota Charter of the Organisation of American States of 1948 which includes a Chapter on fundamental rights and duties of States. Besides this in 1947 the International Law Commission prepared a draft declaration of Rights and Duties of States on the basis of a proposal made by Panama. The General Assembly transmitted it to the Member States of the U.N. for their consideration.[34] It is significant to note that the Draft included 14 basic articles incorporating certain traditional rights such as independence, territorial jurisdiction, equality and individual and collective self-defence and duties such as non-intervention, not to foment civil strike in another State's territory; not to do anything in its territory which endanger international peace and security, not to resort to war or use force or make a threat thereof against the territorial integrity or political independence of another State or in any manner inconsistent with international law (including the Charter of the U.N.), to settle international disputes peacefully and ensure respect for and observance of human rights and fundamental freedoms, without distinction as to race, sex, language or religion in its territory and jurisdiction. The Draft Declaration has yet not been adopted and therefore doubts have been expressed in respect of its general application and validity. As pointed out by Rosalyn Higgins,[35] "on occasions United Nations organs may pass resolutions deliberately declaratory of existing law one may cite for example General Assembly Resolution 375 (IV), the declaration on the Rights and Duties of States though in the event this particular Declaration was not in fact adopted. It covers certain traditional rights and duties in 14 basic articles ranging from jurisdiction to intervention to sovereign equality. Although the General Assembly is not a legislative body, the adoption of such a type of resolution by an overwhelming majority or by unanimous vote would surely provide probative evidence of the belief of States concerning certain rules of law."

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[30] Oppenheim, Supra note 3, at pp. 259-60.

[31] *Ibid* at p. 261.

[32] For criticism see "Theory of Fundamental Rights" discussed under Chapter 2.

[33] For this and the right to self-defence and self-prevention, see Chapter entitled "Intervention".

[34] See General Assembly Resolution 375 (IV).

Different kinds of 'States' and 'non-State entitles'

Following are different kinds of 'States' and 'non-State entities' :

(1) *Confederation.*—Confederation is formed by independent States. Under international law confederation has no international personality. The aim and objective of confederation is to establish a sort of co-ordination among the States, leaving States independent in their internal and external matters. But under international law, these States are not international persons.

(2) *Federal State.*—Generally a Federal State is formed by the merger of two or more than two sovereign States. Under international law, a Federal State is an international person. The Federal State exercises control and has rights not only over the member-States but also over the citizens of the States. In a Federal State, generally there is a division of powers between the central authority and the States through a contribution. States are generally autonomous in their internal matters but the federation or the central authority exercises control over them. The United States of America, Switzerland, India are good examples of the Federal States. The main difference between a Confederation and a Federal State is that while the Federal State in an international person under international law, a Confederation is not an international person.

(3) *Condominium.*—When two or more States exercise rights over a territory, it is called Condominium. "A Condominium exists when over a particular territory joint dominion is exercised by two or more external powers." [36] New Hebrides is a good example of a Condominium. Both England and France exercised control and had rights over the territory of New Hebrides between 1914 and 1980. Thus there is a joint sovereignty of France and Britain over New Hebrides. Other examples of condominium are those of Austria and Prussia over Schleswig-Holstein and Lanenburg from 1864 till 1866, of Great Britain and Egypt over Sudan from 1898 to 1955, and of Great Britain and France over Islands of Canada and Endenbury after 1939. In respect of rivers, gulfs or bays also sometimes the idea of condominium is used.[37]

(4) *Vassal State.**—A State which is under the suzerainty of another State is called a Vassal State. Its independence is so restricted that it has no importance under international law. As remarked by Starke, "Vassal State is one which is completely under the suzerainty of another State. Internationally its independence is so restricted as scarcely to exist at all.[38] In its foreign affairs, the Vassal State possesses no power and all its foreign policies are governed by the State of which it is a Vassal State.

(5) *Protectorate State.***—According to Starke, "Although not completely independent, a Protectorate State may enjoy a sufficient measure of sovereignty to claim jurisdictional immunity in the territory of another State, If may also still remain a State

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[35] See Rosalyn Higgins, "The Development of International Law by the Political Organs of the United Nations", Proc., ASIL Vol. 59 (1955), p. 116.

[36] Starke, see *supra* note 5, p. 116.

[37] See Oppenheim's International Law, note 8, pp. 565-566.

* See for P.C.S. (1971), Q. No. 4(a) ; I.A.S. (1954), Q. No. 4.

[38] Starke, *Supra* note 5, at p. 115.

** See for I.A.S. (1964), Q. No. 4.

under international law." [39] In the case of *Ionian ship*,[40] the court held that a State may remain international person even though it is dependent upon some other State. The facts of this case are as follows:—

The Treaty of Paris, 1815 declared the Ionian group of Islands as an independent State under Britain. The treaty provided that the Ionian State could independently perform its internal functions with the consent of Britain. This treaty had empowered Britain to declare war or peace on behalf of Ionian State. In 1854 the German War broke out between Britain and Russia. During the war, the British warships apprehended some ships which were flying flags of Ionian State. These ships were seized on the ground that they were carrying on trade with the enemy. It was contended that the inhabitants of the Ionian group of Islands are British subjects and consequently they cannot carry on trade with the enemies of Britain during the war period. The Court had to decide mainly two questions. In the first place, it was to be decided whether Ionian group of Islands is an independent State. Secondly, whether the inhabitants of the Ionian group of Islands were British subjects and consequently, whether they will be treated as enemies of Russia.

In reply to the first question the Court ruled the Ionian group of Islands is an independent State and it was, therefore, free to trade with Russia. The Court further observed that it would be wrong to contend that the ships of Ionian State would be treated to be the ships of Britain. In reply to the second question, the Court ruled that since Ionian group of Islands is an independent State, its inhabitants are not the subjects of Britain and hence they will not be deemed to be the enemies of Russia.

Thus, a protectorate State can remain a State under international law and may possess some rights and immunities. This view was expressed by Lord Finlay in *Duff Development Co.* v. *Kelantan Government*.[41] The same view was expressed in *The Charkieh*.[42] In *Rights of U.S. Nationals in Morocco*,[43] the International Court of Justice has subscribed to this view. Often Protectorate States entrust matters of foreign policy and the matters regarding defence to other States. For example, Sikkim was a protectorate State of India before it was made an associate State of India. Subsequently, it was compeletely merged in India and became a State in the Indian Union. Thus it lost all vestige of international personality and became a constituent unit and a part and parcel of India. Starke has rightly pointed out, "Protectorates, in the strict sense, have for all practical purposes now disappeared from the international scene." [44]

Difference between Protectorate and Vassal State*

Following are the main points of difference between a Protectorate State and a Vassal State :

(a) Often through a treaty, a Protectorate State entrusts its matters of security, defence and external affairs to another State. A Vassal State is autonomous in its internal matters, but is completely dependent upon other State in external matters.

(b) A Protectorate State may become a member of the international community. A Vassal State is not regarded a member of the international community.

(c) A Protectorate State is not completely sovereign and in fact its sovereignty is taken by the country of which it becomes a Protectorate State. A Vassal State is a semi-sovereign State.

(d) If the protecting State declares a war against any country, then the Protectorate State is not necessarily involved in that war. Thus, the treaty entered into by the protecting State is not binding upon the Protectorate State. In the case of a Vassal State, it is bound by the treaty entered into by the protecting State.

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[39] Starke, note 5, p. 115.

[40] (1855) 2 Spinks 212 ; Hudson Cases 421.

[41] (1924) A.C. 797 at p. 814.

[42] (1873) L.R. 4A & E. 59.

[43] I.C.J. Rep. (1952), p. 176.

[44] Starke, note 5, p. 116.

* See also for C.S.E. (1988), Q. 5(c).

(e) Lastly, Protectorate State may remain a State, but a Vassal State is completely under the suzerainty of another State and has no separate and independent existence under international law.

(6) *Trust Territories.*—Trust territories have been discussed in detail entitled "The Trusteeship Council" therefore, see that Chapter.

International position of Tibet, Holy See or Vatican City and Commonwealth of Nations

Tibet

Tibet is a mountaneous region in between India and China. Till 1720, it was an independent State, but later on it was incorporated by China in its State. After the end of the reign of Manchu dynasty in China, Tibet became free from the suzerainty of China. In 1906, Tibet was brought under the joint protection of China and Britain. After some years, the control of China over Tibet ceased and it again became an independent State. However, in its external affairs, China continued to exercise control over it. In Simla Conference of 1914 Tibet was declared autonomous in its internal matters and was regarded to be under the protection of China. The next land-mark event was the treaty of 1951 whereby Tibet was regarded as a Protectorate State of China. China accepted Dalai Lama as the spiritual head of Tibet. Thus, Tibet was autonomous in its internal matters but was under control of China in its external matters. It may, however, be noted that China flagrantly violated the treaty of 1951 and started interfering in the internal matters of Tibet. In 1959, the situation deteriorated so much that the conflict took the form of a war between China and Tibet. China sent its forces in Tibet and ruthlessly suppressed the movement of people. Dalai Lama, the spiritual head of Tibet was compelled to leave Tibet. He fled away from Tibet and took asylum in India. Thus Tibet is a Protectorate State. But because of the autocratic and imperialistic policy of China it has been converted into a vassal State and the rights of citizens of Tibet are flagrantly violated and Tibetians are at the mercy of the Government of China. But time and again India has declared that Tibet is a protectorate State of China and its affairs are internal matters of China.

Holy See or Vatican City

Holy See or Vatican City is a place where the religious head of Catholic Christians (Pope) resides. Holy See is smallest sovereign State. In the middle of 19th century, the rulers of Italy seized the territory of Pope and occupied his capital, Rome. Consequently Pope went away and settled in his residential place called Vatican City. Since Pope was religious head, the Government of Italy passed a law in 1871 whereby some guarantee was given to Pope. The said Act conferred some privileges and immunities upon Pope more or less equal to those privileges and immunities which are enjoyed by head of the States. Next important change took place in 1929, when a treaty was concluded between Pope and the Government of Italy whereby Vatican City comprising of 100 acres of land was accepted as a State and Pope was conferred upon the rights to enter into diplomatic relations with other States. Thus by the treaty of 1929, Vatican State assumed the status of an international person under the international law. The present position of Vatican City is that it is an international person and possesses all the rights and duties of a sovereign State. It is a natural State. It is not a member of the United Nations. In short, Vatican City is an international person and is fully independent and sovereign State under international law.

Commonwealth of Nations*

Except Britain, Commonwealth of Nations is an association of those States which were at some time the colonies of the British Empire.[45] Before 1948, it was called the British Commonwealth of Nations. Slowly and gradually the British colonies became independent one by one and with their liberation, their attitude also underwent significant changes. After the attainment of independence, these liberated States were not prepared to accept the suzerainty or overlordship of any other State. In the conference of 1948, a resolution was passed that the members of the British Commonwealth of Nations will be autonomous in their internal matters. As pointed out earlier, significant changes had appeared in international field by the year 1948. Consequently, the word 'British' was dropped and was named only "Commonwealth of Nations'. The present position is that all the members of the Commonwealth of Nations are sovereign States. They are fully independent and may exchange diplomatic envoys. In foreign affairs, their powers are unlimited. They can enter into treaty and may make declaration of war or peace on the basis of their sovereign powers.

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* See for I.A.S. (1956), Q. No. 2 ; P.C.S. (1969), Q. No. 10.

[45] Besides Britain The Commonwealth of Nations now comprises of 46 States including Australia ; Bangladesh ; Canada ; Fiji ; Ghana ; Guyana ; Hong Kong ; India ; Jamaica ; Kenya ; Lesotho ; Malawi ; Malaysia ; Malta ; Mauritius ; Newzealand ; Nigeria ; Papua and New Guinea ; Sierra Leone ; Singapore ; Sri Lanka ; Tanzania ; Trinidad ; Uganda and Zambia.

The Common Wealth of Nations has 1/3 of World population. It has 53 current members. They are—

18	from Africa
02	in America
12	in Carribean
03	in Europe
10	in South Pacific
08	in Asia

53	

Legal Status of Commonwealth of Nations.—Commonwealth of Nations is neither a State nor a federation. It is only a loose association of equal and sovereign States who are members of the United Nations and agree, to follow certain principles.[46] Under International law, the Commonwealth of Nations is not a separate independent entity. It is only a loose association of independent States. So far as India is concerned, she has made it clear that India is a sovereign democratic republic. India has joined Commonwealth of Nations, on the basis of equality and the membership of Commonwealth of Nations depends upon the sweet will and discretion of India.

Neutral State and Neutralised State and Distinction between them.[47]

N.B.—For a critical discussion of this, please see Chapter on "Neutrality".

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[46] See Starke, note 5, at pp. 116-117.

[47] See also Chapter on "Neutrality........"

CHAPTER 10

STATE RESPONSIBILITY[*]

Since, formerly, States alone were recognized as subjects of international law, the general topic of international responsibility for wrong used to be discussed under the heading "State Responsibility". Though international responsibility now also involves consideration of position of international organisations and individuals for the sake of convenience, the topic of international responsibility is still studied under the heading "State responsibility".[1]

Meaning of the term 'State Responsibility'[**]

Often it is said that the sovereign has no obligation under law. This statement is true only in respect of the subjects of the sovereign because a State may change its law at its will and may thus bring about changes in its obligations. The position is, however, different in respect of the obligations towards other nations. In that respect, obligations of the State are that of an international person. A State has certain obligations under international law. "The State responsibility concerning international duties is, therefore, a legal responsibility, for a State cannot abolish or create international law in the same way that it can abolish or create municipal law."[2] Thus, "The rules of international law as to State responsibility concern the circumstances in which and the principles whereby the injured State becomes entitled to redress for the damage suffered."[3]

In the *Chorzow Factory (indemnity) case,*[4] the Permanent Court of International Justice said ".........it is a principle of International law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[5] In the *Corfu Channel* case,[6] the International Court of Justice held Albania responsible for the explosions which occurred and observed : "These grave omissions involve the international responsibility of Albania......... and there is a duty upon Albania to pay compensation to the United Kingdom." As pointed out by Starke,[7] "The law of State responsibility is still in evolution and may possibly advance to the stage where individuals are also fixed with the responsibility for breaches of international law which are 'international crimes.'[8]

State responsibilities during the wars have been generally accepted in Article 3 of Hague Convention, 1907. According to it, if a belligerent State violates rules of war, it shall be responsible for the payment of compensation. It shall also be responsible for the acts committed by persons of its armed forces. "State responsibility, like the question of the definition of aggression, is a pedigreed subject. It was considered by the Hague

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[*] See also for IAS (2008) Q. 5(d)

[1] See Openheim's International Law, Vol. I, Ninth Edition, Longman Group UK Limited and Mrs Tomoko Hudson, 1992, p. 500.

[**] IAS (2005) Q. 8(b).

[2] L. Oppenheim, International Law, Vol. 1, Eighth Edition, p.337. See also W. Friedmann, 'Law in a Changing Society' (First Indian Reprint, 1970), p. 336; F.V. Gracia Amador, "State Responsibility in the Light of the New Trends of International Law", 49 A.J.I.L. (1955), p. 339.

[3] J.G. Starke, Introduction of International Law Tenth Edition, (Butterworths, Singapore, 1989) p. 293.

[4] (1928) P.C.I.J. Series A. No. 17, p. 29.

[5] The World Court further observed, "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish this situation which would in all probability have existed if that act had not been committed—Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it— such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." *Ibid* at p. 47.

[6] I.C.J. Reports (1949), p. 23.

[7] Starke see *supra* note 3, at p. 294.

[8] See S.P. Jagota, "The Role of the International Law Commission in the Development of International Law", A.J.I.L. Vol. 16 (1976), p. 459 at p. 464.

Conference of 1930. It has been considered by the Commission in the early fifties but the present work has been done since 1969 by Professor Ago as the Special Repporteur...... " the object of the current work of the U.N. International Law Commission on State responsibility, is to codify the rules governing State responsibility as a general and independent topic.[9] Under the general plan for the draft on State responsibility adopted by the Commission, the origin of international responsibility forms the subject of Part I of the Draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. Part II deals with the content, forms and degrees of international responsibility, that is to say, the determination of the consequences an internationally wrongful act of State may have under international law (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and penalties may take). Once these two essential tasks are completed, the Commission may, if it seems fit, decide to add to the draft Part III concerning the settlement of disputes and the "implementation." [10]

By the 42nd Session in 1990, the Commission had provisionally adopted first reading of 35 articles relating to first phase of its work. First five articles of second phase were also adopted.

Kinds of State Responsibility

Original and Vicarious responsibility :—

Original responsibilities of the State are for the works of its government and vicarious responsibilities are for its citizens and the works done by its agents. When the private individuals of a State cause harm to other States through their acts, the question of vicarious responsibility arises. In such a situation it becomes the duty of the State to punish the individuals concerned and compel them to pay compensation. "'Original' responsibility is borne by a State for acts which are directly imputable to it, such as acts of its government, or those of its officials or private individuals performed at the government's command or with its authorisation. 'Vicarious' responsibility, on the other hand, arises out of certain internationally injurious' acts of private individuals (whether nationals, or aliens in the State's territory), and of officials acting without authorisation. It is apparent that the essential difference between original and vicarious responsibility in this sense is that whereas the former involves a State being in direct breach of legal obligations binding on it and is accordingly a particularly serious matter, with the latter the State's responsibility is at one to remove the injurious conduct complained of : in such cases the State's responsibility calls for it to take certain preventive measures and requires it to secure that as far as possible the wrongdoer makes suitable reparation, and if necessary to punish him. But these preventive and remedial obligations of the State in cases of 'vicarious' responsibility are themselves obligations for the breach of which (as by refusing to take the remedial action, which is required) the State bears direct responsibility." [11] It is to be admitted that the legal consequences of the two categories of acts may not be the same, but there is no fundamental difference between the two categories, and in any case, the use of 'vicarious responsibility' here is surely erroneous." [12]

State responsibilities in different fields or consequences of State Responsibility :—

(1) *International Delinquency.**—As pointed out by Prof. Oppenheim, "An international delinquency is any injury to another State committed by the Head or Government of a State in violation of an international legal duty. Equivalent to acts of the

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[9] For details see : Richard D. Kearney, "The Twenty-fifth Session of the International Law Commission", A.J.I.L., Vol. 68 (1974), p.454 at pp. 455-462.

[10] U.N. Monthly Chronicle, Vol. XIII, No. 8 (August-September, 1976), p. 49.

[11] Oppenheim's International Law, note 1, at pp. 50-1-502.

[12] Ian Brownlie, Principles of Public International Law, Second Edition (1973), p. 442.

* See for I.A.S. (1968), Q. No. 7 and I.A.S. (1962), Q. No. 3 and P.C.S. (1966), Q. No. 4 (a).

Head and Government are acts of officials or other individuals commanded or authorised by the Head of Government. The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving not more than pecuniary compensation to violations of International Law amounting to a criminal act in the generally, accepted meaning of the term... International delinquencies—a term applying both to wrongs consisting of breaches of treaties and to wrongs independent of treaty may be committed in regard to different objects. Thus a State may be injured in regard to its independence through unjustified intervention; in regard to its treaty rights through an act violating a treaty ; or in regard to its right of protection over citizens abroad through any act that violates the person or the property of one of its citizens abroad." Starke has explained the term, 'international delinquency' in the following words : 'In practice most cases of State responsibility, at least before international tribunals, arise out of wrongs alleged to have been committed by the State concerned. By wrong in this connection is meant the breach of some duty which rests on a State at international law and which is not the breach of a purely contractual obligation. To such wrongs, more frequently the term 'international delinquency' is applied......... Most of the cases that come under this head concern injuries suffered by citizens abroad......... Generally speaking, a person who goes to live in the territory of foreign State must submit to its law ; but that is not to say that certain duties under international law in respect to the treatment of that person do not bind the State. Examples are, the duty of the State to provide proper judicial remedies for damage suffered, and the duty to protect alien citizens from gratuitous personal injury by its officials or subjects." [13]

Thus according to Starke, International delinquency is a wrongful act committed by a State which is not a breach of a purely contractual obligation. International delinquency is a wrongful act which is the breach of international obligation and is independent of any contractual obligation. On the other hand, crimes are violations of customary or treaty rules of International law. For international delinquency, generally the remedy is pecuniary compensation. The remedy for international crime may be the punishment or reparation as the case may be. It is in respect of a crime against international law, the observation of the Nuremberg judgment that individuals who commit crimes against International law may be punished is relevant. As compared to it, international delinquency is a wrongful act committed by an official or organ of the State concerned which may be imputed or attributed to the State.

Notions of Imputability.—As pointed out by Starke, "In the subject of international delinquencies, it is important to apply the notion of *imputability*. This notion assists in clarifying the subject and in providing a proper framework for its theory. To take a practical example, if an agency of State *X* has caused injury to a citizen of State *Y* in breach of international law, technically we say that State *X* will be responsible to State *Y* for the injury done. What this means is that the organ of official of State *X* has committed a wrongful act, and the conduct in breach of international law is *imputed* from the organ or official to the State. The *imputation* is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the State .... Imputability therefore depends on the satisfaction of two conditions : (a) conduct of a State organ or official in breach of an obligation defined in a rule of international law ; (b) that according to international law, the breach will be attributed to the State. It is only if the breach is imputable that the State becomes internationally responsible for the delinquency. Responsibility begins where imputability ends." [14] But as rightly remarked by Brownlie,[15] "In general, broad formulae on State responsibility are unhelpful and, when they suggest municipal analogies, a source of confusion. Thus it is often said that responsibility only arises when the act or omission complained of is *imputable* to a State. Imputability would seem to be a superfluous notion, since the major issue in a given situation is whether there has been breach of duty, the content of 'imputability' will vary according to the particular duty, the nature of the breach, and so on. Imputability implies a fiction where there is none and conjures up the idea of vicarious liability where it cannot apply."

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[13] Starke, See *Supra* note 3, at p. 304.

[14] *Ibid* at pp. 304-305.

[15] Brownlie, See *Supra* Note 12, at p. 421.

Reference may be made here to *Youmans* case[16]. In this case, the Mayor of the town (in Mexico) ordered a lieutenant of State forces to suppress riots and attack against certain American citizens. Instead of dispersing the rioters, the troops did just the reverse. They started firing on the house in which the Americans had taken refuge. In the process, one American was killed. The other two Americans were forced to leave the house and were killed by the troops and rioters. In opening the fire against the Americans the troops had disobeyed the orders of the Mayor and had acted beyond the scope of their authority. The Mexican Government was held liable for the wrongful acts of the troops.

It is sometimes said that 'A State is not responsible to another State for unlawful acts committed by its agents unless such acts are committed wilfully and maliciously or with culpable negligence'.* "It is difficult to accept so wide a conclusion and so invariable a requirement. A general floating condition of malice or culpable negligence rather contradicts the scientific and practical considerations underlying the law as to State responsibility .... It is only in specific cases when particular circumstances demand it that wilfulness or malice may be necessary to render a State responsible for example, if the State knowingly connives in the wrongful acts of insurgents or rioters, it would become liable although not generally otherwise .... Further the actual decisions of international arbitral tribunals fail to justify a general condition of malice or culpable negligence." [17] In the words of another author, "The fact that an *ultra vires* act of an official is accompanied by malice on his part, *i.e.*, an intention to cause harm, without regard to whether or not the law permits the act does not affect the responsibility of his State. Indeed, the principle of objective responsibility dictates the irrelevance of intention to harm *dolus,* as a condition of liability; and yet general propositions of this sort should not led to the conclusion that *dolus* cannot play a significant role in the law. Proof of *dolus* on the part of leading organs of the State will solve the problem of 'imputability' in the given case, and in any case, the existence of a deliberate intent to injure may have an effect on remoteness of damage as well as helping to establish the breach of duty. Malice may justify the award of "penal damages." [18]

The basis of responsibility "has been said to be essentially delictual and based on fault, requiring either international or negligent conduct on the part of the State before a breach of it or an international obligation can be established ; or to be strict or objective, conduct and result alone establishing the breach of an obligation." [19] There is no single basis of international responsibility which may be applicable in all circumstances. In fact, the basis of responsibility depends on the particular obligation in question. For example, responsibility of State for acts of private individuals is based on fault for normally it is required to be shown that the State failed to show diligence in preventing either the injury or punishing the offender. But in certain areas (*i.e.*) dangerous activities responsibility may arise without fault. In certain dangerous activities, absolute or strict responsibility has been fixed in treaties such as Vienna Convention on Civil Liability for Nuclear Damage, 1963, Convention on International Liability for Damage caused by Space Objects, 1971 and the International Convention on Civil Liability for Oil Pollution Damage, 1969.[20]

So far 40 countries have ratified Vienna Convention on Civil Liability for Nuclear Damage, 1963.

The Convention on International Liability for Damage caused by Space Object, 1971 has 89 parties as of January, 2013. International Convention on Civil Liability for oil Pollution Damage, 1969 has been ratified by 133 countries as of 2013.

(2) *State responsibility for injury to aliens* —Under international law it is generally agreed that aliens living in a State should also be conferred upon the same rights which are given to the citizens. It is the responsibility of the State to protect rights of the aliens in the same way as they protect the rights of their citizens. State responsibilities towards aliens may be of following types:—

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[16] Annual Digest of Public International Law Cases, 1925-26, p. 223.

* Asked in IAS (1965), Q. No. 5 and seems to have been adopted from Starke, supra note 2, at p. 339.

[17] Starke, *Supra* note, 3 at p. 312.

[18] Brownlie, see *supra* note 12 at pp. 427-28.

[19] Openheim's International Law, note 1, at pp. 508-509.

[20] See *ibid*, at pp. 509-511.

*(a) State responsibility for acts of private individuals**.—Under international law, each State is under a duty to exercise due diligence to prevent its own subjects as well as foreign subjects who live within its territory from committing injurious acts against other States. While the State responsibility for official acts of administrative officials and members of armed forces is extensive, responsibility for private persons is limited because in practice it is impossible for a State to prevent a private person from committing injurious act against a foreign State. The duty of the State is simply to exercise due diligence and where injurious acts have nevertheless been committed, to procure satisfaction and reparation for the wronged act, as far as possible, by punishing the offenders and compelling them to pay compensation, if necessary.[21] If the citizens of a State cause some damage or harm to an alien in that State, that alien gets the right to file the suit for compensation according to law of that State. Thus in such a situation the State tribunals protect the rights of aliens. It may be noted here that the decisions of the State courts are binding upon the aliens in the same way as they are binding upon the citizens of the State. But if the decision of a State Tribunal is arbitrary and against justice, the alien person has a remedy to approach his home State to settle the matter through political means and ensure that the matter is decided in accordance with the principles of international law. Since in such matters the political matters are involved, it would not be correct to say that there is any State responsibility in this connection.

(b) State responsibility for acts of mob-violence.—State responsibility for acts of mob-violence is same as for acts of private individuals. Generally, State may be held responsible for mob-violence only when it has not made due diligence to prevent it. "Outbreaks of mob-violence resulting in injury to the aliens raise regularly the question of prevention as well as of redress. While occasional outbreaks of mob-violence may be accepted in any State, and their mere occurrence is not of itself a ground of responsibility, the State is expected to use 'due diligence' to prevent them".[22] But this test is very uncertain and ambiguous. 'Due diligence' to prevent mob-violence depends upon the time, facts and circumstances. "What constitutes 'due diligence' is a question of time and circumstances'[23] This test is so ambiguous that often jurists express the view that there is no State responsibility in respect of mob-violence. But this view is not correct. Some countries such as England and America do not support this view. If the alien person is some officer of foreign country then the State responsibility is further increased.[24]

As regards the vagueness of the test and definition of the term 'due diligence', "Obviously no very dogmatic definition would be appropriate, since what is involved is a standard which will vary according to the circumstances. And yet, if 'due diligence' be taken to denote a fairly high standard of conduct the exception would overwhelm the rule. The reporteur for the International Law Commission on State responsibility, Gracia Amador, concludes that the basic principle is that there is a presumption against responsibility and proposes the following provision : "The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances if the constituted authority was manifestly negligent in taking the measures which, in such circumstances, are normally taken to prevent or punish the acts in question". There is some authority for the view that the granting of an amnesty to rebels constitutes a failure of duty and an acceptance of responsibility for their acts on the basis of a form of estoppel ; but in many cases this inference will be unjustified".[25]

Reference may also be made here to the *case concerning United States Diplomatic and Consular Staff in Tehran*[26] which involved the acts of rioters and other militants who attached and occupied U.S. diplomatic and consular premises in Iran. The rioters and militants also seized the occupants and held them as hostages. Since the rioters and militants were persons without official status in the initial stages their acts could not be imputed to the State, the International Court of Justice held Iran not responsible for the initial stages of their acts. But subsequently the situation changed when the militants became agents of the State and hence Iran was held responsible for their acts. The World Court also held Iran responsible for breach of its international responsibility to take steps to protect American diplomatic premises and to restore *status quo*.

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* See also for P.C.S. (1972), Q. No. 6.

[21] See Oppenheim's International Law, note 1, at p. 549.

[22] Charles, G. Fenwick International Law (Third Indian Reprint, 1971), p. 338.

[23] Ibid.

[24] Ibid, at p. 339.

[25] Brownlie, *Supra* note 12 at pp. 440-41.

[26] I.C.J. Rep. (1980) p. 3.

Illustration.—'A Portuguese subject residing in India is mobbed and his property plundered by the mob on India refusing to pay damages to Portugal, Portugal blockades the Indian Coast and orders the capture of Indian vessel.* In this case India would be responsible for injury to the person and property of the Portuguese subject if she did not take 'due diligence' to prevent the mob violence or if she 'was manifestly negligent in taking the measures which, in such circumstances are normally taken to prevent or punish the acts in question'. But the Portuguese action amounts to reprisal and one of the conditions for a valid reprisal is that there must be a certain proportion between the offence and the action taken in reprisal. Obviously in the present case, there is no proportion between the injury caused to the Portuguese subject and the reprisal resorted to by Portugal. Moreover, no State is entitled to resort to reprisal which may endanger international peace and security.

State Responsibility in respect of injuries suffered by Persons Serving the U.N.

There is also State responsibility in respect of the persons serving under the auspices of the international organisations. This conclusion can be validly drawn on the basis of the decision of the International Court of Justice in the case of Count Bernadottee or the case of *Reparation for Injuries suffered in the Service of the U.N.*[27] The facts of this case were as follows : Count Bernadottee along with a French observer was appointed by the United Nations Security Council to mediate in the conflict between Arabs and Jews in Palestine. On September 17, 1948, when he was in that area of Jerusalam which was under the occupation of Israel he along with a French observer was murdered. In this connection, the General Assembly of the United Nations requested, in 1948, the International Court of Justice to give an advisory opinion as to whether in such matters the United Nations can claim compensation and damages for organisation and the persons appointed under its service. If, questions were answered in the affirmative, it was further asked in what manner the action taken by the United Nations could be reconciled with such rights as might be possessed by the State of which the victim was a national. In its advisory opinion of 11th April, 1949, the Court held that the organisation was intended to exercise functions and rights which could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane. It followed that the organisation (in this case the U.N.) had the capacity to bring a claim and to give it the character of an international action for reparation for the damage that had been caused to it. The World Court further declared that the organisations can claim reparation not only in respect of damage caused to itself, but also in respect of damage suffered by the victim persons entitled through him. Although, according to the traditional rule, diplomatic protection had to be exercised by the national State, the organisation should be regarded in international law as possessing the powers which even if they are not expressly stated in the Charter are conferred upon the organisation as being essential to the discharge of its function. The Court held that the organisation has the capacity to claim appropriate reparation, including also reparation for damage suffered by the victim or by persons entitled through him. The risk of possible competition between the organisation and the victim's national State could be eliminated either by means of a general convention or by a particular agreement in any individual case. In purusance of the above decision, the Secretary-General of the U.N. claimed compensation from Government of Israel for the death of Count Bernadotte and a French observer. The Government of Israel paid the money in the form of compensation but refused to accept any obligation under law in this connection. In other words, we may say that although Israel paid the compensation, but it did not accept that it was its legal responsibility to pay compensation, arising out of mob-violence. Thus the legal position is that a State is responsible for injuries caused in its territory to person serving the U.N. or any other international organisation.

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* Asked in P.C.S (1964), Q. No. 8(a).

[27] I.C.J. Rep. (1949), p. 174.

(c) State responsibility for acts of insurgents.—So far as the State responsibility for the acts of insurgents is concerned, the general rule is that it is the responsibility of the States to try to prevent the violent acts of the revolutionaries. But there is a controversy that if States are not able to prevent violent activities, whether they will be responsible or not. According to Fenwick, State responsibility for the acts of insurgents is different from State responsibility for the acts of mob-violence. When there is a revolution or to put it more precisely insurrection, there is a presumption that the State shall make due diligence to prevent it because it is in the interest of the State to suppress it. In the words of Fenwick, "The very existence of organised revolution raises a presumption of 'due diligence' on the part of the State in suppressing it, since the government had an immediate interest in such an open attack upon its authority.[28] As pointed in the Ninth Edition of Oppenheim's International Law[29] where the aim of insurrection or rebellion is to overthrow of government, position in principle is the same as for rioters and acts of mob-violence. "The State is not responsible for acts of the insurrectionists, but is only obliged to exercise due diligence to prevent, or immediately crush the insurrection, and to punish those responsible for injury to foreigners." [30]

Calvo Doctrine*

The doctrine was propounded by Calvo of Argentina and hence it is called Calvo doctrine. According to this doctrine, during civil war the State is not responsible for the losses suffered by the alien persons because if this responsibility is accepted then big nations will get an excuse to intervene in the independence of weaker States. In the words of Fenwick, "The general principle that the State is not responsible for losses incurred by aliens in time of civil war became associated in Latin America with the name of the Argentine publicist Calvo, who argued in his treatise on international law that a State could not accept responsibility for losses suffered by foreigners as the result of civil war or insurrection, on the ground that to admit responsibility in such case would be the menace to independence of weaker State by subjecting them to the intervention of strong States, and would establish an unjustifiable inequality between nationals and foreigners." [31] But many States such as America and England do not accept completely the above doctrine. Since the revolts or insurrections are frequent in the States, the presumption that State made due diligence becomes weak.

Reference may also be made here to the insertion of *Calvo clause* in contracts providing for the determination of any dispute arising out of the contract by national courts and preventing the home government of the alien concerned from making diplomatic intervention. "In order to prevent appeals by aliens to their home governments for diplomatic intervention on behalf of their contract right, a number of Latin American States during the latter part of the nineteenth century adopted a policy of writing into their contract with aliens a clause known as the 'Calvo clause' the general tenor of which was that the alien agreed that any dispute that might arise out of the contract were to be decided by the national courts in accordance with national law and were not to give rise to any international reclamation." [32] "Further, the decisions of international arbitration tribunals and of mixed claims commissions upon the subject have been conflicting, some upholding the Calvo clause as a bar to the interposition of the alien's government, others rejecting it on the ground that the act of the alien's cannot restrict the right of his government under international law." [33] In *Orinoco Steamship Co.* case between *United States and Venezuela*[34] the Steamship Co. had suffered losses as its vessels were requisitioned during revolution. It also alleged that it was unlawfully discriminated against it in the navigation of the river. The Calvo clause was upheld. But on its reference to the Permanent Court of Arbitration at the instance of the United States it was held that the rejection of claims by the Umpire was not justified.[35] *North American Dredging Company* case between the U.S. and Mexico[36] involved the breach of contract by Mexico. The contract related to the dredging at the port of Salina Cruz. The contract provided that contractor and persons working shall be considered Mexicans in all matters and "are consequently deprived of any rights as alien and under no condition shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract." The Mixed Claims Commission held that under international law such a clause may be included by an alien in a contract but he is not entitled to "deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage." Thus although the Calvo clause was held to be binding on the claimant to be governed by Mexican laws, it could not take from him "his and undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law." [37]

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[28] Charles G. Fenwick, International Law, p. 340.

[29] See note 1, at p. 552.

[30] Ibid.

* See also I.A.S. (1973), Q. No. 11 (d) ; I.A.S. (1970), Q. No. 10 (e) ; I.A.S. (1968), Q. No. 7 ; I.A.S. (1963), Q. 12 (c) ; p.c.s. (1974), Q. No. 10(c) ; P.C.S. (1968), Q. No. 10(d) ; P.C.S. (1966), Q. No. 10(b).

[31] Charles G. Fenwick, International Law, at p. 341.

[32] Ibid., at pp. 350-351.

"(1) *Thus* in so far as such clause attempts to waive in general the Sovereign right of a State to protect its citizens, it is to that extent void.

(2) .... it would be obviously improper for the individual to treat the State against which he seeks redress as an inferior and untrustworthy country and to apply for his government's intervention without making any claim in the local courts.

(3) Where such a stipulation purports to bind the claimant's government not to intervene in respect of a clear violation of international law, it is void.

To sum up, it may be said that Calvo clause is ineffective to bar the rights of States to protect the internationals abroad, or to release States from their duty to protect foreigners on their territory.[38]

(3) *State responsibility for acts of government organs.*—The State concerned has responsibility for the act performed by its representatives or high officials towards the alien persons. But State responsibility is accepted only to the extent where the officials concerned have acted out of their powers and jurisdiction. "The traditional doctrine of international law, which restricts State responsibility to persons officially connected with government, as distinct from private persons, is predicted on the assumption that the latter are free from government direction to control in their actions affecting foreign States".[39] Similarly, State is responsible for the acts of its judicial organs.

(4) *State responsibility for contracts with foreigners.*—In this connection, the general rule is that if there is a breach of the contract entered into by a State with aliens, then it does not give rise to any international responsibility. The alien person, however, has the remedy to avail the local means available to him in the State law of the State concerned. If the matter is not resolved to the satisfaction of the alien person then he may try to settle it through the medium of his home State by resorting to political and diplomatic means. In the words of Fenwick, "In general, the alien, believing himself to be the victim of breach of contract by foreign government, must first exhaust such local remedies as are

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[33] Charles G. Fenwick, International Law, at p. 351.

[34] (1903), Ralston. International Arbitral Law and Procedure, p. 72.

[35] See 1910, Scot, Hague Court Reports, p. 226ff.

[36] *U.S.* v. *Mexico*, General Claims Commissions, 1926.

[37] See also the International Fisheries Company case between the United States and Mexico, (1926), Opinions of the Commissioners, 1931, p. 207.

[38] Starke, see *Supra* note 3, at pp. 302-303.

[39] W. Friedmann, Law in a Changing Society (First Indian Reprint, 1970), p. 337.

available to him. These failing him, he may seek to press the claim through the foreign office of his Government." [40]

(5) *State responsibility for Breach of Treaty or Contractual Obligations.*—State responsibility for breach of treaty obligation depends upon the provisions of the treaty. In *Chorzow Factory (Indemnity)* case,[41] the Permanent Court of International Justice held : "It is a principle of international law that the reparation of wrong may consist in an indemnity corresponding to the damage which the national of the injured State have suffered as a result of the act which is contrary to international law .... Rights or interest of an individual the violation of which right causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never, therefore, identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State." In several cases, international arbitral awards have awarded damages under two separate heads— (i) Damage suffered by individual and (ii) Damage sustained by the claimant State. *I'm Alone*[42] is an illustrative case on the award of such type. In this case I am Alone, a British ship of Canadian registry, was sunk by a United States Coast Guard Vessel in 1929 as it was engaged in the smuggling of alcoholic liquor in the United States. It was sunk on the high seas more than 200 miles from the coast of the U.S. after a hot pursuit which began outside U.S. territorial water but within the inspection Zone provided for in the 'Liquor Treaty' between U.K. and the U.S. The Canadian Government complained of the sinking of *I'm Alone.* The Canadian claim was referred to the Commissioners appointed under the convention concerned. In their final report the Commissioners observed : "We find as a fact, from September, 1928, down to the date when she was sunk, the *I'm Alone,* although a British ship of Canadian registry, was *de facto* owned, controlled, and at critical times, managed and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned (*i.e.* smuggling of liquor)......... in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.

The act of sinking the ship, however, by officers of the United States Coast Guard, was ...... an unlawful act ; and the commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor ; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government ; and they recommend accordingly".[43]

As pointed out earlier, if a State contracts with the citizens of another State, then generally there is no State responsibility in consequence of the breach of such contract but if any contract entered into with another State that it will enforce the contract entered into with the citizen of that State, then there will be State responsibility in consequence of the breach of the contract with the citizens. In this connection *Anglo-Iranian Oil Co.* case[44] deserves a special mention here. Anglo-Iranian Company was company registered in Britain on April 19, 1933, a contract was entered into between this company and Iran wherein Iran gave some concessions to the company in respect of extracting oil in Iran. In 1951, Iran nationalised this company by passing a law to that effect. Britain contended that the said contract was sponsored by her and Iran had promised not to end or otherwise make any change in the concessions granted. The International Court of Justice held that for an implied treaty in respect of a contract between a State and the citizens of another State, it is necessary that there should be sufficient evidence for the same. The Court rejected the contention of Britain on the ground that there was no privity of contract between Persia and Britain.[45]

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[40] Fenwick, *supra* note 28 at p. 350.

[41] United Nations Reports of International Arbitral Awards, Vol. III, p. 1609, L.C. Green, International Law Through cases, p. 469.

[42] P.C.I.J. (1928), Series A. No. 17 (1) W.C.R. 646.

[43] See also Reparation for injuries suffered in the Service of the United Nations I.C.J. Rep. (1949), p.174.

[44] I.C.J. Rep. (1952), p. 93.

The Court also rejected the view that the agreement of 1933 was both a concessionary contract between Iran and the company and an international treaty between Iran and the U.K. since the U.K. was not a party to the contract. The position was not altered by the fact that the concessionary contract was negotiated through the good offices of the council of the League of Nations.

(6) *State Responsibility in respect of Expropriation of Foreign Property.** —There is a great controversy in regard to the expropriation of foreign property situated in a State. However, in the modern period, significant changes have taken place in this connection. Till the 19th century, if any State expropriated the foreign property it was considered to be the violation of international law making the said State liable for the same. But in the modern period, in view of the complete control of States over their economic system and in consequence of the nationalisation of different industries, it has become difficult to recognise such expropriation as the violation of international law. It may be noted here that the term 'expropriation' includes nationalisation and confiscation of property. On the basis of practice, principles and decided cases, it may be that expropriation of foreign property may be valid only where there has been no irregularity or discrimination with the foreigners. This was held in *Anglo Iranian Oil Co. Ltd.* v. *Jaffarte.*[46]

There has been the constant development of the law relating to the expropriation of foreign property. In 1952, the General Assembly approved the concept of economic self-determination through a resolution.[47] The said resolution referred *Anglo-Iranian Oil Co. Ltd.* v. *S.U.P.O.R.*[48] and *Anglo-Iranian Oil Co. Ltd.* v. *Idemtsu Kosan Kobushiki Kaisha.*[49] In 1958, a Commission on Permanent Sovereignty over Natural Resources was established. On the basis of the report of this commission, the Economic and Social Commission passed a resolution[50] in 1962 which declared that in case of expropriation, nationalisation, or requisitioning the owner shall be given "appropriate compensation in accordance with the rules in force in States taking such measures in accordance with international law".[51] In 1965, the Third Committee of the General Assembly adopted a draft article for human rights covenant which provided : "The peoples may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." Thereafter, such type of provisions were included in Human Rights Covenants, 1966. These covenants have now come into force. In this connection, 1965 Convention of the Settlement of Investment Disputes between States and Nationals of other States also deserves a special mention. In this convention, an endeavour has been made to establish international procedure and machinery for the settlement of investment disputes between States and nationals of other States. On 17th December, 1973, the General Assembly passed a resolution [Resolution 3171 (xxviii)] on permanent Sovereignty over National Resources wherein it affirmed "that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.[52]

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[45] Anglo-Indian Oil Co. case, I.C.J. Rep. (1952), p. 112.

* See also for I.A.S. (1970). Q. No. 6; I.A.S. (1975) Q 4; CSE (1986), Q 6 (a) (ii).

[46] (1953) 1 W.L.R. 246; see also J.E.C. Fawcett, "Some Foreign Effect of Nationalisation of Property" BYBIL Vol. XXVII (1950), p. 355 at p. 375.

[47] General Assembly Resolution, 626 (vii) of 21st December, 1952.

[48] 22nd. International Law Reports (1955), p. 23 at p.40.

[49] 20th International Law Reports (1953), p. 305 at p. 315. In this case the Court held that nationalisation was merely a species of expropriation.

[50] See Resolution 1803 (xvii) of 14th December, 1962.

[51] See *Ibid.* para 4.

On December 13, 1974, the U.N. General Assembly adopted by an overwhelming majority a Charter of economic rights and duties of States.[53] It has been hailed by some developing countries as an 'economic *Magna Carta*.' The resolution was passed by a majority of 120 to 6 with ten abstentions. The resolution proclaims that each State has the right to "freely exercise full permanent sovereignty over its wealth and natural resources, to regulate and exercise authority over foreign investments within its national jurisdiction, and to nationalise, expropriate or transfer the ownership, of foreign property." It further provides that "appropriate compensation" should be paid in cases of nationalisation by the State adopting such measures, taking into account its relevant laws and regulations and all the circumstances which the State considers pertinent. In case of any dispute or controversy relating to compensation, it should be settled under the domestic laws of the nationalising State and its tribunals unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with free choice of means.[54] United States, Britain, Denmark, West Germany and Luxemburg voted against the resolution while other affluent members, Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain abstained. Despite this, it would not be wrong to say that "the new Charter marks the beginning of a new phase in international relations, even if interested powers may be expected to defy and sabotage it."

In view of the above discussion, it may be rightly said that 'A State's natural asset is a national asset'.* Since it is now generally recognised that each State has permanent sovereign rights over its natural resources, all natural resources are therefore its national assets and it has sovereign right to nationalise, expropriate or transfer ownership of foreign property. In such a case, the only requirement is that appropriate compensation should be paid. But appropriate compensation is to be paid taking into account its (*i.e.* State's concerned) relevant laws and regulations and all circumstances that the State considers pertinent. In case of any dispute in this connection, the same shall be settled under the law of the nationalizing State and by its tribunals or by any other peaceful means agreed between the parties. Even the developed States concede the Sovereign right of each State to nationalise, expropriate or transfer ownership of foreign property but they contend that appropriate compensation (*i.e.* just equivalent of market value) should be paid for such expropriation and it should be subject to international adjudication. Such compensation should not only be adequate but must be paid promptly.

Despite this controversy, there is general agreement about the Sovereign right of each State to nationalise or expropriate foreign property and hence it has been remarked that 'A State's 'natural asset is a national asset'. This is clear from the example of nationalisation of Suez Canal in 1956 by Egypt. By this Egypt asserted its Sovereign rights over its natural resources. This was resented by France, Britain and Israel who made joint, armed intervention in the internal affairs of Egypt. But the problem was subsequently resolved by the efforts of Soviet Union, Security Council and the General Assembly. The agreement that followed recognised the Sovereign right of Egypt to nationalise Suez Canal and to realise taxes for the use of the canal. Thus the nationalisation of Suez Canal is a very strong precedent to show that a natural asset being a national asset, each State has Sovereign rights to nationalise or expropriate foreign property. So is the case with oil in West Asia. The events of past few years have clearly demonstrated the Sovereign rights of West Asian countries in respect of their most valuable natural resource—oil. They have gone even a step ahead and have used oil as a weapon to get their demands fulfilled and to influence international politics.

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[52] On Permanent Sovereignty over Natural Resources see also Ian Brownlie, Principles of Public International Law, pp. 431-44 ; U.S. Secretariat Study, The Status of Permanent Sovereignty over Natural Wealth and Resources, 1962 ; Gess, ICLQ. Vol. 13 (1964), pp. 398-449. Hyde, AJIL, Vol. 50 (1956), pp. 851-67.

[53] For the text of the Charter of Economic Rights and Duties of States ; see Resolution 3281 (XXXIX) reprinted in U.N. Monthly Chronicle, Vol. XII (January, 1975), p. 118.

[54] Article 2(2) (c) of the Chapter of Economic Rights and Duties of States ; see also Chapter I entitled International Economic Co-operation and the Evolution a New International Economic Order."

* Asked in I.A.S. (1975), Q. No. 4.

In recent years more and more emphasis is being given to the recognition of the principle of nationalisation or expropriation of foreign property by the developing countries and the opposition of the developed countries is growing weaker day by day. The main attack is against the implementation of the principle and not the principle itself. Besides nationalisation the developing countries have also been emphasizing the right of each State "to regulate and exercise authority, over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities" and that "no State shall be compelled to grant preferential treatment to foreign investment."[55] They further contend that each State has the right to "regulate and supervise the activities of transnational corporation within its national jurisdiction and take measures to ensure that such activities comply within its laws, and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State."[56]

To conclude in the words of a writer, "Finally, from a political view point, it appears to follow as a matter of course that the past struggle between the proponents of the Hull rule and adherents of the Calvo Doctrine (or its modern variants) will lead to synthesis in which the emphasis upon domestic law will be considerably stronger than under the old Hull Rule. Put succinctly, one may, therefore well expect that international law will continue to protect alien property, but that the extent of protection will more than previously be in accordance with modern developments in domestic property orders."[57]

(7) *Liability for the Acts of Multinational Corporations : Bhopal Gas Leak Disaster** .—There is lack of definite international law in respect of liability of transnational or multinational corporations. The charter of Economic Rights and Duties adopted by the General Assembly on 12 December 1974, recognises the right of each state "to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies." But developed countries such as U.S., U.K., Federal Republic of Germany and Japan voted against this. In *M.C. Mehta* v. *Union of India*,[58] which is more popularly known as *Oleum Gas Leak case*, the Supreme Court of India held : "the enterprise must be under an obligation to provide that the hazardous or inherently dangerous activity, in which it is engaged must be conducted with the highest standard of safety and *if any harm results on account of such activity the enterprise must be absolutely liable to compensate for such harm and it should be no answer to say that it had taken all reasonable care and that the harm occurred without any negligence on its part .... the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands* v. *Fletcher.*[59]

After having consolidated all claims relating to Bhopal Gas Leak Disaster and having acquired exclusive right to represent and make the claim by passing Bhopal Gas Leak Disaster (Processing of claims) Act, 1985, the Union of India instituted a suit against Union Carbide Corporation (U.C.C.) on 8 April 1985 in South District Court of Judge John F. Keenan. Judge John F. Keenan held on 12 May 1986 that the proper forum for filing the suit is India. Thereupon, on 5 Sept. 1986 the Union of India filed the suit at Bhopal against the U.C.C. requesting the court to award Rs. 3900 crores as compensation. On 17

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[55] Article 2(a) of the Charter of the Economic Rights and Duties.

[56] Article 2 (2) (b), ibid.

[57] Rudolf Dolzer, "New Foundations of the Law of Expropriation of Alien Property", A.J.I.L., Vol. 75 (1981) p. 553 at p. 589.

* See also for IAS (2002) Q. 5(b).

[58] AIR 1987 SC 1086.

[59] Ibid, at p. 1099.

December, 1987 Bhopal District Court passed an interim order directing the U.C.C. to deposit Rs 350 Crores. U.C.C. appealed against the said order and the High Court reduced the quantum of interim compensation to Rs. 250 crores. The U.C.C. once again filed an appeal in the Supreme Court against the order of the High Court. Thus the Bhopal Gas Leak Case reached the Supreme Court on the basis of compromise between the Union of India and the U.C.C. The Supreme Court passed an order on 14 February, 1989 directing the U.C.C. to pay a sum of US 470 million dollars in full settlement of all claims, rights and liabilities arising out of the Bhopal Gas Leak Disaster and quashing "all Criminal proceedings related to the disaster".

Thus in the *Bhopal Gas Leak Disaster* case the Supreme Court got an opportunity to further develop the principle of 'strict and absolute' liability enunciated in *M.C. Mehta* v. *Union of India* but the court abdicated its responsibility and even before the challenge to the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was decided, the Court passed settlement under awarding a very meagre sum and ending all criminal and civil liability in respect of the Bhopal Gas Leak Disaster. The settlement order has been severely criticized.[60] As remarked by Mr. P.N. Bhagwati, retired Chief Justice of the Supreme Court of India, "The Bhopal Gas has come to a disturbing end in an abrupt and unprecedented manner. The multinational has won and the people of India have lost. What has happened is unfortunate and distressing. The Supreme Court has lost the opportunity of advancing human rights jurisprudence from the Third world point of view and failed to meet the expectations of the people of India the constituency of the Court."[61]

On 22nd December, 1989, the Supreme Court upheld the validity of Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. The Court decided it in *Charan Lal Sahu* v. *Union of India*.[62] In regard to the review of decision of 14 February, 1989, the Supreme Court gave its decision on 3rd October, 1991 in case of *Union Carbide Corporation* v. *Union of India*.[63] The question for consideration, *inter alia*, before the Supreme Court was as to whether the compromise decision of 14 February, 1989 was within the jurisdiction of the Court because the Court was considering an interim order and not an appeal. The Supreme Court held that it was within the competence of the Court under Article 136 of the Constitution.[64] It was also argued before the Court that in *M.C. Mehta* v. *Union of India*,[65] the principle was propounded that greater the enterprise, greater quantum of compensation be awarded by the Court. The Supreme Court held that in compromise decision, this principle cannot be necessarily applied.[66] The Supreme Court rejected other arguments also and upheld the validity of the order of 14 February, 1989.

It may, however, be noted that the courts of states where multinational corporation operate possess jurisdiction over such corporations and their properties situated in the host state. If the acts of such corporation cause loss to the person or property of citizens of the state, the action can be taken against the corporation according to the law of that state.

As regards the liability in respect of Bhopal victims, two questions still remained. First, who should be blamed for the paltry compensation paid to Bhopal gas leak victims ? Secondly, who should make good the shortfall in compensation if the $ 470 million paid by Union Carbide Corporation is found inadequate ? According to the Supreme Court October 3, 1991 judgment, on both counts, the Central Government will have to pay and not the Dew Chemicals. It is the Central Government which will have to settle any additional claims for compensation made by victims of the gas tragedy.

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[60] See Dr. S.K. Kapoor "Bhopal Gas Leak Disaster (Industrial Hiroshima) and the Waterloo of Indian Judiciary" Law Review of Sri J.N.D.C., Lucknow, Vol. II (1989) p. 13.

[61] India Today, March 15, 1989, p. 45.

[62] AIR 1990 SC 1480.

[63] AIR 1992 SC 248.

[64] Ibid, at pp. 272-273.

[65] AIR 1987 SC 1086.

[66] AIR 1992 SC 248, 309.

Reeling under the blowback of the Bhopal Gas tragedy verdict, the government on 15th June, 2010 withdrew a set of "official amendments" to the nuclear liability for civil damage bill which were seen to dilute accountability of foreign suppliers and restrict legal options of victims.

Legal controls on the Transboundary Movements of Hazardous Wastes.—The most important Convention in this respect is *1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.* It was adopted in 1989. It entered into force in 1992. So far the convention has been ratified by 187 countries. Protocol to this convention has for only 11 parties. For coming into force it requires 20 parties to ratify it. But unfortunately, the United States of America, the largest generator of hazardous wastes, has not yet ratified the convention. The definition of hazardous wastes given the convention does not include ratification wastes and wastes emanating from the normal operations of the ship because they are already covered under several other international regulations. The object of the convention is to minimize the generation of hazardous wastes to promote disposal of hazardous wastes as close as possible to their source of generation, to encourage to take precautions to control pollution and to reduce transboundary movements of hazardous and other wastes covered by the Basel convention. With a view to continuously review and evaluate the effective implementation of the provisions of the Convention, Article 15 of the convention provides for the establishment of conference of Parties as the governing body of the convention. Article 16 provides for the setting up of a Secretariat at Geneva.

Having taken into account the relevant provisions of Principle 13 of the 1992 Rio Declaration on Environment and Development, according to which States shall develop international and national legal instruments regarding liability and compensation for the victims of pollution and other environmental damage and to fulfil the commitment accepted under Article 12 of the convention and emphasizing the need to set out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes, States Parties to the Basel Convention adopted *Protocol of liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal.* As noted above, it has yet to come into force.

According to Article 1 of the Protocol, the objective of the Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes.

As regards the scope of application of Article 3 provides that the Protocol shall apply to damage due to an incident occurning during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of a State of export. Any contracting party may by way of notification to the Depository exclude the application of the Protocol, in respect of all transboundary movements for which it is the State of export, for such incidents which occur in an area under its national jurisdiction, as regards damage in its area of national jurisdiction. The Secretariat shall inform all contracting parties of notifications received in accordance with this Article.

As regards preventive measures, Article 6 of the Protocol provides that subject to the requirement of domestic law any person in operational control of hazardous wastes and other wastes at the time of an incident shall take all reasonable measures to mitigate damage arising therefrom. Article 4 provides for 'strict liability'. It provides that the person who notifies in accordance with Article 6 of the convention shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. If the State of the export is the notifier or if no notification has taken place the exporter shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. Article 5, which provides for 'fault-based liability', adds that any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the convention or by his wrongful intentional, reckless or negligent acts or omissions. This Article shall not affect the domestic law of the contracting parties governing liability of servants and agents.

Article 13, which fixes the time of liability, states that claims for compensation under the Protocol shall not be admissible unless they are brought within ten years from the date of the incident. Article 16 however, provides that the Protocol shall not affect the rights and obligations of the contracting parties under the rules of general international law with respect to state responsibility.

The Protocol was opened for signature by States and by regional integration Organisations parties to the Basel Convention in Berne at the Federal Department of Foreign Affairs of Switzerland from 6th to 17th March, 2000 and at United Nations Headquarters in Newyork from 1st April to 10th December, 2000. According to Article 29, the Protocol would enter into force on the nineteenth day after the date of deposit of the twentieth instrument of ratification, acceptance, for mal-confirmation, approval or accession.

Reference may also be made to the other convention in this field. The Walgani Convention to Ban the Importation into Forum Islands Countries of Hazardous and Radioactive Waste and to Control the Transboundary Movement of Hazardous Waste Within South Pacific Region. This convention was adopted in 1995 and entered into force in 2001. Last but not the least, the Stockholm Convention on Persistent Organic Pollutants. This convention was adopted in 2001. It has yet not entered into force.

State Responsibility for Environment

N.B.—For this please see chapter "Development and Environment".

Defences to State Liability

Articles 29 to 35 of the 1980 Draft Articles on State responsibility submitted by International Law Commission deal with the defences to State Responsibility. They are following :

(1) Consent.—If a State gives its consent to such an act of some other State as is not in conformity with the obligation of the other State to it, then the State giving such consent will not be entitled to claim that the said act is wrongful. But this rule will not apply where a peremptory rule of international law has been violated.[67]

(2) Counter measure in respect of an internationally wrongful act.—The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.[68]

(3) Force majeure and fortuitous event.—The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistable force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

The above rule will not apply the State in question has contributed to the occurrence of the situation of material impossibility.[69]

(4) Distress.—The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

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[67] Article 29.

[68] Article 30.

[69] Article 31.

But this rule will not apply if the State in question has contributed to the occurrence of the situation of extreme distress or of the conduct in question was likely to create a comparable or greater peril.[70]

(5) State of necessity.—A State of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of State unless :

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril ; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

In any case, a State of necessity may not be invoked by a State as a ground for precluding wrongfulness :

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law.

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the State of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the State of necessity.[71]

(6) Self-defence.—The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self defence taken in conformity with the charter of the United Nations.[72]

(7) Reservation as to compensation for damage.—Preclusion of the wrongfulness of an act of a State by virtue of the provisions of Articles 29, 31 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.[73]

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[70] Article 32.

[71] Article 33.

[72] Article 34.

[73] Article 35.

CHAPTER 11

RECOGNITION

Meaning and Definition of the term 'Recognition'*

As aptly remarked by Professor G. Schwarzenberger, "The growth of international law is best understood as an expanding process from a nucleus of entities which have accepted each other's negative sovereignty and on the basis of consent, are prepared to maintain and possibly expand the scope of their legal relations. Like most clubs, the society of sovereign States is based on the principle of co-option. In exercising this preorgative the existing subjects of international law employ the device of recognition." According to Prof. L. Oppenheim, "In recognising a State as member of international community, the existing States declare that in their opinion the new State fulfils the conditions of statehood as required by international law." [1] Fenwick also subscribes to the view that through recognition the members of the international community formally acknowledge that the new State has acquired international personality. The Institute of International Law has defined the term 'recognition' in the following words : it is "......the free act by which one or more States acknowledge the existence of a definite territory of a human society politically organized independent of any other existing States and capable of observing obligations of international law by which they manifest through their intention to consider it a member of international community." [2] According to Kelsen, a community to be recognised as an internaitonal person must fulfil the following conditions : (1) The community must be politically organised ; (2) It should have control over a definite territory ; (3) This definite control should tend towards permanence ; and (4) The community thus constituted must be independent.[3] Thus the conditions of a Statehood are (a) People ; (b) a territory ; (c) a government ; and (d) sovereignty. "Recognition of a State is an act by which another State acknowledges that the political entity recognized possesses the attributes of statehood." [4] In short, we may say that through recognition, the recognising State acknowledges that the recognised State possesses the essential conditions of statehood. However, international law does not provide as to how these essential conditions are to be determined. In fact, international law leaves members of international community free to determine by themselves whether the recognised States contain the essential condtions of statehood. It is because of this reason that very often recognition is said to be a political diplomatic function.[5]

Theories of Recognition**

There are two main theories of recognition (1) Constitutive theory ; and (2) Declaratory or Evidentiary theory.

(1) *Constitutive theory.****—According to this theory, recognition clothes the recognized State with rights and duties under International law. Recognition is a process through which a political community acquires internaitonal personality by becoming a member of family of nations. Hegel, Anzilloti, Oppenheim, etc. are the chief exponents of

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* See also for P.C.S. (1982), Q. NO. 2 C.S.E. (1988), Q. 6(a), P.C.S. (1990) Q. 8(a) ; UPPCS (2001) Q. 7(b).

[1] *L. Oppenheim*, International Law, Vol. I, Eighth Edition, p. 127. See also Oppenheim's International Law *Ninth Edition*, Longman Group UK Ltd. and Mrs. Tomoko Hudson, 1992, pp. 127, 128 and p. 132.

[2] *Charles G. Fenwick* International Law (1971), p. 156.

[3] *See* A.J.I.L. *(1936)*, *Vol.* 30, Supplement, at p. 185.

[4] Hans Kelsen, "*Recognition in* International Law", A.J.I.L. Vol. 55 (1941), p. 605 at pp. 607-8.

[5] Philip C. Jessup, A Modern Law of Nations (1948), p. 63.

** See also I.A.S. (1960), Q. No. 4 and P.C.S. (1968), Q. No. 5 ; C.S.E. (1979), Q. No. 8 (a) ; P.C.S. (1983) Q. 2(a) C.S.E. (1987), Q. 6 (a) ; C.S.E. 1988, Q. 6 (a) C.S.E. (1990) Q. 6(a) ; P.C.S. (1990) Q. 8(a), P.C.S. (1991) Q. 7(a) ; P.C.S. (1995) Q. 8 (a) ; UPPCS (2001) Q. 5(b) ; UPPCS (2007) Q. 6.

*** See also for I.A.S. (1971), Q. No. 5 and I.A.S. (1962), Q. No. 4 ; IAS (2006) Q. 5(d).

constitutive theory. In the words of Professor Oppenheim,[6] "A State is, and becomes, an international person, through, recognition only and exclusively."* "According to the Constitutive theory, statehood and participation in the international legal order are attained by politcal group only in so far as they are recognised by established State." [7] Holland also supports the Constitutive theory. In his view, recognition, confers maturity upon State and until and unless a State is recognised, it cannot acquire rights under international law. In the view of Judge Lauterpacht, Constitutive theory is in accordance with the practices of the State and is based on sound legal principles. The practice of States, however, indicates the contrary. In practice most of the States accept the Declaratory theory. In this connection, Judge Lauterpacht has remarked that the wide acceptance of Declaratory theory is due to the reaction against the traditional conception of recognition as a political act purely and simply. In his view, there is a legal duty on the part of the State to recognize any community that has in fact acquired the characteristics of statehood.

Criticism.—Jurists have criticized the Constitutive theory. The view of Judge Lauterpacht that there is legal duty on the part of the existing States to recognize any community that has in fact acquired the characteristics of statehood, does not seem to be correct. In practice, State do not accept any such obligation. "The practice indicates, however, that although established States normally recognize new States and new governments that in fact exist, they have not consented to law norms that obligate them to do so." [8] Besides this, the Constitutive theory presents several other serious difficulties. According to this theory, if a State is not recognized it can have neither duty nor rights under international law. This is a very absurd suggestion. If we accept this proposition, it will create difficulties in the case of new State which is recognized by some States but not recognized by others. The examples of China and Bangladesh can be cited in this connection. China was not recognized by America and other Western countries for a number of years although China possessed all the essential attributes of State. But to assert that China, therefore, did not have rights and duties under international law would be an absurd proposition. Similarly, Bangladesh was not recognised for sometime by China, Pakistan, Albania, etc.

However, in support of the constitutive theory, it must be admitted that once a state is recognized it acquires status and is recognized as such by the municipal courts of the recognising state.

(2) Declaratory Theory**

According to this theory, statehood or the authority of the new government exists as such prior to and independently of recognition. Recognition is merely a formal acknowledgment through which established facts are accepted. The act of recognition is merely declaratory of an existing fact that a particular State or government possesses the essential attributes as required under international law. The chief exponents of this theory are Hall, Wagner, Brierly, Pitt Corbett and Fisher. According to Prof. Hall, a State enters into the family of nations as of right when it has acquired the essential attributes of statehood. Pitt Corbett has expressed the view that existence of a State is a matter of fact. In his words, "So long as a political community possesses in fact the requisites of a statehood, formal recognition would not appear to be a condition precedent to acquisition of the ordinary rights and obligaitons incident thereto." Brierly has also remarked, "the granting of recognition to a new State is not a 'Constitutive' but a 'Declaratory' act. A State may exist without being recognized and if it exists in fact, then whether or not, it has been formally recognized by other States it has a right to be treated by them as a State." [9] The Soviet view and practice are also in favour of the declaratory theory of recognition.

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[6] Oppenheim : See Supra note 1, at p. 125.

* Asked in I.A.S. (1973), Q. No. 6(b).

[7] P.E. Corbett, The Growth of World Law (1971), p. 62.

[8] Edward Collins, International Law in a Changing World (1969), p. 88.

** See also for P.C.S. (1990) Q. 10(b) ; IAS (2007) Q. 6(b).

[9] J.L. Brierly. The Law of Nations, Sixth Edition (1946), p. 139.

According to the Soviet view, birth of a State is the act of internal law rather than that of international law.[10] In modern times international personality does not depend upon recognition.[11]

Criticism.—This theory has also been subject to criticism. The view that recoginition is only a declaratory of an existing fact is not completely correct.[12] In fact when a State is recognized, it is a declaratory act. But the moment it is recognized, there ensue some legal effects of recognition which may be said to be of constitutive nature.

Conclusion.—On the basis of the above discussion, it may be concluded that recognition is declaratory as well as constitutive act. "Probably the truth lies somewhere between these two theories. The one or the other theory may be applicable to different sets of facts." [13] Judge Lauterpatcht has also expressed the view that it is declaratory of a simple fact of existence of political community after ascertaining facts of statehood in the functional way. On such declaration of statements, recognition is constitutive of certain legal consequences. Svarlien has also subscribed to this view. Prof. Oppenheim who has been classed among the exponents of constitutive theory, has admitted that "Recognition is declaratory of an existing fact but constitutive in nature." [14] In the Ninth Edition of Oppenheim's International Law[15] it has been pointed out that there is "no settled view whether recognition is the only means through which a new State becomes part of the international community". On the one hand there is the view that a new State comes into existence as a matter of fact and becomes a member of international community irrespective of the fact whether it has been recognised or not. On the other hand the view is that recognition constitutes the new State as a member of the internatonal community ; no State has a duty to recognise a new State ; and that no new State has a right to be recognised by other State.[16] Indeed, "The problem is largely theoretical because state practice is inconclusive and may be reationalised either way." [17] Prof. Briggs has rightly remarked, "Juridical theories of recognition deduced from jurisprudential concepts fail to explain the facts of State conduct, and inductions from State conduct have failed to provide a juridical unambigous theory of recognition." [18] Prof. T.C. Chen has also remarked, "In the last analysis, the question of international recognition is but a reflection of the fundamental cleavage between those who regard the State as the ultimate source of international rights and duties and those who regard it as being under a system of law which determines its rights and duties under that law." * The exponents of constitutive theory want the institution of recognition to be under a system of law and that is why, Lauterpacht, the chief exponent of constitutive theory, posits a legal duty on the part of existing States to recognize any community that has in fact acquired the characteristics of statehood. The act of recognition is thereby defined as a clearly legal act, with new States having the legal right to be recognised and established States having the legal duty to recognize them. Similar reasoning is used to posit a legal duty to recognize new governments that in fact come to power in existing States." [19] On the other hand, exponents of declaratory theory contend that international personality does not depend upon recognition. They regard the State as the ultimate source of international rights and duties. According to them, there is no legal duty to recognise State even after it has attained Statehood. Thus, according to the declaratory theory, recognition depends upon the discretion or sweet will of the recognising States. States are, in practice, not prepared to be bound by any norms in this connection. However as was aptly remarked by an eminent writer,[20] "Non-recognition based on political considerations has lost most of its meaning. It no longer produces all the effects it was meant to in the past ...... Since institutions of international law are but reflex of history, they are produced by it and in turn influence its further course. That is why in the long turn the institution of recognition will surely be more and more affected by inevitable trend towards greater mutual understanding and towards the adoption of principles and criteria reflecting the growing co-operation of States of different political and economic structure."

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[10] See Kazimierz Grozybowski Soviet Public International Law (A.W. Sijthoff, Leyden (1970), p. 69.

[11] Ibid at p. 70 M. Lachs has also observed : "We face today the waning legal importance of recognition...... Non-recognition based on political considerations has lost most of its meaning. It no longer produces all the effects it was meant to in the past." "Recognition and Modern Methods of International Co-operation." BYBIL, Vol.. XXXV, (1959) p. 252 at p. 259.

[12] See Oppenheim, Supra note 1 at p. 128.

[13] J.G. Starke, Introduction to International Law, Tenth Edition, (1989), p. 133 ; see also Svarlien, An Introduction to the Law of Nations, pp. 97-98.

[14] L. Oppenheim. International, Law, Vol. I, Eighth Edition, p. 128.

[15] See note 1, at p. 128.

[16] *Ibid, at pp.* 128-129.

[17] *Ibid. at p.* 129.

[18] Herbert W. Briggs, "Recognition of States : Some Reflections on Doctrine and Practice", A.J.I.L. Vol. 43 (1949), *p. 113 at p.* 121.

* **Asked in I.A.S. (1967), Q. No. 3.**

[19] **Edwards Collins**, *International* Law in a Changing World (1969), p. 88.

Modes of Recognition*

Recognition may be of two kinds—*De facto* and *de jure* recognition. The practice of States shows that in first stage the State generally give *de facto* recognition. Later on, when they are satisfied that the recognized State is capable of fulfilling international obligations, they confer *de jure* recognition on it. That is why, it is sometimes said, *de facto* recognition of State is a step towards *de jure* recognition.** We will now discuss in a little greater detail both kinds of recognition.

De facto Recognition

According to Prof. G. Schwarzenberger, "When a State wants to delay the *de jure* recognition of any State, it may, in the first stage grant *de facto* recognition." The reason for granting *de facto* recognition is that it is doubted that the State recognized may be stable or it may be able and willing to fulfil its obligations under international law. Besides this, it is also possible that the State recognized may refuse to solve its main problems. *De facto* recognition means that the State recognized possesses the essential elements of statehood and is fit to be a subject of international law. However, the effects of *de jure* recognition are more far-reaching. In the words of Oppenheim, "The *de facto* recognition of a State or government takes place when, in the view of the recognising State the new authority although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not yet offer prospects of complying other requirements of recognition such as, willingness or ability to fulfil international obligations." [21] In the view of Judge Lauterpacht, *de facto* recognition shows that the recognizing State wants to establish its relations with the recognised State without establishing diplomatic relations. As remarked by Prof. Oppenheim, *De facto* recognition is, in a sense, provisional and liable to be withdrawn if the absent requirement of recognition fails to materialize." [22] In the view of Judge Philip C. Jessup, "*De facto* recognition is a term which has been used without precision when properly used to mean the recognition of the *de facto* character of a government, it is objectionable and indeed could be identical with the practice suggested of extended recognition without resuming diplomatic relations." [23]

De jure Recognition

De jure recognition is granted when in the opinion of recognizing State, the recognized State or its Government possesses all the essential requirements of statehood, and it is capable of being a member of the international community. As pointed out by Prof. H.A. Smith, the British practice shows that three conditions precedent are required for the grant of *de jure* recognition of a new State or a new Government. The three conditions are as (i) A reasonable assurance of stability and permanence ; (ii) The

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[20] M. Lachs, see supra note 11.

* C.S.E. (1987) Q. 6 (a).

** Asked in I.A.S. (1974), Q. No. 2 ; For answer of this question see the two kinds of recognition and the distinction between them discussed below.

[21] See Oppenheim, see supra note 14, at pp. 134-35.

[22] Ibid at p. 136.

[23] Phillip C. Jessup. A Modern Law of Nations, p. 57.

Government should command the general support of the population; and (iii) It should be able and willing to fulfil its international obligations.[24] Further, "Recognition *de jure* results from an expressed declaration or from a positive act indicating clearly the intention to grant this recognition such as the establishment of diplomatic relations." [25] *De jure* recognition is final, and once given cannot be withdrawn. As pointed out earlier, for *de jure* recognition and the intention to establish diplomatic relaitons are necessary.

Distinction between De facto and De jure Recognition*

As observed by Prof. G. Schwarzenberger, "*De jure* recognition is by nature provisional and may be made dependent on conditions with which the new entity has to comply. It differs from *de jure* recognition in that there is not yet a formal exchange of diplomatic representatives. *De jure* recognition ......is complete, implying full and normal diplomatic relaiton." In the words of Kelsen :"......*de jure* recognition is final, whereas *de facto* recognition is only provisional and thus may be withdrawn." [26] According to Prof. Oppenheim, so far as the legislative and other internal acts of the State recognized are concerned, there is hardly any difference between *de facto* and *de jure* recognition.[27] Thus we see that from the point of legal effect, there is hardly any difference between *de jure* and *de facto* recognition of a State. As a matter of fact, *de facto* Government enjoys same immunities from suits as *de jure* Government. However, diplomatic courtesies and representations are usually not accorded to *de facto* government except in extraordinary circumstances occurring in times of war. Thus, "The distinction between *de jure* and *de facto* recognition is in essence that the former is the fullest kind of recognition while the latter is a lesser degree of recognition, taking account on a provisional basis of present realities." [28]

In *Luther* v. *Sagor,*[29] it was held that there is no distinction between *de facto* and *de jure* recognition for the purpose of giving effect to the internal acts of the recognized authority. The facts of this case are as follows :—

In June, 1918, Russia nationalised timber and other industries. Consequently, the mill of the plaintiff was acquired. In August, 1920, the representatives of the Russian Government entered into a contract with the defendant to sell some timber, etc. The plaintiff requested the Court to declare that all the goods purchased by the defendant under the said contract were his property. The defendant contended that Russia was a Sovereign State and by the act of a Sovereign State, the ownership of the plaintiff was ended. Britain had given *de facto* recognition to Russia. The court decided in favour of the defendant. Warrington, L.J. held : "...... there is no difference for the present purposes between a Government recognised as such *de jure* and one recognised *de facto*. In the latter case, as well as in the formal the government in question acquires the right to be treated by the recognising State as an independent Sovereign State ......"[30]

This rule has been applied in a number of cases. For example in *Bank of Ethopia* v. *National Bank of Egypt. and Liquori,*[31] the court ruled that in view of the fact that the British Government granted recognition to the Italian Government as being the *de facto* Government of the area of Abyssinia, which was under Italian control, effect must be given to an Italian decree in Abyssinia dissolving the plaintiff bank appointing liquidator.

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[24] H.A Smith, Great Britain and the Law of Nation, Vol. I, p. 79.

[25] Philip Marshall Brown "Legal Effects of Recognition", A.J.I.L., (1950), p. 617 at p. 639.

* See also for I.A.S. (1970), Q. No. 4 and P.C.S. (1973), Q. No. 3 ; P.C.S. (1982) Q. No. 2 ; P.C.S. (1983) Q. 2(b) ; C.S.E. (1984) Q. 5(b) ; C.S.E. (1988) Q. 6 (a) ; C.S.E. (1993) Q. 6(b) ; IAS (2001) Q. 8(a) ; IAS (2003) Q. 5(b) ; IAS (2009) Q. 6(a).

[26] "Recognition in International Law", AJIL, Vol. 35 (1941), p. 605 at p. 612.

[27] Oppenheim, see supra note 14, at p. 136.

[28] Oppenheim's International Law, note 1, at p. 155.

[29] (1921) 3 K. B. 532 ; see also Williams v. Bruffy, (1917) U.S. 178 at p. 186 and Underhill v. Hernandez, (1897) 168 U.S. 230 at p. 253.

[30] Adopted from L.C. Green, International Law Through Cases Third Edition (1970), pp. 133-134.

[31] (1937) Ch. 517.

Another leading case on the point is *The Arantzazu Mendi*.[32*] The facts of the Arantzazu Mendi case are as follows :

The Arantzazu Mendi was a Spanish ship registered at Bilbao. After the occupation of Bilbao by insurgents led by General Franco, the republican Government of Spain passed a decree taking the *Arantzazu Mendi* in its possession. At this, the ship was in the High Seas. When the ship reached London on August 11, 1937, the onwer of the ship held a writ for taking possession of the ship. The ship was arrested by the Admiralty-Marshall. The Republican Government made a conditional appearance as the defendant. In March, 1938, General Franco passed a decree taking the said ship and other ship in his possession. Till April, 13, the owners of the ship consented to the decree in General Franco and declared the ship to be under him. On the same day, the Republican Government issued a writ but the officers of the Government of Franco argued that the same was ineffective because it was against a foregin Sovereign State which does not consent to be under its jurisdiction. The Republican Government of Spain was a Government recognised *de jure* by Britain while the National Government under General Franco was a Government recognised *de facto* by Britain. The House of Lords dismissed the writ and declared the warrant of arrest as invalid. Lord Atkin observed : "By 'exercising *de facto* administrative control' or 'exercising effective administrative control' I understand exercisng all the functions of a Sovereign Government ....It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warship or merchant ships. In those cirumstances, it seems to me that recognition of a Government as possessing all those attributes in a territory while not subordinate to any other Government in that terrtory is to recognise it as sovereign, and for the purposes of international law as a foreign State." He further observed : "There is ample authority for the proposition that there is no difference for the present purpose between a recognition of a State *de facto* as opposed to *de jure*. For these reasons I think it was established by the foregin office letter that the National Government of Spain at the date of writ was a foreign State and could not be impleaded."

As pointed out earlier, one of the main differences between *de facto* and *de jure* recognition is that in *de facto* recognition diplomatic relations are not formally established. Diplomatic relations are formally established only after the grant of *de jure* recognition. The majority of jurists are of the view that so far as the legal effects are concerned, there is hardly any difference between the two types of recognition. According to Wiliam W. Bishop, if at all there is difference, it is political rather than legal.[33] In the view of Prof. Kelsen, "From the juristic point of view, the dinstinction between *de jure* and *de facto* recognition is of no importance. Any codification of International Law relating to recognition can ignore it." [34] In the view of Fenwick and Judge Lauterpacht, there are certain differences between *de facto* and *de jure* recognition. They have pointed out that in case of succession only the State, which has been granted *de jure* recognition will be deemed to be the successor State. It may, however, be pointed out that in last few years, the judicial decisions have not subscribed to this view. "Since succession to liabilities is same, whether *de facto* or *de jure* recognition is extended, it cannot be argued consistently that a difference arises in succession of rights." [35]

It is, therefore clear from the above discussion that if at all there is a difference between *de facto* and *de jure* recognition, it is chiefly political rather than legal. In *de jure* recognition formal diplomatic relations are established whereas in *de facto* recognition diplomatic relations are not established. To conclude in the words of Prof. Charles L. Cochran, "Whatever the merits of the arguments for or against the distinction between *de facto* and *de-jure* recognition, it is clear that the difference, if any, is becoming less clear.

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[32] (1939) A.C. 256.

[*] See also for I.A.S. (1973), Q. No. 7 (b) and I.A.S. (1968), Q. No. 11 (a).

[33] See William W. Bishop, Jr. International Law : Cases and Material, 2nd Ed. (1962), p. 289.

[34] H. Kelsen, "Recognition in International Law", AJIL, Vol. 35 (1941), p. 605 at p. 613.

[35] Charles L. Cochran, "De-facto and 'De-jure Recognition : Is there a Difference ?" AJIL, Vol. 62 (1968), p. 457.

The existence of *de facto* recognition is becoming a moribund issue simply by not being raised as a possbility by the Government." [36]

Recognition of Insurgency*

Insurgency denotes the state of political revolt in a State. Insurgency, presupposes a civil war.[37] "Insurgency is used to denote the condition of political revolt in a country where the rebels have not attained the character of belligerents." Thus "Insurrection is a war of citizens against the State for the purposes of obtaining power in the whole or part. It always implies a sustained armed struggle by a group of citizenry against an established order." [38] In fact, insurgency is an intermediate stage between tranquillity and belligerency. In the view of Judge Lauterpacht if the State recognizes the insurgents of another State, it would imply that it would not treat such insurgents as violators of law. It also implies that such a State wishes to establish relations with such insurgents on a temporary basis. The effect of insurgency is that it partially internationalises the conflict. In the view of Judge Lauterpacth, it is not against international law to recognize insurgents as a *de facto* government over the territory under their control. It is merely an acknoiwedgment of fact situation for practical purposes.

Essential Conditions for Recognising Insurgents

Following are the essential conditions for recognition of insurgents :—

(1) Control over a considerable part of the territory ;

(2) Considerable support to the insurgents from the majority of the people living in the territory ; and

(3) Insurgents should have the capacity and will to carry out the international obligations.

Effects of recognition of insurgency—The recognition of insurgency is less important than the recognition of belligerents. The following effects ensue from the recognition of insurgency :—

(1) They (*i.e.* insurgents) are not treated as pirates ;

(2) The rebels of civil strife are treated as *hostes generis humani* (the public enemy) until they are recognized as insurgents ;

(3) The international rules of war become applicable to them.

Recognition of belligerency **

"When the insurgents are well organized, conduct hostilities according to laws of war and have a determinate territory under their control they may be recognized as belligerents whether or not the parent State has already recognized that status."[39] As in the case of a recognition of a State recognition of belligerency is the question of policy and not of law. Consequently some States find it convenient to recognise belligerency and some do not. The policy of State in this regard hinges upon national interest of recognizing State." [40] The belligerency is in fact the final status of three stages of the ascending intents of the conflict which presents a 'violent challenge to the sovereign authority within a State'. "Recogniton of belligerency is the acknowledgment of a juridical fact that there exists a state of hostilities between two factions contending for power or authority." [41]

Essential conditions for the recognition of belligerents

Recognition of belligerency is treated to be an unfriendly act until the following conditions are present :

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[36] Ibid at p. 460.

* See also for IAS (1971), Q. No. 6; IAS (1957), Q. No. 3; PCS (1982), Q. No. 7 (e) ; P.C.S. (1983) Q. 8 (b).

[37] Kelsen "Recognition in International Law", AJIL, Vol. 35 (1941), p. 605 at p. 616.

[38] R.P. Dhokalia, "Civil Wars and International Law", AJIL, Vol 11 (1971), p. 219 at p. 225 ; see also Chen Tichiang, The International Law of Recognition, p. 398 ; H. Lauterpacht, Recognition in International Law, p. 275.

** See also for IAS (1957), Q. No. 3 ; IAS (1955), Q. No. 8 ; PCS (1982), Q. No. 7(e) ; PCS (1983) Q. 8(b).

[39] Philip C. Jessup, A Modern Law of Nations, p. 53.

[40] M.K. Nawaz "Bangladesh and International Law", AJIL (1971), p. 251 at 259.

[41] Ibid

(1) The armed conflict is to be of general character ;

(2) The insurgents occupy and administer a considerable portion of the national territory.

(3) They conduct hostilities through armed forces under a responsible authority. Moreover, they conduct hostilities in accordance with the rules of war ; and

(4) The hostilities are to be of such magnitude that the foreign States may find it necessary to define their attitude towards the belligerents and the established government.

Effects of recognition of belligerents.—Following are the effects or consquences of the recognition of belligerency :

(1) From the date on which the recognition of belligerency is accorded international law rules governing the conduct of hostilities apply.

(2) The conflict is internationalised and the belligerents get some rights under International Law.

(3) The relations between the recognized belligerent authorities established government and the recognising States are governed by International Law rather than municipal law.

Distinction between recognition of States and Government.*

Generally a State is recognized when it possesses essential elements of Statehood. The recognition of a State means that it has been included as a member of international community. There is a difference between recognition of State and of a government. Once a State is recognized, it becomes a member of international community. By recognition the international community determines that the recognized State possesses the essential qualities of a State, and is able and willing to fulfil its international obligations. But so far as the recognition of a government is concerned, it simply means that the government recognized is entitled to represent the state concerned and that it depends on facts and circumstances. For example if there is a civil war in a State and through revolution the government of that State changes, the other States have to take a decision as to whether to grant recognition to the said government or not. If the change in the government takes place in accordance with the constitutional provision through peaceful means, then such a government ordinarily receives recognition from other States and the existing ambassadors continue without any change or their formal reappointment on the same post. For example, after the replacement of Congress (I) government by the National Front Government recently recognition of the new government was implicit in continuance of the existing diplomatic envoys. The position is, however, different when the change takes place by the use of force or revolution. In such a case other States have to see whether the new government commands the respect of the people. Besides, it has also to be ascertained as to whether the new government has signs to become permanent or stable. When the other States are satisfied that the new government commands the support of the majority of the people and may become stable, other States accord recognition to such a government. Ordinarily it is seen that recognition of government is given simultaneously with the rcognition of the State. For example, most of the States which recognized Bangladesh also recognized simultaneously its government. The distinction between recognition of State and Government has been aptly summed up by P.E. Corbett in the following words : "The recognition of governments is a different matter, but one clouded with similar ambiguities. What is involved is not the acknowledgment of statehood but decision as to who is entitled to act for a given State.[42]

As in the case of recognition of States, in respect of the recognition of a government also states do not accept any obligation and much depends on their discretion or sweet will. This can be explained with the example of China. Most of the

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* See also for I.A.S. (1957), Q. No. 3 and P.C.S. (1968), Q. No. 5 ; C.S.E. (1987), Q. 6(a) ; P.C.S. (1988), Q. 6, P.C.S. (1990) Q. 8(a) ; P.C.S. (1991) Q. 7 (a).

[42] P.E. Corbett, The Growth of World Law (1971), p. 66.

States accepted China as a State but for many years they did not recognise the Government of Communist China on the mainland of China and Formosa which is practically a government in exile on an island 70 miles off the Chinese mainland, having support of less than two per cent of the Chinese population, was officially held by the majority of States to be the *de jure* government of China's immense territory and seven hundred million people. P.E. Corbett has, therefore, suggested that "......the decision should be in the hands of an organisation of that universality, and the U.N. is our nearest approach. Agreement that the Committees which pass upon credentials of delegates to the General Assembly and the Security Council should be their decision confirm or deny, in such a way as to bind all members, the title of the delegates senders to govern, would be a long step in the right direction." [43]

Recognition of governments serves three functions—(i) it ensures that only regimes which clearly deserve such status are accepted as governments of states ; (ii) it assures new governments that others will respect their status ; and (iii) it serves to inform courts, government agencies and nationals of recognising states that a particular regime is in fact the government of another state.[44] Lately some scholars have expressed the view that recognition of governments should be abolished because decision in respect of recognition of new government often depends on policy and the current doctrine on the effects of recognition or non-recognition creates unnecessary confusion.[45] But it has been correctly pointed out that "......... abolishing recognition of governments would be a mistake. This is not to argue that existing institution is perfect. Far from it advocates of abolition are correct in their basic criticism of recognition as it has been practiced and in their insistence that any government in effective control of its state should have its status acknowledged and respected. If recognition of governments is to perform its proper functions and confusion among acknowledgments of status, communication, and approval is to be avoided, recognition decisions must be based solely on whether the new government has control of that state." [46]

*Is there a duty to recognize.** —As pointed out earlier a State is generally recognized when it possesses the essential conditions and elements of statehood as noted earlier. In the view of Judge Lauterpacht, if a State possesses the above mentioned essential elements of statehood, International Law posits a duty on other States to recognise such a community. The view of Judge Lauterpacht is not supported by the parties of States. In practice, States have not consented to any such obligation. "Practice indicates, however, that although established States normally recognise new State and new governments, that in fact exist they have not consented to law norms that obligate them to do so." [47] Kelsen also subscribes to this view. He writes : "such an obligation, however, desirable is not stipulated by positive international law. Existing States are only empowered, they are not obligated to perform the acts of recognition. Refusal to recognise the existence of a new State is no violation of general international law." [48]

*Facultative Theory of Recognition*** *or is recognition a political or discretionary act ?*—As pointed out earlier, a State to be recognized should possess the above-mentioned elements of statehood. But International Law does not provide as to how the above-mentioned essential elements are to be ascertained. In fact the granting of recognition depends upon the discretion of the recognizing State. In other words, International law leaves the States free to determine as to whether a particular State possesses the essential elements of statehood. In the view of Judge Lauterpacht, International Law posits a duty on the existing States to recognize any community which possesses the essential elements of statehood. This view does not seem to be correct because neither it is supported by the practice of States nor does International Law impose any such duty upon States. As pointed out earlier, the granting of recognition depends much upon the discretion of the State. The practice of the States shows that recognition is a political function. "Recognition constitutes the weakest link in international law. Since recognition tends to enhance the prestige of recognized community, and also sometimes its material resources, recognition is accorded prematurely to sympathetic regimes and is protectedly withheld from unsympathetic ones"[49] Prof. Schwargenberger has also remarked : "In the absence of established rules or treaty obligation to the contrary, recognition is a matter of discretion." "Recognition of a new State or government is a political diplomatic function .... It is determined by reasons of expediency and high State policy. No State or group of persons organized politically has legal claim to recognition though it may possess moral claim." [50]

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[43] P.E. Corbett, The Growth of World Law (1971), p. 67.

[44] M.J. Patterson, "Recognition of Governments should not be abolished" A.J.I.L., Vol. 77 (1983) p. 31.

[45] Ibid.

[46] Ibid., at pp. 49-50.

* See also for PCS (1976), Q. No. 3 ; For answer of this question see also theories of recognition discussed earlier.

[47] Edward Collins, see supra note 19 at p. 89.

[48] Kelsen, Supra note 31, at p. 610.

** See also for IAS (1972), Q. No. 10(c) ; IAS (1969), Q. No. 4 and IAS (1960) Q. No. 4 ; CCS (1979) Q. No. 8 (a) ; C.S.E. (1992) Q. 5 (d).

Since recognition of a new State is a political diplomatic function, States sometimes grant premature recognition to a new State. A premature recognition is granted to new State although it has yet not attained statehood. Since the granting of recognition is a discretionary act, granting of premature recognition is not forbidden. Whatever be the reasons which prompt an existing State to recognise a new State, even though prematurely, it cannot be regarded as violative of international law because granting of recognition is a matter which depends upon discretion of the recognising States.

According to the Soviet view also, recognition is a political act and it is in the establishment of diplomatic relations which facilitate co-operation between States, that the political meaning of recognition above all consists.[51] The People's Republic of China also seems to follow this view.[52] In respect of recognition, the British practice is also based on political realism.[53] In practice, India also considers recognition as a political and discretionary act. The practice of States shows clearly that recognition is political function and it ultimately depends upon the discretion of the States. For example, China was not recognized by many countries for a long time although China possessed all the essential elements of statehood. The obvious reason for this was that it was in the political interests of States not to recognize China.

Suggestions.—Judge Philip C. Jessup has suggested that the matter of the existence of the statehood of a new State must be subject to the collective decision. In his view, unless a declaration is made in regard to the existence of the statehood of any political community, the members of the U.N. should not recognise such a new State. The General Assembly may make such a declaration on the recommendation of the Security Council. In the words of Judge Jessup, "The declaration of the General Assembly might also include a statement of the position that members of the U.N. would not independently accord recognition to new State." [54] If this suggestion is accepted and implemented, recognition will cease to be a political and discretionary act and will become a matter under the International collective control. Percy E. Corbett also agrees with the view of Judge Jessup. He writes : "Since any group satisfying conditions will, judging now by 23 years (now 60) of experience almost certainly desire the prestige and other advantages of membership in the U.N., its application could be treated at the same time as a submission of its claim to statehood, and its admission accepted as a conclusive evidence of this status and of international personality."[55]

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[49] A.V. Levontin, The Myth of International Security, pp. 122-23.

[50] Philip Marshall Brown, "Legal Effects of Recognition, AJIL Vol. 44 (1950) p. 617.

[51] See Academy of Sciences of U.S.S.R., International Law, p. 117.

[52] See James C. Hsiung, "China's Recognition, Practice and its Implications in International Law" in China's Practice of International Law ; Some case studies Edited by Jerome Alan Cohen (1972), p. 14 at p. 23.

[53] See J.G. Merrils, "Recognition and Construction", ICLQ, Vol. 20 (July, 1971) p. 476.

[54] Philip C. Jessup, A Modern Law of Nations, pp. 47-48.

[55] P.E. Corbett, the Growth of World Law (1971), p. 64.

Legal effects of recognition.* —As pointed out earlier, recognition is, a political diplomatic function and depends upon the discretion of the recognizing State. But once recognition is accorded, there ensue certain legal effects. The recognized State acquires certain rights, privileges and immunities under international law as well as municipal law. In the words of Starke, "Recognition produces legal consequence affecting the rights, powers and privileges of the recongised States or government both at International Law and under the municipal law of States which have given it recognition." [56] Some jurists are of the view that since recognition is a political act, there ensue no legal effects except the special agreements which are made at the time of granting recognition. For example, Philip Marshall Brown holds this view.[57] But this view does not seem to be correct. "The typical act of recognition has two legal functions. Firstly, the determination of statehood, a question of law : Such individual determination may have evidential effect before a tribunal. Secondly, the act of recognition is a condition of the establishment of formal, optional and bilateral relations, including diplomatic relations and the conclusion of treaties. It is this second function which has been described by some jurists as 'constitutivist' although here it is not a condition of statehood." [58] Kelsen has rightly written that by the grant of recognition, legal relations are established between the recognising and the recognised States and their relations are governed by the rules of international law.[59]

Following are the main effects of recognition :

(1) The recognized State becomes entitled to sue in the courts of the recognized State ;

(2) The courts of the recognizing State given effect to the past[60] as well as present legislation and executive acts of the recognized State.

(3) In case of *de jure* recognition, diplomatic relations are established and the rules of international law relating to privileges and immunities apply.

(4) A recognised State is entitled to sovereign immunity for itself as well as its property in the Courts of the recognising State.

(5) The recognised State is also entitled to the succession and possession of the property situated in the territory of the recognising State.

For example, State X deposited some gold in State Y. There is a rebellion in State X and the rebels are successful in establishing a parallel government. After some time Y grants *de jure* recognition to the new government. The new government claim the gold deposited by the old Govt**. The new government which has been granted *de jure* recognition will be entitled to the succession and possession of the gold deposited by the old government for recognition of a government means the recognised government has effective control over the State and is fit to represent that State.

It is clear from the above discussion that after being recognized, the new State becomes a member of the international community. After the grant of *de jure* recognition the State recognized becomes entitled to establish diplomatic relations with other States. Since it becomes a member of international community, it requires certain rights as well as duties under international law.

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* See for IAS (1973), Q. No. 11(b) and IAS (1955), Q. No. 2 ; CCS (1979), Q. No. 8(a) ; IAS (2009) Q. 6(a).

[56] Starke, supra note 13 at p. 146 : Edward Collings also writes; "Although recognition is essentially a political act, it is important to realize that the consequences of non-recognition are of both political and legal importance." Supra note 16 at p. 89.

[57] Philip Marshall Brown, See Supra Note, 22 at p. 640.

[58] Ian Brownlie, Principles of Public International Law, Second Edition (1973), p. 93.

[59] Kelsen, see Supra note 34, at p. 609.

[60] For retroactive of recognition. See Boguslawski and Another v. Gdynia Amervka Line, (1950) 2 All E.R. 355 ; see also Luther v. Sagor (1921) 3 KB 532 ; Guarantee Trust Co. v. U.S. 340 U.S. 140 ; U.S. v. Pink, 315 U.S. 203.

** P.C.S. (1983) Q. 2(b). For answer see also recognition of government discussed earlier.

Consequence of Non-recognition*

Although recognition is essentially a political act, there are certain political as well as legal consequences of non-recognition as a State. 'Recognition can bring, *inter alia,* an opportunity to establish diplomatic and consular relations with recognising States ; an increase in stability at home and prestige abroad ; access to foreign aid, loans and trade ; and, the case of a new government of an established State, access to State funds on deposit in the banks of recognizing States. A decision to withhold recognition can be a powerful or an important political weapon, depending upon the relative power of the non-recognizing and unrecognized entities." [61] There may be following consequences of non-recognition of State :—

(1) An unrecognised State cannot sue in the courts of non-recognising State. In *Russian Socialist Federated Soviet Public* v. *Cirbaria,*[62] the New York Court had observed that such a State cannot sue, as matter of right, in American courts. In *Guarantee Trust Co. of New York* v. *U.S.,*[63] it was laid down that the court is not competent to recognise such a State. It is the function of the Executive. Similarly in *U.S.* v. *Pink*[64] the Supreme Court of the United States of America laid down the principle that the court shall decide the cases of only those States which has been recognised by the United States of America. The British Courts have also given similar decisions. For example, in re *Al Fin Corporation's Patent,*[65] it was held that the Court shall recognise the executive acts of only those States who have been recognised.

Thus, where a new government is established in a State as an outcome of rebellion and it is recognised by some governments as *de jure* Government, while some have not recognized at all, the new government can intervene in judicial proceedings instituted to proceed against the assets of the State claiming sovereign immunity in the State which have recognised either *de facto* or *de jure* but it cannot sue in the courts of States which have not recognized it.** It can institute actions to take possessions of the assets of the State in the courts of those States which have recognized it.*** Where the recognised Government has expropriated the property of a company belonging to a citizen, and bestowed title in a State Corporation. The Corporation sells the oil to a Multinational Corporation. The Multinational Corporation shall enjoy a firm title to the oil in those States which have recognized it.****

(2) A State which has not been recognised, is not entitled to enter into diplomatic relations with the non-recognising States.

(3) The diplomatic representatives of a State which has not been recognised do not possess immunities from legal processes in foreign States.

(4) Such States are also not entitled to get their property situated in foreign States. A leading case on this point is *Bank of China* v. *Wells Fargo Bank & Union Trust Co.*[66] In this case, the defendant was a Californian Bank, in which the money of Bank of China was deposited. Bank of China was a Chartered Bank according to the Chinese Law having two-thirds stocks of the Government of China and the rest of the Chinese citizens. In 1949, the Bank of China filed a suit in the District Court to get the money deposited in the defendant Bank. On June 27, 1945, the defendant Bank was informed through cable from Shanghai that the Bank of China had been taken over by the Chinese People's Liberation Army. On 26th January, 1950, the New People's Republic Government of China requested the court that the suit of the plaintiff be dismissed and they should be substituted in place of the plaintiff. On the other hand, the Nationalist Government of China said that it was the

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* See for IAS (1955), Q. No. 2 ; C.S.E. (1982) Q. 6, P.C.S. (1988) Q. 6 ; I.A.S. (2009) Q.6(a).

[61] Edward Collins, see Supra note 49.

[62] New York Court of Appeals, 235-255.

[63] (1938) 304 U.S. 126 at p. 137.

[64] (1942) 315 U.S. 203 ; 86 L. Ed. 796.

[65] (1970) Ch. 160 ; see also Zeiss case, (1967) I.A.S. 853.

** See for C.S.E. (1982) Q. 6 (a) : see also the fourth print discussed below.

*** C.S.E. (1982) Q. 6(b).

**** C.S.E. (1982) Q. 6 (c).

[66] (1952) 104 F. Supp. 59.

lawful claimant of the said money on the ground that America has recognised only it. Moreover, the court cannot bring about change in the management of the Bank on the basis of acts of a government which has not been recognised. The Court held : "It is not a proper function of a domestic court of the United States to attempt to judge which government best represents the interests of the Chinese State in the Bank of China. In this situation, the court should justly accept, as the representative of the Chinese State, that government which our executive deems best able to further the mutual interests of China and the United States. Since the court is of opinion that it should recognize the Nationalist Government of China as legally entitled to exercise, the Controlling corporate authority of the Bank of China in respect to the deposit in suit, the motion for summary judgment in favour of the Bank of China, as controlled by the Nationalist Government, is granted ......"

Implied Recognition

Ordinarily, recognition is a unilateral act of State and when a State recognizes another State it makes the declaration in regard to the same either orally or in writing. But sometimes recognition may be implied. In other words, the recognition of a State may be implied by the attitude and other circumstances of a State. Recognition depends upon the discretion of a State. Implied recognition may be inferred when circumstances indicate that the State concerned has been accepted as a member of the international community. In practice such an implied recognition may be only *de facto*. But in the following circumstances such a recognition may also be deemed to *de jure* recognition :

(1) When the recognized State and the recognizing State enter into a bilateral treaty and formally sign it ;

(2) The beginning of formal diplomatic relations, exchange of Consuls, etc.

In addition to the above-mentioned conditions following circumstances may also indicate implied recognition : (i) Participation of the State concerned in a multi-lateral treaty ; (ii) Participation in international conference ; and (iii) The start of negotiations between the recognising and the recognized States.

Recognition subject to a condition

Since recognition is said to be a political diplomatic function and depends much upon the discretion of the recognizing State, recognising States often impose certain conditions along with their grant of recognition. For example in 1878 while recognizing Bulgaria and Rumania, Germany imposed the condition that the said States shall not discriminate their citizens on the basis of religion. It may, however, be noted that under international law such a condition is meaningless. It can never imply that if the condition is not fulfilled the recognition shall be withdrawn. According to international law, recognition denotes that the recognized State has attained statehood and has become a member of the international community. Hence such a condition will have no effect. In the words of Starke, "It is true, however, that if recognition should under International Law become purely and simply the cognitive act of registering the statehood or of government capacity, it could not be subject to any such extrinsic terms of conditions." [67] To conclude in the words of another author "......the very essence of recognition is that the recognising State thereby declares that it has satisfied itself that the recognised authority possesses the distinguishing marks of a State. To say that one recognises that has been, subject to its conduct being satisfactory in other particulars, is sheer nonsense. It is like telling a pupil that her sum is correct if she will promise to be a good girl." [68]

Collective Recognition*

By collective recognition we mean the recognition granted by number of States collectively. For example, when a State is admitted to the United Nations, it will mean collective recognition by those States which voted in favour of the admission of such a

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[67] Starke, note 13, p. 159.

[68] Baty, "So-called De-facto Recognition" 31 Yale L.J. (1922), p. 469.

* See also for P.C.S. (1990) Q. 8(a).

State. In its advisory opinion on *Condition of admission of a State to the United Nations,*[69] the International Court of justice also opined that if a State is admitted as a member of the United Nations, it will amount to collective recognition by the States who voted in favour of the admission of such a State. It may, however, be noted here that recognition is the free act of each State. The collective recognition will therefore not mean that all the members of the United Nations have recognized such a State.

Is withdrawal of Recognition possible ?

Recognition *de jure* is final and once given cannot be withdrawn. If the recognized State finds that the State recognized *de facto* is not capable of fulfilling its international obligation or lacks the signs of stability, it will not grant *de jure* recognition to such a State. In other words, we may say that in certain circumstances, *de facto* recognition may be withdrawn. But *de jure* recognition once given can never be withdrawn, because if after granting *de jure* recognition a State wants to withdraw its recognition then it will have no meaning under International law. Under International Law, recognition means that the State recognized has attained statehood. The simple fact of withdrawal of recognition by a State would not necessarily mean that the State recognized has ceased to be a State.

Retroactive Effects of Recognition

Jurists are of the view that *de jure* recognition has retroactive effect. In other words, after a State is recognized, its acts done prior to recognition are also recognized. As pointed out by J.M. Jones, this rule is based on policy of the States, rather than on any juristic logic. When a State recognizes another State it often recognizes the past acts of such a State with a view to establish friendly relations with such a State. *Civil Air Transport Incorporated Co.* v. *Central Air Transport Corporation,*[70] is a leading case on the retroactive effect of recognition. In this case, the appellants were a registered corporation in Delware State of the United States of America and the respondent corporation was an institution under the national government of China. After the revolution in China Chiang Kai Shek fled away to Formosa. Consequently, the Chairman of the respondent Corporation also fled away from Hongkong to Peking and declared his loyalty towards the Peking Government. The Peking Government declared respondent corporation was its property. After fleding away from China the government of Chiang-Kai-Shek established its headquarters in Formosa and sold the property of the respondent corporation to an American firm. This property included 40 air-crafts which were lying at an airfield in Hongkong. The Court had to decide whether the Chiang-Kai-Shek government was entitled to sell this property. In other words, the courts had to decide the retroactive effects of the grant of *de jure* recognition to the communist government by England, *i.e.* whether past acts of *de jure* government can be valid only if such a government is the same which had been granted *de facto* recognition previously. The court also ruled that the retroactive effect of a *de jure* recognition of a government did not mean that the legal acts performed by other *de jure* government would become invalid. Lord Simon of the Judicial Committee of the Privy Council observed : Primarily, at any rate, retroactivity to recognition operates to validate act of a *de jure* government which has subsequently become the new *de jure* government and not invalidate acts of previous *de jure* government." [71] In other words, at the date when the transaction regarding the sale of the property of the respondent corporation took place, the nationalist China was *de jure* government of China and hence it was entitled to sell its property. In short, the granting of *de jure* recognition of a communist government of China would not invalidate the legal acts of the former *de jure* government of China.

In British Courts such retroactive operation is extremely wide. Thus : (a) A cause of action based upon the existence of a particular State or Government at the date of institution of proceeding, is nullified if before or at the time of the hearing the British Government recognises another State as government as having been in existence at the date the action commenced ; (b) A judgment of a Court of first instance based upon the existence of a particular State or Government at the date of judgment may be set aside on appeal if before or at the time the appeal is heard, the British Government recognises another State Government as having been in existence at the time the judgment was delivered." [72] But the correct position has been aptly summed up by Brownlie[73] in the following words : "British and American Courts have applied the principle of retroactivity in following or interpreting the views of the executive in matter of recognition but Oppenheim describes the rules as one of convenience rather than of principle." Once again one ought not to generalize except to say that on the international plane there is no rule of retroactivity. When a State makes a late acceptance of the existence of a State than in the field of the basic rights and duties of existence, this recognition *ex hypothesi* cannot be 'retroactive' because in a special sense it is superfluous. In the sphere of optional relation and voluntary obligation may or may not be, since the area is one of discretion."

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[69] I.C.J., Rep. (1948), p. 4.

[70] (1953) A.C. 70 ; See also Gdynia Wmeryka Linie (Zeglugowe Spolka Akcyjna) v. Boguslnwski, (1953) A.C. 11.

[71] Adopted from I.C. Green, International Law Through Cases, Edition (1970), p. 147.

Thus retroactive effect of recognition and its extent depends upon the intention of the recognising state.[74]

Estrada Doctrine

This doctrine was propounded by Mr. Estrada, the Foreign Minister of Mexico. In this doctrine he declared that regarding the establishment of diplomatic relations with other States, Mexico Government considers itself free to determine it in accordance with the facts and circumstances of each case. In other words if the Mexico Government considers that after the change of government in any State through revolution, a revolutionary government commands the support of the people, it may establish diplomatic relations with it. This doctrine has been subject to servere criticism because it disregards the rules of International Law. It encourages the individual appraisal in this field. However in practice it takes a new way so far as the recognition of new States are concerned. As pointed out by Philip C. Jessup,......... the Estrada doctrine properly assumes that diplomatic representatives should be considered as accredited to the State and not to the government." [75] This doctrine, therefore, does not seem to be correct and needs to be discouraged.

Stimson Doctrine

This doctrine was propounded by Mr. Stimson, Secretary of State of the United States of America. This doctrine is also often called the doctrine of non-recognition. According to this doctrine if a State grants recognition to another State in violation of international treaty, such a recognition would not be valid. By international treaty, the Stimson doctrine mainly meant the Pact of Paris, 1928, or Kellog Briand Pact, through which the State parties renounced war as an instrument of their national policy. The League Assembly also passed a resolution that any State who violated the Pact of Paris, 1928, would not be granted recognition. The Secretary of the State of the United States of America prpounded this doctrine after Japan attacked Manchuria in 1931. In this doctrine the American Secretary of States declared that any contract or treaty which was contrary to the Paris Pact of 1928 would not be acceptable. It may be noted here that China, Japan and America were all parties to the Paris Pact, 1928. Although this doctrine has much to recommend itself, it is not always followed by the States so far as the grant of recognition to new State is concerned. States refuse to accept any such obligation and treat recognition as a political diplomatic function.

Hallestein Doctrine

This doctrine was propounded in the context of the division of Germany into two *i.e.* East and West Germany. According to it, no State should have diplomatic relations with both the Germany. This doctrine has become inadequate and obsolete in the present times and circumstances. Now both, East Germany and West Germany, have become the members of the United Nations. Some States supporting the State of Pakistan referred this doctrine in the context of Pakistan and Bangladesh. But this doctrine has no relevance, legal or political, in the present times and circumstances especially because, *inter alia,* the unification of Germany has now been effected.

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[72] *Starke, note 13 at p. 173.*

[73] *See note 58, at p. 97-98.*

[74] *See Gdynia Ameryka Lenie (Zeglugowe Spolka Akchjna)* v. Boguslawaski, (1953) AC 11.

[75] *Philip C. Jessup—A Modern Law of Nations*, p. 58.

India's Practice and Policy of Recognition of States and Governments*.—Recognition of a new State is often described as "a political diplomatic function." [76] "Recognition, or the withholding of recognition is often used as a political instrument to express approval or disapproval of a new State Government or a territorial change." [77] It may, however, be noted that "In the practice of States, the birth of a new State, the establishment of a new Government, or a territorial change, is frequently recognised by states." [78] This is true of India also. Like most other countries, India has also granted recognition to States and governments as a matter of course or routine. India has generally accorded recognition to State as soon as the conditions of statehood were fulfilled."[79] In some cases, however India was also guided by certain other considerations. It will be desirable to discuss briefly some of such cases in which recognition was not granted by India as a matter of course or routine.

China.—The first of such cases which deserves mention here is relating to China. India was one of first States to recognise People's Republic of China. (The First Country, outside the Communist block, to recognise China was Burma). India recognised China on 30th December, 1949. While many countries in the world were still waiting or were withholding recognition of China, India accorded recognition. Subsequently India's example was followed by many other States.[80]

Israel.—Probably diametrically opposed to the above case was the case of India's delayed recognition of the State of Israel. Israel, emerged as a sovereign State on May 14, 1948, and was, within a short time recognised by a number of States. But India delayed the recognition of Israel for more than two years and even when she recognised Israel on 17th September, 1950, the announcement simply stated : "The Government of India has decided to accord recognition to the Government of Israel." In this announcement, India did not express her willingness to establish (nor did it establish) diplomatic relations with the State of Israel. India has not yet established diplomatic relations with the State of Israel. India's policy in regard to Israel has been subjected to severe criticism inside as well as outside the country. Her belated recognition and non-establishment of diplomatic relations with Israel was due to the attitude of Arab States towards Israel. However, India's announcement makes at least one thing clear that India recognises the fact of the statehood of Israel. It has been aptly remarked, "In recognising Israel, India once more reiterated her determination to subscribe to the principle of *de factoism,* even if it was at the risk of some misunderstanding or alienating the sympathies of some of her best friends in the world. At the same time it is quite true that to a degree India's policy was a matter of expedience governed by the consideration that restraint was essential.........Further, by recognsing Israel, though not establishing diplomatic relation with her to this date, the Government of India has clearly provided weighty reasons for thinking that it distinguishes between recognition as a legal act and the establishment of diplomatic relations as a purely political act, a view confirmed by the State practice of the most countries." [81]

In January 1992, India decided to establish diplomatic relations with Israel. Subsequently this decision was immediately implemented and diplomatic relations were set up with Isreal. India took this decision in view of changed international situation. It may be noted here that earlier China, Soviet Union and some other countries had set up diplomatic relations. One of the main reasons for this was the forthcoming West Asia Peace talks in Moscow beginning on January 29, 1992.

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* IAS (2009) Q. 6(a).

[76] Philip C. Marshal Brown, "Legal Effects of Recognition," AJIL Vol. 44 (1950), p. 617 at p. 639.

[77] Max Sorensen's Manual of Public International Law (1968), p. 267.

[78] Ibid.

[79] See K.P. Misra, "India's Policy of Recognition of States and Governments' AJIL, Vol. 55 (1961), p. 398 at p. 422.

[80] See also Q. Wright, "The Chinese Recognition Problem," AJIL, Vol. 49 (1955) p. 322.

[81] K.P Misra, see Supra note 79 at pp. 408-409.

Spain.—Next typical case is that of Spain which was recognised by India on May 2, 1956. In this case also India had delayed recognition because of political considerations. In the press communique issued on the said date, wilingness to establish diplomatic relations was clearly expressed. This is a sharp contrast to the case of Israel discussed earlier. Yet another important thing in this case was that, while expounding India's policy of recognition, Pandit Nehru stated that it was India's policy "to recognise any country that was an independent functioning country represented in U.N." Thus weightage was given to the fact of a country being represented in the U.N.

Bangladesh.—Another important case which deserves mention is that of Bangladesh which also evoked criticisms from certain countries. India recognised Bangladesh on 6th December, 1971. India's recognition of Bangladesh was widely welcomed inside the country and Indian jurists justified it. Some Indian writers even expressed the view that the elements of statehood were present in Bangladesh long before 6th December, 1971.[82] On the other hand, India's action was subjected to criticism and was regarded as premature. Thus while recognition in respect of Israel, Spain, Vietnam and East Germany had been delayed, India was very quick to accord recognition to Bangladesh. India was the first country to recognise Bangladesh. This was obviously due to expedience and political considerations.

Cambodia.—So is also the case of India's recognition of Royal Cambodian Government headed by Prince Sinhanouk. On April 1, 1975, India accorded full diplomatic recognition to the Royal Cambodian Government headed by Prince Sinhanouk in a joint communique issued at the end of the visit of the Foreign Minister of the Royal Government Mr. Sarin Chhal who claimed 97 per cent of the Cambodian territory under control of his government.[83]

Vietnam and Germany.—A brief mention of cases of North Vietnam and East Germany will not be out of place here. In both these cases, India waited for sufficiently long time before according recognition. In case of Vietnam it may be argued that her refusal to recognize was "a kind of moral pressure" that it wanted "to use for attaining the objectives set forth by the Geneva Conference." [84] The same can be said about East Germany. India might be waiting to see whether unification of Germany took place or they remained as two distinct States. Despite these weighty reasons, involvement of expediency, national interest and political considerations cannot altogether be ruled out.

Provisional Revolutionary Government of Vietnam.—A brief mention of India's recognition of the Provisional Revolutionary Government (PRG) of South Vietnam will also be desirable here. On April 30, 1975, South Vietnam surrendered unconditionally to the communists. Within hours of surrender of the Saigon regime, India accorded full diplomatic recognition to the PRG of South Vietnam. The announcement was made in the Lok Sabha by Mr. Bipinpal Das, Deputy Minister for External Affairs. This was again based on the principle of *de factoism.*

Recognition of the new Government of Afghan Republic under the New President.—On 1st May 1971 Afghanistan was proclaimed a democratic republic with Mr. Nur Mohammad Tarakki as President of the newly constituted Revolutionary Council. This Government was established after a coup replacing former President Daoud. India recognised the new Government on 2nd May, 1978. India was thus one of the first countries to accord recognition to the new Government of Afghanistan. Soviet Union and Bulgaria also recognised the new Government on the said date.

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[82] See for example, Dr. Debiprosad Pal, "Bangladesh in the Eye of International Law" A.I.R. (July, 1971), Journal section, p. 102 and O. Chinappa Reddy, "Bangladesh and the Question of Recognition", Lawyer (February, 1972), p. 19.

[83] The Times of India, April 2, 1975.

[84] See K.P. Misra, Supra note 78, at p. 421.

On the basis of the above discussion, it may be concluded that while in many cases India has accorded recognition to States and governments on the principle of *de factoism* and as matter of course or routine, in some cases, however, she has either delayed recognition or accorded quickly being influenced by her national interest, expediency and political consideration. Recognition being a diplomatic political function, it need not be over-emphasised that this is in no way contrary to international law. India's practice is in conformity with the norms and principles of international law as well as general practice of States in this connection.

CHAPTER 12

STATE SUCCESSION*

Definition and meaning of 'State Succession.'**—"A succession of government occurs when the government of a State is replaced with a new one. State succession occurs when a State ceases to exist or a new State is formed within the territory of an existing State or territory is transferred from one State to another State. When a succession situation arises, the point of chief legal interest is the effect, if any, on the international rights and obligations of the State or States concerned." [1] According to Oppenheim, "A succession of international person occurs when one or more international persons take place of another international person, in consequence of certain changes in the latter's condition." [2]

The rule of State succession was incorporated from the Roman law by Grotius.[3] In Roman Law when a person dies his rights and duties are succeeded by his successors. This principle was applied by Grotius in International Law as well. Later on, there were certain international treaties through which the rules of State succession were developed. The Law of State Succession is still developing.

Term "State Succession" misnomer***.—According to T.T. Poulose, "Under traditional rules of International Law the term 'State Succession' is used when there is transmission of the rights and obligations of one State to another in consequence of territorial sovereignty." Further "the term 'State succession' has been regarded as inaccurate because it is based on municipal law analogy of the actual demise of a person and the transmission of his rights and liabilities to his successor, used by classical International law writer like Gentilis, Grotius, Pufendorf and Vattel,"[4] D.P.O. ' Connell also writes, "The term 'State succession' has been objected to as begging the question which any investigation of the consequences of change of sovereignty seeks to resolve. It seems to suggest that the State which extends its sovereignty over a specific territory thereby becomes invested with all the juridical consequences of its predecessor's acts, that is, in law as well as in fact, the latter's successor". The significance of the term is to be limited, however, to the factual situation which arises when one State is substituted for another in sovereignty over a given territory, and in this sense it enjoys the authority of an extensive literature. It does not necessarily presuppose a juridical substitution of the acquiring State in the complex of rights and duties possessed by the previous sovereign.[5] Ordinarily, the practice of States shows that no general succession takes place. "With the extinction of international person disappears its rights and duties as a person." [6] This seems to be correct to a great extent. But to say that no succession takes place among the States would not be correct. Most of the jurists agree that when an international person extincts or disappears then some of its rights and obligations are succeeded by other international persons which take place. There is, however, controversy and uncertainty as to which rights and duties devolve on the successor.[7]

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* See also for I.A.S. (1963), Q. No. 3; P.C.S. (1989) Q. 4(a) ; UPPCS (2001) Q. 7(a).

** See also for P.C.S. (1995) Q. 9(a)

[1] Edward Collins, International Law in a Changing World (1969), p. 105.

[2] L. Oppenheim, International Law, Vol. I, 8th Edition, p. 157. See also Oppenheim's International Law, Ninth Edition, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group UK Limited and Mrs. Tomoko Hudson, 1992, p. 208.

[3] Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 172.

*** See also for I.A.S. (1966), Q. No. 4 ; See also for I.A.S. (1966), Q. No. 4 ; PCS (1995) Q. 9(a).

[4] T.T. Poulose, "State Succession in India," IJIL. Vol. 10 (1970), p. 175.

[5] D.P.O.' Connell, State Succession in Municipal Law and International Law, Vol. 1 (1976), p. 3.

[6] Oppenheim, Supra note 2, at p. 159 ; See also Oppenheim's International Law, note 2, p. 210.

[7] Oppenheim's International Law, note 2, at p. 209.

Kinds of State Succession*

State Successions are of two types—(1) Universal succession ; and (2) Partial succession. "If the legal identity, of a community is completely destroyed there is said to be a 'total succession' of States. If the territory is lost while personality and legal responsibility remain unimpaired, the process, is described as 'partial succession'. This does not imply a total or partial succession respectively to the legal relation of the previous sovereign, but is merely an abbreviated way of defining the extent of the change." [8]

Universal succession.—Universal succession takes place under the following circumstances :—

(a) When one State is completely absorbed in another State either through subjugation or voluntary merger.

(b) When a State breaks into several parts and each part becomes a separate international person or are annexed by surrounding international persons.[9]

Partial succession.—Partial succession takes place—

(a) When a part of the State revolts and after achieving freedom becomes a separate international person. The breaking away of Bangladesh and becoming international person is a glaring example of partial succession. A part of state may also become independent through agreement or any other peaceful means.

(b) When a part of a State is ceded to another State.

(c) When a sovereign State loses a part of its independence by joining the federal State or when a State accepts the suzerainty or becomes a protectorate of another State.

Principle of the Continuity of States**

The succession of Governments is based on the principle of the continuity of States. The change in the Government of a State does not affect the legal personality of the State.[10] The new Government succeeds to the rights and obligations of the predecessor Government.[11] This principle is based on the common interests of international community. The importance of the international agreements will suffer a set-back in case the treaty obligations are disregarded in consequence of the change of Government of a State.[12] But the treaties entered into by a State come to an end in case it is completely absorbed in another State. This rule also applies in a case when a part of State revolts and after becoming an international person, refuses to follow the treaties entered by its parent State.[13] For example, Bangladesh is not bound by the treaties entered into by Pakistan.

Reference may be made here to *The Tinoco Arbitration* : *Great Britain—Costa Rica* (1923)[14], wherein :—

In January, 1917, the Government of Costa Rica under President Alfredo Gonzalez, was overthrown by Federico Tinoco, the Secretary of War. Gonzalez fled. Tinoco assumed power, held an election, and established a new constitution in June, 1917. His Government continued until August, 1919, when Tinoco retired, and left the country. His Government fell in September following. After a provisional government under one Barquero, the old constitution was restored and elections were held under it. The restored government was a signatory to this treaty of arbitration. On the 22nd of August, 1922, the constitutional congress of the restored Costa Rican Government passed a law known as Law of Nullities No. 41. It invalidated all contracts between the executive power and private persons, made with or without approval of the legislative power between January 27, 1919, and September 2, 1919, covering the period of the Tinoco government. It also nullified the legislative decree No. 12 of the Tinoco government, dated June 28, 1919, authorizing the issue of the fifteen million colones currency notes. Great Britain claimed that the Royal Bank of Canada and the Central Costa Rica Petroleum Company were British corporations whose shares were owned by British subjects ; that the Banco International of Costa Rica and the Government of Costa Rica were both indebted to the Royal Bank in the sum of 998,000 colones, evidenced by 998, one thousand bills held by the Bank ; that the Central Costa Rica Petroleum Company owned by due assignment, a grant by the Tinoco government in 1918 of the right to explore for and exploit oil deposits in Costa Rica, and that both the indebtedness and the concession have been annulled without right by the Law of Nullities and should be expected from its operation. She asked for an award that she was entitled on behalf of her subjects to have the claim of the bank paid, and the concession recognized and given effect by the Costa Rican Government. The Government of Costa Rica denied its liability for the acts or obligations of the Tinoco government and maintained that the Law of Nullities was a legitimate exercise of its legislative government power. It further denied the validity of such claims on the merits, unaffected by the Law of Nullities.

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* See also for P.C.S. (1973), Q. No. 2(c).

[8] O'Connell, see Supra note 5, at p. 4.

[9] See also theory of Universal Succession referred on the next page.

** See also for P.C.S. (1967), Q. No. 6.

[10] See *Lazard Brothers* v. *Midland Bank Ltd.*, (1933), A.C. 283 : 102 LJKB 191 ; See also *Dr. Ram Babu Saxena* v. *The State,* A.I.R. 1950 S.C. 155 at p. 163.

[11] See Moore, Digest of International Law, Vol. 1, p. 249.

[12] See Kaplan and Katzenbach, The political Foundations of International Law, p. 113.

[13] D.P. O'Connell, "Independence and Prolems of Succession" in William V. O'Brien. The New Nations in Independence Law and Diplomacy (London, 1965), p. 20.

[14] 1, United Nations Reports of International Arbitral Awards, p. 369.

William H. Taft, Arbitrator held that the Law of Nullities in decreeing the invalidity of the Amory Concession worked no injury to the Central Costa Rica Petroleum Company Ltd., its sole stockholder, of which Great Britain can complain, because the concession was in fact invalid under the constitution of 1917. Expounding the law on the subject he observed : "The courts of the restored government are bound to administer the law of the restored government under its constitution and their decisions are necessarily affected by the limitation of that instrument. This may prevent the Court from giving full effect to international law that may be at variance with the municipal law which under the restored constitution the national courts have to administer. It is obvious that the obligations of a restored government for the acts of the usurping *de facto* government if succeeds cannot, from the international standpoint, be prejudiced by a constitution which though restored to life is for the purpose of this discussion, exactly as if it were new legislation which was not in force when the obligations arose." Mr. Taft, Arbitrator, quoted with approval the following observation of Dr J.B. Moore[15] : Changes in the government or the internal policy of a State do not as a rule affect its position in International law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reserve ; but, *though the government changes, the nation remains, with rights and obligations unimpaired.*" Further, "The *principle of the continuity of States has important results. The State is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper* .... The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the State in its ability to maintain itself and discharge its internal duties and its external obligations". According to Mr. Taft, this statement of law "announces the general principle which has had such universal acquiescence as to become well-settled international law."

Theories of State Succession*.—Prof. D.P.O.' Connell classifies the theories of State Succession into the following categories :

I. Theories of Continuity. II. Negative Theories. III. Theories Importing International Law. IV. Communist Theory of State Succession.

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[15] Digest of International Law, Vol. I, 249 ; emphasis added.

* See for I.A.S. (1972), Q. No. 6.

I. Theories of Continuity*

(a) *The theory of universal succession*—According to this theory, "change of rules .... whether effected by cession of territory, by revolution or by death, cannot involve the replacement of one right or duty by another, but only a replacement of their subjects. If a ruler acts in a private capacity his contracts expire with his death or expulsion ; but if he acts in his princely office his commitments relate not to himself but to people through whom in virtue of the social contract, he ultimately derives his authority." [16] This theory was in vogue up to the middle of the nineteenth century. According to this theory, succession takes place by virtue of a legal principle antecedent to the enacted law of any society, and therefore, antecedent to the positive law of nations. But it may be noted that "Succession occurs, not in virtue of an external legal prescription, but in virtue of a legal quality which reposes in the objects of succession." [17]

(b) *The theory of popular continuity.*—According to this theory, "Change of Sovereignty involves no more than a change in the fictitious element in political organisation, the real element surviving intact. Obligations of a political character, such as, treaties attach to the element of sovereignty and lapse with it, obligations of a patrimonial character, including most economic and judicial matters attach to society and remain attached." Thus, "While the emphasis in this theory is upon legal continuity, therefore, the degree of continuity, actually achieved is, in virtue of this transformation, considerably less than that achieved in the theory of Universal Succession." [18]

(c) *The theory of organic substitution.*—This theory emphasises more the nature of change itself than the legal effects of political change. When States appear and disappear, the people and territory are integrated in a new organic being. There is a change in the juridical element of organisation, which does not occur in cases of change of government. The legal institutions which attach to the factual elements survive the change while those which attach to the organisational element do not survive it. This theory does not radically, differ with the preceding ones. In the words of D.P.O' Connell, "...... this means that the successor State takes over all the rights and duties of its predecessor, save those which are essentially political, if it substitutes itself factually in the property of its predecessor it must also substitute itself in the encumbrances upon that property." [19]

(d) *The theory of self abnegation.*—The State is at liberty to take over or reject whatever suits it in the previous legal order. It integrates within its own legal order all existing law which is compatible therewith and which is not expressly repealed. This theory emphasises the continuity rather than disruption and constructs the legal bonds of continuity on the basis of tacit consent of all the parties concerned.[20]

II. Negative Theories.—Since the Universal Succession theory did not take into account the existing facts of international practice, negative theories were developed during the latter half of the nineteenth century and early part of the twentieth century. According to these theories "the sovereignty of the predecessor State over the absorbed territory is abandoned. A hiatus is, thus, created between the expulsion of one sovereignty and the extension of the other. The successor State does not exercise its jurisdiction over the territory in virtue of a transfer of power from its predecessor, but solely because it has acquired the possibility of expanding its own sovereignty in the manner dictated by its own will. None of the incidences of sovereignty passes to the successor State. The latter seizes what it can and repudiates what it will." [21]

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* UPPCS (2003) Q. 6.

[16] D.P.O.' Connel, State Succession in Municipal Law and International Law, Vol. I (1967), p. 9.

[17] Ibid, at p. 11.

[18] Ibid.

[19] Ibid at p. 13.

[20] "While the State is formally at liberty to take over or reject whatever suits it in the previous legal order, it is in fact materially required in the interest of realizing its own aims to permit only the least disturbance thereof. Therefore, in practice, it integrates within its own legal order all existing law which is compatible therewith and which is not expressly repealed." Ibid. at p. 14.

III. Theories Importing International Law.—According to this theory, International Law, based on the positive practice of State "directs the successor State to discharge certain of its predecessor's obligations, and vests in it, certain of its predecessor's rights. This approach is useful with respect to the affect of change of sovereignty on relationships governed by international law, such as, treaties and indeed. It may be the only feasible approach with respect to these. But it is quite irrelevant to the solution of problems raised by change of sovereignty with respect to relationships governed exclusively by municipal law and even of the problem of the survival of that law itself.[22]

IV. Communist Theory of State Succession.—The main emphasis under this theory is that a successor State is unencumbered by the economic and political commitments of the predecessor.

Conclusion.—Prof. D.P.O'Connel has rightly concluded, "The law of State Succession in the mid-twentieth century has reached a position of crisis because evident moral and sociological pressures emphasise the need for continuity and avoidance of disruption, while theory remains enmeshed in the nineteenth century conception of sovereign will. The problem is to give expression in normative form to a reconciliation of two competitive pressures, that of stability in the international and internal orders, and that of adjustment of legal relationship to the social and economic effect of change. The solution lies in a presumption of continuity which concrete analysis may rebut." [23]

Rights and Duties arising out of State Succession*

When an international person takes the place of another international person following rights and duties arise :

(1) *Political Rights and Duties.*—No succession takes place in respect of political duties and rights. As remarked by Prof. Oppenheim, "No succession takes place, thereof, with regard to rights and duties of the extinct State arising either from the character of latter as an international person or from its purely political treaty".[24] Hence the succeeding State is not bound by the political treaties of the former State. The successor State is not bound by the treaties of peace or neutrality entered into by the extinct State. But it may be noted that, "International Practice as to succession to treaties is not sufficiently abundant and uniform to permit an attempt at generalisation. The State practice is haphazard and inconsistent. Even the same State adopts different attitudes at different times".[25] When a State relinquishes its life as such through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation, the general opinion of International jurists is that treaties of the former are automatically terminated. The result is said to be produced by reason of complete loss of personality consequent on extinction of State life.[26] Thus, the forceable incorporation of Hanover into the Prussian Kingdom destroyed the previous treaties of Hanover. The admission of Texas into the United States of America by joint resolution extinguished the treaties of the Independent Republic of Texas.[27] The position was same when Korea merged into Japan.

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[21] Ibid. at pp. 14-15.

[22] Ibid. at p. 17.

[23] Ibid, at pp. 34-35. In the words of another author, "The State practice as to succession to treaties is haphazard and inconsistent. The practice is more dictated by public policy of the respective States than by any legally accepted principle. Large scale economic considerations tend to override legal reasoning. Generally speaking, States have attempted to thwart any principle which is politically detrimental to their vital interests, "P.K. Menon," International Practice as to Succession of New States to Treaties of their Predecessor", AJIL Vol. 10 (1970), p. 459 at p. 467.

* See for IAS (1968), Q. No. 3 ; IAS (1957) Q. No. 4 and PCS (1967).

[24] Oppenheim, International Law, Vol. I, Eighth Edition pp. 158-59.

[25] P.K. Menon, Supra note 23, at p. 476.

[26] Hyde on International Law, Vol. III, p. 1529.

[27] Ibid, at p. 1531.

No succession of rights and duties ordinarily takes place in such cases and as political and personal treaties presuppose the existence of a contracting state, they are altogether extinguished. It is a debatable point whether succession takes place in cases of treaties relating to commerce or extradition but here again majority of writers are of the opinion that they do not survive merger or annexation.[28] When as a result of amalgamation or merger, a State loses its full and independent power of action over the subject-matter of a treaty previously concluded the treaty must necessarily lapse.[29] "Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the State which concluded them."[30] Reference may also be made here to *Terlinden* v. *Ames*[31] where the question was whether an Extradition Treaty between Prussia and America, which was entered into in 1882, could be given effect to after the incorporation of Prussia into the German Empire. The question was answered in affirmative. It was pointed out *inter alia* that the constitution of the German Empire left sufficient independent power and sovereignty to the States composing the confederation to enable them to act upon these treaties, and it was observed by Fuller C.J. who delivered the opinion of the Court, that where Sovereignty in respect of the execution of treaties is not extinguished and the power to execute remains unimpaired as void. But where the power of the State concerned to execute the treaty is altogether gone, the treaty cannot but be regarded as void.[32]

(2) *Local rights and duties.*—A genuine succession takes place in respect of local rights and duties. In respect of land, rivers, roads, railways, etc., therefore, the succeeding State succeeds the rights and duties of the former State. In *German Settlers in Poland*[33] the Permanent Court of International Justice, in its advisory opinion, held that private rights do not end by the change of sovereignty.

(3) *Fiscal property debts.*—According to Oppenheim,[34] succession takes place in regard to fiscal property. But he adds that no private person gets the right to claim the old debts from succeeding international person. So far as the question of foreigners is concerned, the position is a little different. They may seek the protection of their government and may pressurize the succeeding international person to pay the whole debts.

*Public debts**.—There is a controversy in regard to the succession of public debts. Jurists are of view that it depends upon the discretion of the succeeding international person whether to pay the public debts of the former State.[35] Part IV of Vienna Convention on State Property, Archive and Debts, 1983 deals with state debts *i.e.* the financial obligation of a predecessor state towards another state or an international organization. Article 36 of the convention provides that the succession of a state does not as such affect the rights and obligations of creditors. Further when the successor State is newly independent state, no State debts shall pass to the new State, unless an agreement between the two states provides otherwise, according to the convention. Such an agreement, however, shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State (Article 38). In case of separation of part of the territory the State debt of the predecessor State should pass to the súccessor State in an "equitable proportion "taking into account the property, rights and interest passing to the successor States (Article 40).

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28. Dr Ram Babu Saxena v. The State, AIR 1950 SC 155 at p. 162; Oppenheim, International Law, Vol. I, p. 152.
29. Ibid, at p. 162 ; Hyde on International Law, Vol. III, p. 1535.
30. Oppenheim's International Law, note 2, at p. 211.
31. 184 US 270.
32. AIR 1950 S.C. 155 at p. 162.
33. PCIJ (1923), Series B, No. 6.
34. L. Oppenheim, International Law, Vol. I, Eighth Edition, pp. 159-161.

* See also for P.C.S. (1995) Q. 9(a).

35. When one State absorbs another State, for example it always 'succeeds' to the public property of the extinct State but only occasionally "succeeds" to its liabilities for illegal acts committed against other States". Edward Collins, International Law in a Changing World (1969), p. 106 ; see also The Treaty of Versailles (1919), Article 254-257.

Vienna Convention on Succession of States Property, Archives and Debts, 1983 was signed on 8 April, 1983. It has yet not come into force. For becoming effective, it requires 15 states to be bound by it. As of 5 August 2009, only 7 (seven) states have so far ratified it. One of the main flaws of the conventions is heavy reliance throughout on equity as a guiding principle. Another defect that has been pointed out is undue emphasis on succession of states in a simple case of independence, typically from a colonial power. Moreover this convention does not seem to be a useful guide to settling the complex problems of succession resulting from the break up of a state.

(4) *Contracts**.—Most of the jurists are of the view that the succeeding State should be bound by the contract entered into by extinct State. But in the *West Rand Central Gold Mining Co. Ltd* v. *King*,[36] the King's Bench of England ruled just the reverse. In this case, the Court ruled that the succeeding State is entitled to decide whether it would accept the financial obligations of the former State. The facts of this case are as follows :—West Rand Central Gold Mining Co. Ltd., was a registered Company in England. It was engaged in the work of digging of gold mines in Transval. In October 1899, two parcels containing gold were seized by the officers of the South African Republic. According to the law prevailing at that time, it was the responsibility of the South African Republic to return the said parcels of gold or equivalent money in lieu of the parcels. Meanwhile war broke out between Britain and South African Republic and the latter was conquered by Britain on October 11, 1899. West Rand Central Gold Mining Co. Ltd., filed a petition to claim the parcels of gold on the ground that after conquering the South African Republic, the obligations of the South African Republic automatically became the obligations of Britain. It was, therefore, argued that the British Government was liable to return either the parcels of gold or pay its value in money. The Court rejected the contentions of the company and held that the conquering State is not liable to fulfil the private contractual obligations of the conquered State. International Law does not impose any obligations upon the conquering State to fulfil the obligations of the conquered State. The court further observed that *acts of State* are beyond the jurisdiction of the Municipal court. Conquest of South African Republic being act of State the appellant company can get no relief in a Municipal court. It may, therefore, be said that much depends upon the discretion of the succeeding State. In the absence of express understanding a conqueror assumes no obligation of the conquered State. There is a difference between the private right of individuals in private property and contractual rights which are sought to be enforced against the sovereign. Lord Alverstone[37] observed : "It must not be forgotten that the obligations of the conquering State with regard to private property of private individuals particularly by land as to which the title had already been perfected before the conquest or annexation are altogether different from the obligations which arise in respect of personal rights by contract .... cession of territory does not mean the confiscation of the property of individuals in that territory." [38]

Illustration.—A company registered in India was carrying on trade in Sikkim before it became part of India. The Government of Sikkim confiscated a few consignments sent to company's office in Sikkim from India. Soon thereafter Sikkim became part of India. The company claims the consignments or their value from the Government of India.**

The facts of this problem resemble that of the case of *West Rand Central Gold Mining Co. Ltd* v. *King* discussed above. As held in this case conquering State or for that matter the State, (*i.e.* India) in which new State (*i.e.* Sikkim) merges, is not liable for the acts of latter state (*i.e.* Sikkim). Moreover, merger of state is an act of state which is beyond the jurisdiction of a municipal court. The Government of India is not therefore liable to return the consignments or their value. As a matter of fact and practice it depends upon the discretion of the succeeding state (*i.e.* India) to deny or accept the claims of the company.

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* P.C.S. (1985) Q. 3—the facts of the case given are those of West Rand Central Gold Mining Co. Ltd. v. King which has been discussed below ; P.C.S. (1988) Q. 10(c) ; C.S.E. (1991) Q. 8(b).

[36] (1905) 2 KB 391 ; See also for UPPCS (2001) Q. 7(a) ; IAS (2005) Q. 8(b).

[37] Ibid, at p. 411.

[38] See also Cook v. Sprige, (1899) AC 572 at p. 578.

** C.S.E. (1987) Q. 6 (b) (i).

(5) *Concessionary contracts.*—Although much depends upon the discretion of the succeeding State so far as the contracts in general of the former State are concerned, the position is different in respect of the concessionary contracts. By concessionary contracts, we mean the contracts through which certain concession, such as, digging of mines, laying of railways, etc. are given through contracts. These are mostly of local nature. Succeeding State may or may not be bound by such depending concessionary contracts upon the facts and circumstances of each concessionary contract. In *Premchibar* v. *The Union of India,*[39] wherein the Government of India rejected the application of a former Portuguese citizen for extension of the period of licence granted to him by the then Portuguese Government, the Supreme Court of India held, "In such a case the residents of territories did not carry with them the rights which they possessed as subjects of the ex-sovereign, and that as subjects of the new sovereign they had only such rights as are granted or recognised by him, so far as the relations between the subject and the sovereign are concerned. "Further, whether new sovereign has recognised the rights of the new subjects as against himself and has undertaken the liabilities arising thereunder is a question of fact depending upon the new sovereign after the requisition territory concerned." In this case the petitioner was a citizen of former Portuguese territory. On December 20, 1961 Portuguese territory was merged in India and the petitioner adopted Indian citizenship. About three months before merger of Portuguese territory in India, the petitioner had obtained a licence for importing goods worth about 10 lakhs pounds and on the basis of the said licence he had even advanced some money. After acquiring Indian citizenship he requested the Government of India to extend the period of licence, but his application was rejected. He filed a writ-petition in the Supreme Court and contended that the rejection of his application amounted to the violation of his fundamental right mentioned in the Constitution and that he was discriminated which was also contrary to the provision of the Constitution. But the Supreme Court dismissed his petition. *State of Gujarat* v. *Vora Fiddali,*[40] and *State of Rajasthan* v. *Shyamlal,*[41] also deserve mention in this connection.[42]

(6) *Laws.*—So far as the laws of the former State are concerned, civil law continues until it is changed by the succeeding State.[43]

(7) *Unliquidated damages for torts.*—No succession takes place in respect of unliquidated damages for torts. This was held in *Robert E. Brown's* claim.[44] The facts of this case are as follows :

Robert E. Brown was an American citizen. In 1894, he went to South Africa and started the work of digging gold mines. After some, time the head of the State of South Africa declared that in the eastern part of that area, State would undertake the work. Robert Brown submitted an application of licence for carrying on digging of goldmines but it was rejected. Later on, the Government withdrew its earlier order for carrying on digging of goldmines. Robert E. Brown filed a suit in 1895 for recovery of compensation. But the case could not proceed because in the meantime Great Britain conquered South Africa and incorporated it in its Empire. The Government of America contended that her citizen, Mr Brown, had been authorized to carry on digging of goldmines but this right was subsequently snatched from him before South Africa was annexed by Britain. It was agreed to refer this dispute to arbitrators. The arbitrators had to decide mainly two questions : (1) Whether South Africa refused to do justice to Robert E. Brown ? and (2) If justice was denied to him, whether the succeeding State of South Africa would be responsible for the loss and damages. In other words, whether Britain was liable to pay compensation ? In reply to the first question, the arbitrators held that justice was denied to Robert E. Brown because if the case had proceeded, South Africa would have been liable to pay damages. In reply to the second question referred to them, the arbitrators decided that the peace agreement under which South Africa surrendered before Great Britain, Britain did not undertake the liability for torts committed by South Africa, hence Britain was not liable. But if the former State had accepted or had decided to pay the compensation, then the succeeding State should pay the damages for torts.

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[39] AIR 1966 SC 442. See also Rajavi Amar Singh v. State of Rajasthan, AIR 1958 SC 228 at pp. 230-231 ; see also State of Madras v. K.M. Rajagopalan, AIR 1955 SC 817, Reilly v. The King, (1934) AC 176 ; Noakes v. Doncaster Amalgamated Colliers Ltd., (1940) AC 104.

[40] AIR 1964 SC 1043.

[41] AIR 1964 SC 1495.

[42] For detailed study. See D.P.O'Connell Economics Concessions in the Law of State Succession, BYBIL, Vol. (1950), pp. 93-124.

[43] In Virendra Singh and others v. State of U.P., AIR 1954 SC 447 at p. 452, the Supreme Court observed "........all authorities are agreed that it is within the competence of the new Sovereign to accord recognition to existing rights in the conquered or ceded territories and, by legislation or otherwise, to apply its own laws to them ; and these laws can, and indeed when the occasion arises must be examined and interpreted by the municipal courts of the absorbing State". For detailed study see also Shabtai Rosenne, "Effect of Change of Sovereignty upon Municipal Law," BYBIL, Vol. XXVIII (1950), pp. 267-292.

[44] American and British Claim Arbitration Tribunal, Nov. 1923 in BYBIL (1924), pp. 220-221.

(8) *Nationality*.—The nationals of the former State lose their nationality at the extinction of the State and become the nationals of new international person. In this connection it may, however, be noted that generally such nationals are given a certain period within which they have to decide whether they continue their loyalty towards the former State or will accept the citizenship of the succeeding State.[45]

(9) *Succession to property in foreign State*. —As regards the succession to property in foreign State, jurists are of the view that succeeding States become the successors of such property.

Part II of the Vienna Convention on State Property, Archives and Debts 1983 deals with "State Property." Article 11 of the convention provides that unless otherwise agreed, the passing of state property will take place without compensation. Article 12 provides that property, rights and interests owned by a third State should not be affected by succession of states. Article 13 asks the predecessor state to take all measures to prevent damage or distruction to State property which passes to successor State. As regards succession in case of newly independent States Article 15 allows special reference to be made to bilateral agreements between the predecessor State and the newly independent State but it shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources."

(10) *Succession to State Archives*.—Article 25 of the Vienna Convention on State Property, Archives and Debts, 1983 lays special emphasis on preserving the integral character of grounds of State archives of the predecessor State. The convention provides that the passing of or appropriate reproduction of State archives of the predecessor State to a newly independent successor State should be determined in such a manner that "each of those States can benefit as widely and equitably as possible" from those archives. Bilateral agreements between the two states should not "infringe the right of the peoples of those states to development, to information about their history, and to their cultural heritage.

(11) *Succession of States in Respect of Treaties*.* —The traditional doctrine of the State succession in respect of treaties have been rejected by the large number of newly independent States. These newly independent States have relied upon the rules of "moving treaty frontiers" and "clean state." These rules are not simply reactions against the inheritance treaties and devolution agreements but were necessitated by the changing times and circumstances. On 23rd August, 1978, Vienna Convention on Succession of States in Respect of Treaties was adopted. The Convention entered into force on November 6, 1996. The provisions of the convention show that the clean State rule has been followed and due recognition has been given to the consent of States. The clean State rule is similar to negative theories and communist theory discussed earlier. According to 'Clean State' rule, a newly independent State is unencumbered by the obligations and commitments of the predecessor State. It has, therefore, full freedom to continue or discontinue the treaties of the predecessor State. The 'moving treaty

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[45] See AIR 1954 SC 447 at p. 454.

* See also for P.C.S. (1995) Q. 9(d) ; UPPCS (2001) Q. 7 (a) ; IAS (2005) Q. 8 (b).

frontiers' rule is based on the association of a territory with an already established State and on the basis of the prior legal nexus a newly independent State is entitled to claim its succession to multilateral treaties.

Article 1 of the Vienna Convention on Succession of States in Respect of Treaties, 1978 which deals with the scope of the convention provides that the convention applies to the effects of a succession of states in respect of treaties between states. As regards agreement for the devolution of treaty obligations or rights from a predecessor State to a successor State, Article provides that the obligations or rights of a predcessor State under treaties in force in respect of a territory at the date of succession of States do not become the obligations or rights of the successor State towards other State parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State. So is the effect of, as provided by Article 9, unilateral declaration by successor State regarding treaties of the predecessor State.

Article 11 of the Convention which deals *Boundary Regimes,* clearly provides that a succession of states does not as such affect : (a) a boundary established by a treaty, or (b) obligations and rights established by a treaty and relating to the regime of a boundary. Obviously to avoid chaos regarding established situation, clean State rule does not apply here.

Article 15 of the Convention deals with *Succession in Respect of Part of Territory.* It provides : When part of the territory of a state, or when any territory for the international relations of which a state is responsible, not being part of the territory of that State, becomes part of the territory of another State :

(a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States ; and

(b) treaties of the successor State are in force in respect of the territory to which the succession of State relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

As regards the position of newly independent States in respect of the treaties of the predecessor State, a general rule is laid down in Article 16 which provides that the newly independent State is not bound to maintain the treaty in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of states relates. This provision clearly follows clean State rule.

Article 24 deals with conditions under which a *Bilateral treaty* is considered as being in force in the case of a succession of States. It provides : A bilateral treaty which at the date of a succession of states was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent state and the other State party when : (a) they expressly so agree; or (b) by reason of their conduct they are to be considering as having so agreed. So far as the position between the predecessor State and the newly independent State is concerned, Article 25 provides that a treaty which under Article 24 is considered as being in force between a newly independent state and the other State party is not by reason only of that fact to be considered as being in force also in the relations between the predecessor State and the newly independent State. A brief reference may also be made to the provisions of the convention relating to uniting and separation of states. Article 31, which deserves a special mention in this connection provides :

When two or more States unite and so form one successor State, any treaty in force at the date of succession of state in respect of any of them continues in force in respect of the successor State unless :

(a) the successor state and the other State party or State parties otherwise agree ; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 34, which deals with succession of States in cases of separation of parts of a State, provides as follows :

1. When a part or parts of territory of a State separate to form one or more States, whether or not the predecessor State continues to exist :

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed ;

(b) any treaty in force at the date of the succession of States in respect only of that part, of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply to :

(a) the States concerned otherwise agree ; or

(b) it appears from the treaty or is otherwise established that application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

As regards multilateral treaties, Article 17 provides that a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of states was in force in respect of the territory to which the succession of State relates. But this rule does not apply if it appears from the treaty or is otherwise that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Similarly when according to the object and purpose of the treaty, the participation of any other State in the treaty must be considered requiring the consent of all the parties, the newly independent state may establish its status as a party to the treaty only with such consent. As regards participation in treaties not in force at the date of the succession of states, Article 18 provides that a newly independent state may by a notification establish its status as a contracting state if at the date of succession of states the predecessor state was a contracting state in respect of the territory to which that succession of state relates.

As regards succession to reservations, Article 23 provides that when a newly independent state establishes its status as a state party or as a contracting state to a multilateral treaty by a notification of succession under Article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of states in respect of the territory to which the succession of states relates unless when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject-matter as that reservation.

The convention also contains provision for settlement of disputes in respect of the application of the conventions, provisions relating to consultation and negotiation, conciliation, judicial settlement and arbitration, settlement by common consent and other provisions in force for the settlement of disputes are contained in Articles 41 to 45.

This convention became effective on November 6, 1996. The convention required 15 ratifications to become effective. So far 21 countries have ratified it.

This convention has proved to be controversial because it distinguishes between newly independent states and cases of separation of parts of states.

Article 16 states all newly independent states receive "a clean states" whereas Article 39 (1) states that all other new states remain bound by the treaty obligations of the state from which they separated. Moreover Article 17 states that newly independent state may join multilateral treaties to which their former colonizer were a party without the consent of all other parties in most circumstances whereas Article 9 states that all other new states only join multilateral treaties to which predecessor states were a part of with the consent of other parties.

Succession regarding membership of the United Nations

The question of the succession regarding membership of the United Nations arose for the first time after the partition of India into India and Pakistan. India was originally the member of the United Nations having signed the United Nations Charter at San Francisco. Later on, it was ratified by the Government of India. After partition, Pakistan claimed that since it was a part of India which was an original party to the United Nations Charter, it should get the membership of the United Nations in succession automatically. The General Assembly of the United Nations rejected this claim of Pakistan. According to General Assembly, when a State becomes international person, it can become the member of the United Nations only after it is admitted in accordance with the provisions of the Charter. That is to say, a State to be admitted to the United Nations, should apply for the membership. A State is admitted as the member of United Nations by the decisions of the General Assembly by 2/3 majority of the members present and voting on the recommendation of the Security Council. Thus the principle of succession does not apply in case of the membership of the United Nations.

Succession in Respect of International Organisations.—Ordinarily, the succession of International Oraganizations depends upon the constituent instrument or special agreements. "While as a rule devolution of rights and competencies is governed either by the constituent instruments of the organs in question or by special agreements or decisions of their organs, the requirement of continuity of international life demands that succession should be assumed to operate in all cases where that is consistent with or is indicated by the reasonably assumed intention of the parties as interpreted in the light of the parties of the organisation in question." [46] The law regarding the succession of International Organisation has been clarified by the International Court of Justice in its Advisory Opinion of 1950 in the following case :—

Status of South West Africa.[47]—Trusteeship Council of the United Nations succeeded to all rights and duties of the Mandatory Commission. That is to say, all the territories which were under the Mandatory Commission came under the control of the Trusteeship Council. Thus, South West Africa also came under the control of the Trusteeship Council. In the beginning, South Africa accepted the control of the Trusteeship Council and sent its reports, etc. to the United Nations in this connection but later on South Africa contended that after the extinction of the League of Nations, South West Africa ceased to be under control of any international institution and became a part of the South Africa, and as such Trusteeship Council had no control over it. Consequently, South Africa refused to follow the directions and control of the Trusteeship Council. In 1950, the General Assembly referred this matter to the International Court of Justice for its advisory opinion. The International Court of Justice advised that Mandatory Commission was an Institution of international status and the Mandatory Commission had created an international status of South West Africa which could not be modified unilaterally by South Africa. Besides this, the functions and purpose of the Mandatory Commission and Trusteeship Council are same. Keeping in view the desirability of the requirement of continuity of international life, the Trusteeship Council succeeded all the functions of the Mandatory Commission. Consequently, the South West African Republic was a Trust Territory under the control of Trusteeship Council and hence South Africa was bound to follow the directions and control of the Trusteeship system of the United Nations. The conclusion that the United Nations succeeded to the supervisory functions of the League of Nations in the matter of Mandated Territories flow partly from the principle adopted by the court that the regime established for the mandates was of an international status as distinguished from a purely contractual agreement.[48] The other principle that the court applied was that if the nature, functions and purposes of the new international organisation are the same, succession may take place in regard to the functions and powers of an international organisation.

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[46] L. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 158.

[47] ICJ Rep. (1950), p. 79 ; for more details see Chapter on "Trusteeship Council".

Question of Application of the Rules of State Succession in respect of division of India into two Independent States (India and Pakistan)*.— After the passing of the Indian Independence Act, 1947, India and Pakistan became two independent dominions. There was no controversy regarding the status of Pakistan. Pakistan emerged as a new State in the horizon of International community. But a controversy arose in respect of India as to where India emerged as a new State having acquiesced new international personality. By the Independence Act of 1947, British India was divided into two independent states on the basis of equality on the basis of International agreements rights, property, obligations etc. were divided between the two states. It was not, therefore, a case of cession. The Supreme Court has expressed the same view in *Virendra Singh* v. *State of U.P.*[49] In fact, it was a case of dismemberment of British India. Therefore, the principle of state succession will apply to determine the rights and obligations of both the states. So far as Pakistan is concerned there took place state succession in respect of local rights and obligations.The rules of International law of state succession applied in respect of law, property situated in foreign countries etc. But there was no state succession of political rights and duties consequently it was not bound by political treaties earlier entered into by Britain.

In respect of India also the abovementioned rules of International law applied. But the position is not clear in respect of India. Although, in respect of India also, the rules of state succession applied in some respects, such as local rights and duties, law, property situated foreign in countries etc. but in other respects India's international status continued to be the same as was during the British period. Exercising its influence, Britain got India become a member of the League of Nations and International Labour Organization, in 1919. Even after India became an independent sovereign state, India continued to remain the member of these international organizations. Similarly, India had become an original member of the United Nations and continued to remain so even after she become an independent sovereign state. Thus even before independence, India's international personality had been recognized. But a similar thing did not happen in respect of Pakistan. After emerging as a new independent state Pakistan claimed that it should also be recognized as an original member of the United Nations because it became an independent state in consequence of the division of the sub-continent of India into India and Pakistan. But this claim of Pakistan was rejected by the General Assembly of the United Nations. According to the General Assembly, whatever the territory, population etc. of a state after emerging as a new state, it can become a member of the United Nations only in accordance with the provisions of the U.N. Charter on the other hand, India was not regarded as a new state. India was and original member of the U.N. and continued to remain so even after independence.

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[48] Oppenheim, International Law, Vol. 1, Eighth Edition, p. 169.

* See also for UPPCS (2003) Q. 6.

[49] AIR 1954 SC 447, 454.

CHAPTER 13

INTERVENTION

Meaning and definition of the word "Intervention"*

The word 'intervention', has been defined as dictatorial inference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of thing." [1] In principle, international law prohibits intervention. The prohibition of intervention "is the corollary of every State's right to sovereignty, territorial integrity and political independence." [2] But as pointed out by Hans Kelsen, international law does not prohibit intervention in all circumstances. According to him, when one State intervenes in the affairs of another State through force, then as a reaction against this violation, international law permits intervention. In the view of Quincy Wright, "Intervention may be diplomatic as well as military. A diplomatic communication of peremptory or threatening tone, implying possible use of military or other coercive measures may constitute intervention."

The principle of non-intervention propounded under the Charter under Article 2(7) is applicable to the United Nations and not to the States.[3] In fact, the principle of non-intervention by States has been propounded in Article 2(4) of the United Nation's Charter. Article 2(4) runs as follows : "All members shall refrain in their international relations from the threat or use of force, against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations." This principle has been re-affirmed by the General Assembly through its resolution 2131 (xx) of December 1965. "The principle of non-intervention is in fact the search of an ideal of equality and sovereignty of the States. In accordance with this principle a State should not interfere in the affairs of another State. The Governments of States also accept this principle. But so far the real practice is concerned this principle is not followed by the States." [4] Dr. Thomas Frank has even pronounced the death of Article 2(4) and proceeded to tell us who killed it.[5] But as pointed out by Prof. Louis Henkin, "......... the death certificate is premature and the indictment for legicide must be redrawn to change lesser through aggravated degrees of assault. Article 2(4) lives and while its condition is grave indeed, its maladies are not necessarily terminal." [6] He adds : "For me, if Article 2(4) were dead indeed, I should have to conclude that it rules—not mocks us from the grave. In fact, despite common mis-impressions Article 2(4) lives and can live. No government, no responsible official of Government, has been prepared or has wished to pronounce it dead. Article 2(4) was written by practical men who knew all about national interest. They believed the norms they legislated, to be in their nation's interest, and nothing that has happened in the past 25 years (now 59 years) suggests that it is not." [7]

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* See for IAS (1957), Q. No. 5 ; PCS (1974), Q. No. 10(a) ; PCS (1972), Q. No. 9 : PCS (1978), Q. No. 9(a) : PCS (1981), Q. 3 ; PCS (1982), Q. 5(b); C.S.E. (1991), Q. 5(b) ; C.S.E. (1992) Q. 6(a) ; UPPCS (2001) 7 (a); UPPCS (2004) Q. 7(c) ; UPPCS (2006) Q. 8 (b); IAS (2005) Q. 5 (c) ; IAS (2008) Q. 7 (a).

[1] L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 305; See also Oppenheim's International Law, Ninth Edition, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U.K. Limited and Mrs. Tomoko Hudson, 1992, p. 430.

[2] *Ibid* at p. 428.

[3] Nicholas Greenwood Onuf, "The Principle of Non-Intervention, the United Nations and the International System," Int. Orgn., Vol. XXV (1971), p. 209 at p. 212.

[4] "Civil Wars and International Law", I.J.I.L., Vol. II (1971), p. 219 at p. 233.

[5] Thomas Frank, "Who killed Article 2(4) or Changing Norms Governing the Use of Force by States", AJIL, Vol. 64 (1970), p. 809.

[6] Louis Henkin, "The reports of the Death of Article 2(4) are Greatly Exaggerated", AJIL, Vol. 65 (1971), p. 544.

[7] Ibid at p. 547.

In 1970, the General Assembly adopted unanimously a resolution[8] entitled *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U.N.* The resolution declared : "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." [9] As regards the principle of non-intervention the resolution added : "No State or group of States has the right to intervene directly or indirectly for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its Sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State." [10]

It has been rightly remarked that the above resolution contains "a far reaching interpretation of the fundamental principle embodied in Article 2 of the Charter. For instance, the additional principles relating to the prohibition of the use of force make it clear that force may not be used not only across existing international boundaries, but also across international lines of demarcation ; that acts of reprisal involving the use of force are included in the prohibition ..."[11] Further, "It is noteworthy that the General Assembly declared further that the 'principles of the Charter' which are embodied in this Declaration constitute basic principles of international law" ; and appealed to all States, including the non-members, 'to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles'. This is but one important example of the legislative activity of the General Assembly, leading to the creation of new international law applicable to all States." [12] Thus, non-interference in the internal affairs of States has become firmly established in international relations and international law as a fundamental and generally recognized principle.[13] Reference may also be made to the *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or use of Force in International Relations* adopted by the General Assembly on 18 November 1987.[14] This Declaration solemnly declared :

1. Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the U.N. Such a threat or use of force constitutes a violation of international law and the Charter of the U.N. and entails international responsibility.

2. The principle of refraining from the threat or use of force in international relations is universal in character and is binding regardless of each State's political, economic, social or cultural system or relations of aliance.

3. No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter of the U.N.

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[8] *General* Assembly Resolution 2625 (XXV) of 24th October, 1970 GA, Official Records, Twenty-fifth *Session, Suppl.*, No. 28 (1971), pp. 121-124.

[9] *Ibid. at p. 122-123*

[10] *Ibid. at p. 123.*

[11] *Prof. Louis B. John*, "The Development of the Charter of the United Nations ; the Present State "in The *Present State of International* Law and other Essay", (1973) p. 39 at p. 50.

[12] Ibid, at *p. 52 ; emphasis added.*

[13] Valentin Yaroslavatsev, "Non-Interference—A Basic Principle," New Times, No. 20 (May 1977). p. 18 at p. 19.

[14] See A/42/766 and Corr. 1.

4. States have the duty not to urge, encourage or assist other States to resort to the threat or use of force in violation of the Charter of the U.N.

5. States shall fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States or acquiescing in organized activities within their territory directed towards commission of such acts.

6. States have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.

7. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of sovereign rights and to secure from it advantages of any kind.

8. In accordance with the purpose and principles of the U.N. States have the duty to refrain from propaganda for wars of aggression.

The preamble of the above Declaration (of 18 November, 1987) recalls "that this principle is enshrined in Article 2, paragraph 4, of the Charter of the United Nations and has been reaffirmed in a number of international instruments" and reaffirms "the obligation to maintain international peace and security in conformity with the purposes of the United Nations." Thus what has been stated above of the Declaration of 1970 is also true of this Declaration and may be regarded as authoritative interpretation of Article 2(4) of the Charter or extension of the Charter itself. It uses the term 'use of force' which is definitely a much wider term. In case concerning *Military and Para-Military Activities in and Against Nicaragua* (1986), Judge Nagendra Singh (who was then the President of the World Court) in his separate opinion, aptly remarked : "......... it represents the contribution of the court in emphasizing that the principle of non-use of force belongs to the realm of *jus cogens* and is the very corner stone of the human effort to promote peace in a world torn by strife. This aspect does need to be emphasized."

Article 2(4) and the limits of the use of force.*—Article 2(4) as noted above contains prohibition of the unilateral use of force or threat thereof by States in their international relations. The only exception of this recognised under the U.N. Charter is individual and collective self defence as contained in Article 51. But in an article,[15] Reisman has given a very dangerous interpretation. He has tried to justify the use of force to oust a repressive government. He argues : "Coercion should not be glorified, but is native and indeed subversive of public order to insist that it never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law. The critical question in a decenralized system is not whether coercion has been applied but whether it has been applied in support of or against community order and basic policies and whether it was applied in ways whose net consequences include increased congruence with community goals and minimum order." [16] He has suggested that while interpreting Article 2(4), attention should be given to the spirit of charter and not merely the letter of the provision.[17] This is indeed a very dangerous interpretation of the article 2(4) and must be refuted. Schacter[18] has rightly refuted and criticised Reismans' interpretation of Article 2(4). In his view, Reisman's argument is not only against text of the charter it is also against the interpretation which states have given in the past decades. He has rightly remarked, "It would introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular wili or to the goal of self-determination."[19]

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* See also for C.S.E. (1992) Q. 8(b).

[15] W. Michael Reisman, "Coercion and Self-Determination : construing Charter Article 2(4)", AJIL, Vol. 78 (1984) p. 642.

[16] Ibid, at p. 645.

[17] Ibid.

[18] See Oscar Schacter, "The Legality of Pro-Democratic Invasion", AJIL, Vol. 70 (1984) p. 645.

[19] Ibid, at p. 649.

In the *Corfu Channel case* (1949) the U.K. had contented that it had used armed force in the cause of international justice but such a contention was rejected by the International Court of Justice.[20] According to Schacter, "The fragility of international organisation enhances the danger. This is surely not the time for international lawyers to weaken the principal normative restraint against the use of force. The world will not be made safe for democracy through new wars or invasions of the weak by the strong." [21]

Prof. M.K. Nawaz has also refuted the interpretation of Article 2(4) given by Reisman and has supported the views of Schacter.[22] He has aptly remarked, "The up-shot of all this is to say that no state under international law, especially the U.N. Charter, can intervene with armed forces either to change the existant government or to create political environment for installing a government of its liking. Nor can it so act militarily to suppress the processes of self-determination : the only exception being a state that cannot go to the aid of another state, if an armed attack occurs against it, presumably at the request of the attacked state." [23]

So long as the words "armed attack" are retained in Article 51, this seems to be the correct interpretation of the charter. This interpretation also finds support from the verdict of the International Court of Justice indicating interim measures in case *Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America)*.[24] The world court held by a majority of fourteen votes to one, the right to sovereignty and to a political independence possessed by the republic of Nicaragua, like any other State of the region or of world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that states should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any states, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a state, principles embodied in the United Nations Charter and the charter of the organization of American States.

It may be noted that outlining the policy of U.S. in Nicaragua President Reagan openly declared that unless the Nicaraguan Government sought democracy the only other alternative for the rebels would be to have their way and take over. With this policy in view, the U.S. was giving $10 million military aid to contras. But as rightly indicated by the International Court of Justice in its final verdict in June 1986, by a majority of 12 to 3 votes, the aiding of contra rebels with money and military hardware, U.S. supported attacks on Nicaraguan ports and oil installations and U.S. intelligence flights over Nicaraguan territory constituted an infringement of Nicaragua's sovereignty and a flagrant violation of the principles of the U.N. charter which ban unlawful use of force by one state against another. The world court held that there is no rule in customary international law permitting another state the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the state for whose benefit this right is used will have declared itself to be the victim of an armed attack.[25] Further, the lawfulness of the use of collective self-defence by the third state for the benefit of the attacked state also depends on a request addressed by that state to the third state. The requirement of a request by the state which is the victim of the alleged attack is additional to the requirement that such a state should have declared itself to have been attacked.[26] This case clearly illustrates the dangers involved in Reisman's thesis about Article 2(4). The interpretation given by Schacter and Prof. Nawaz is correct and has much to commend itself.

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[20] See Oscar Schacter, "The Legality of Pro-Democratic Invasion", AJIL, Vol. 70 (1984) p. 650.

[21] Ibid.

[22] Dr. M.K. Nawaz, "What Limits on the Use of Force? Can Force be Used to Depose an Oppressive Government?" IJIL, Vol. 24 (1984), p. 406 at p. 410.

[23] *Ibid*; see also Rahmatullah Khan, "The War on Terrorism", IJIL, Vol. 45, No. 1 (January-March, 2005) p. 1 at p. 7.

[24] *ICJ Rep.* (1984) p. 169.

[25] *I.C.J. Reports* 1986, p. 14, at p. 104.

[26] Ibid, p. 104-105.

Reference may also be made here to a recent case of International Court of Justice, namely *Case Concerning Legality of use of Force* (*Yugoslavia* v. *United States of America*).[27] It may be noted here that on 29 April, 1999 Yugoslavia filed as many as ten separate applications instituting proceedings against the U.S., the U.K., Spain, Portugal, the Netherlands, Italy, Germany, France, Canada and Belgium alleging that they were guilty 'for violation of the obligation not to use force" and requested for the indication of provisional measures. The above case is one of the said ten cases, the International Court of Justice rejected the request for indication of provisional measures on the ground that in the absence of the consent by the United States the Court cannot exercise jurisdiction. The Court ordered that the case be removed from the list. However, the World Court remarked :

"Whereas there is a fundamental distinction between the question of the acceptance by a state of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with merits after having established its jurisdiction and having heard full legal arguments by both parties;[28]

Further, "whereas whether or not states accept the jurisdiction of the Court they remain in any event responsible for acts attributable to them that violate International law including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties;[29]

In this context the World Court asked the parties that they "should take care not to aggravate or extend the dispute."[30] Lastly the Court observed : "whereas, when such a dispute gives rises to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter.[31]

Grounds of intervention*

The coming into force of the Charter of the U.N. has brought about revolutionary changes regarding the valid grounds of intervention. Most of the traditional grounds have ceased to be valid. The charter has, however, introduced a new ground, namely, Collective Measures or Collective Intervention founded on the concept of Collective Security. Broadly speaking, there are now only two valid grounds of intervention—one for the states *i.e.* self-defence and the other for the United Nations *i.e.* Collective intervention or enforcement action under Chapter VII of the Charter. A critical discussion of the following grounds is being undertaken with a view to see which of these grounds are still valid :

(1) Self-defence ; (2) on humanitarian grounds ; (3) to enforce treaty rights ; (4) intervention to prevent illegal intervention ; (5) balance of power ; (6) for protection of persons and their property ; (7) collective intervention ; (8) intervention to maintain international law ; and (9) intervention in civil wars.

(1) *Self-defence.*** —Self-defence has been a valid ground of intervention for long time. On the ground of self-defence a State may intervene in the affairs of another State. In this connection Mr. Webster, the Secretary of United States of America propounded a very important principle in the famous case, *The Caroline* (1841). In this case Mr. Webster declared that the necessity of self-defence should be *instant, overwhelming and leaving*

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27. Decided on 2 June, 1999.
28. Para 30 of the judgement.
29. Para 31 of the judgement.
30. Para 32, ibid.
31. Para 33, ibid.

* See P.C.S (1968), Q. No. 9 : For answer see also definition of "Intervention" discussed earlier, P.C.S. (1990) Q. 9(b) ; See also for C.S.E. (1992) Q. 69 (a) ; UPPCS (2001) Q. 6 (d) ; UPPCS (2004) Q. 7(a); IAS (2005) Q. 5(c).

** See for I.A.S. (1964), Qs. No. 2 and 7 ; P.C.S. (1973), Q. No. 4 ; P.C.S. (1965), Q. No. 1 ; P.C.S. (1977) Q. 9 ; C.S.E. (1982) Q. No. 5(c) ; P.C.S. (1983), Q. 6 ; P.C.S. (1988) Q. 2(b) ; UPPCS (2003) Q. 7(a) ; IAS (2003) Q. 8 (a).

no choice of means and no moment for deliberation.[32] This principle was affirmed by *Nuremberg Tribunal* in 1946.[33] The test laid down in *The Caroline* was finally affirmed by the International Court of Justice in the *Corfu Channel* case.[34]

The facts of *the Caroline* case are as follows :—

In Canada, which was then the colony of Britain, some revolutionaries were trying to overthrow the government. The ship named *Caroline* was carrying arms and men from across the river Niagra (within the territory of America) to assist the rebels. The British Government lodged a protest against the American Government but with no effect. Consequently the British soldiers crossed the river, seized the ship in the American territory and left it floating. The American Government protested and asked the British Government to justify its action on the ground of self-defence and self-preservation The American Secretary of State. Mr Webster propounded the above-mentioned test. England failed to justify its action on the basis of this test and had to express regrets.

The facts of the *Corfu Channel case** (1949) are as follows :

North Corfu Channel is between Albania and Greece. A part of it is within the maritime belt of Albania. Before May 1946, the British ships had removed the mines from the channel and had ensured that it was safe for the passage of ships. That very month some British ships were fired at from the territory of Albania resulting in damage to the ships. In addition to this, after some time the British ships suffered loss and damages due to mines which were laid in the territorial waters of Albania. This also resulted in the loss of lives of some persons. Consequently, the British ships removed mines and explosive substance from the said portion without seeking permission of the Albanian Government in this connection. Albania protested against this and contended that it was a clear violation of Albania's Sovereignty. On the other hand, due to the loss and damage to the British ship by mines laid down by Albania, Britain raised this matter in the Security Council. The Security Council advised Albania and Britain to refer this matter to the International Court of Justice. In the beginning, Albania raised the objection in regard to the jurisdiction of the International Court of Justice in this matter. The International Court of Justice rejected the objection of Albania. Ultimately Britain and Albania agreed to refer the matter to the International Court of Justice for adjudication. Albania and Britain entered into a special agreement and through this agreement referred the following two questions for adjudication of the Court : (1) Was Albania liable under International Law for explosions in its maritime belt and if the answer is yes whether, Albania is liable to pay damages for the same? (2) Whether Britain violated the Sovereignty of Albania by removing the explosive substance, mines, etc., from the territorial waters of Albania ?

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[32] In his note dated April 24, 1841, Mr Webster Wrote "......... it will be for Her, Majesty's government to show upon what state of facts and what rules of national law the destruction of the 'Caroline' is to be defended. It will be for that government to show a *necessity of self-defence instant, overwhelming, leaving no choice of means, and no moment for deliberation.* It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive ; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown admonition or remonstrance to the persons on board the "Caroline" was impracticable, or would have been unavailing. It must be shown that day light could not be waited for : that there could be no attempt or discrimination between the innocent and the guilty ; that it would not have been enough to seize and detain the vessel; but that there was necessity, present and equitable for attacking her in the darkness of the night, while unarmed to the shore, and while unarmed men were asleep on board killing some and wounding others, and then drawing her into the current above the cataract, setting her on fire and careless to know where there might not be in her the innocent with the guilty ; or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this the government of the United States cannot believe to have existed."

[33] The Nuremberg Tribunal observed : "it must be remembered that preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity of self-defence, leaving no choice of means and no moment of deliberation" (The Caroline's case, Moore's Digest of International Law, Vol. 11, p. 412).

[34] ICJ Rep. (1949), p. 4.

* See also for IAS (1957) Q. No. 6(b), IAS (1977) Q. No. 10(d); P.C.S. (1964) Q. No. 4(b).

The International Court of Justice answered the first question in favour of Britain. That is to say, the Court decided that Albania was responsible for explosions in its territorial waters. The Court answered the second question in favour of Albania. That is to say, Britain violated the Sovereignty of Albania by removing the explosive substances from the territorial waters of Albania without its permission. The Court observed that Albania was under an obligation to inform Britain about the mines and explosive substance in the North Corfu Channel. Albania did not give any such warning to the warships of Britain. In addition to this, no such endeavour was made by Albania as might prevent the harm caused to the warships of Britain. The Court, therefore, ruled that Albania was liable for the loss and damage caused to the British warships on account of explosions and was also liable to pay compensation to Britain.

The Court observed :

> "It is generally recognised and in accordance with international customs that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace."

But by removing mines etc. from territorial waters of Albania without its permission, Britain was guilty of the violation of Albanian sovereignty. However, in view of the gravity of Albanian act of firing on British ships the world Court did not award any compensation on this account.

The test propounded by Mr Webster is still valid with the only difference that intervention on the ground of self-preservation is no more allowed. Thus instead of self-defence and self-preservation the valid ground now is only self-defence, that too very much limited and curtailed by Article 51 of the Charter of the U.N. However the concept of self-defence as expounded under Article 51 includes the defence of others and is called the right of individual and collective self-defence.

The United Nations Charter enshrines the principle of individual and collective self-defence in Article 51.[35] Article 51 provides : "Nothing in the present Charter shall impair the inherent *right of individual or collective self defence* if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures to maintain international peace and security. Measures taken by members in exercise of this right shall be immediately reported to the Security Council and shall not in any way effect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." The right of self-defence under Article 51 is subject to following conditions : (i) There should be an armed attack ; (ii) The right exists until Security Council has taken any action ; (iii) It should be reported to the Security Council ; (iv) It is subject to the review by Security Council ; (v) This right shall not affect the responsibility of the Security Council for the maintenance of peace and security ; (vi) The right is not available against a non-member of the United Nations.[36] Thus, "The beginning of an armed attack is condition precedent for resort to force in self-defence".[37] This may be explained with the help of following illustration : (i) State *A* receives information that its neighbour State *B* is preparing to invade its territory. In order to forestall the invasion *A* attacks *B* and disperses the troops amassed in *B*. *A* and *B* are both members of the U.N. *B* brings a complaint against *A* in the Security Council that State *A* has committed aggression. *A* pleads self-defence.* (ii) Similarly, the territories of a big and powerful State "*X*" lie between the territories of two small states "A" and "*B*". State "*A*" is towards the east and the State "*B*" is towards the west of the State "*X*". After certain border incidents during the course of which a few soldiers belonging to each of the three States were killed and wounded, the State "*X*" attacked States "*A*" and "*B*" and occupied major portions of their territories. The Security Council tried to intervene but the reply was given by the State "*X*" was that the States "*A*" and "*B*" were about to attack "*X*" and the latter had started military operations ~~in~~ order to protect its interests. The State "*X*" also contended that it alone could determine whether or not such danger existed.** In illustration (i) intervention by State *A* is not justified under Article 51 of the Charter. Similarly in illustration (ii) intervention by "*X*" is also not justified because Article 51 of the Charter permits the right of self-defence only if "an armed attack occurs against a member of the United Nations." [38] In both the above illustrations, armed attack had not taken place but the contention was that preparations were being made to launch the attack. Moreover, in the second illustration, *X*'s contention that it alone could determine whether or not such danger existed, is not justified because Article 51 of the Charter clearly provides that "measures taken by members in exercise of this right......... shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security."

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[35] According to Josef L. Kunz : "Under general international law, States have the right to use military force as sanctions, Article 51 gives he same right of self-defence plus the right of defence of others incorrectly-called self-defence." "Sanctions in International Law," AJIL, Vol. 54 (1960), p. 324 at p. 328.

[36] Julius Stone, Legal Control of International Conflicts (London, Stevens & Sons, 1954), p. 244.

[37] "The Use of Force in Self-Defence," BYBIL, Vol. 37 (1966) p. 266 ; see also Josef L. Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the U.N." AJIL Vol. 41 (1947), p. 872.

Thus, alarming military preparations by a neighbouring State would not justify resort to anticipatory force by the State which believed itself threatened." It has been rightly remarked : "The principal lesson of the League experience and two world wars is that the plea of self-defence should be held within strict confines, so that States may be precluded from embarking upon aggressive wars in the name of self-defence. The Charter of the United Nations has rightly restricted self-defence to armed attack. The solemn words of the preamble of the U.N. Charter that the 'scourge of war which twice in our life-time has brought untold sorrow to mankind' warn against an interpretation of the Charter which extends the scope of self-defence beyond the limits of Article 51.[39] In case concerning *Military and Para-Military Activities in and Against Nicaragua (Nicaragua* v. *United States of America)*[40], the International Court of Justice held that the right of collective self-defence pre-supposes that an armed attack has occurred.[41] Further, *under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of "collective armed response to acts which do not constitute an "armed attack."* [42] As regards the definition of an armed attack, the world court observed : "......... an armed attack must be understood as including not merely action by regular armed forces across an international border but also 'the sending by or on behalf' of a state of armed bands, groups, irregulars or mercenaries, which carryout acts of armed force against another state of such gravity as to amount an actual armed attack ...... or its substantial involvement therein." [43]

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* Asked in P.C.S. (1973), Q. No. 4.

** Asked in P.C.S. (1975), Q. No. 8.

[38] As rightly remarked by Judge Philip C' Jessup : "This restriction in Article 51 very definitely narrows the freedom of action which States had under international law. A case could be made out for self-defence in the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighbouring State would justify a resort to the Security Council, but would not justify resort to anticipatory force by the State which itself threatened." A Modern Law of Nations (New York, Macmillan, 1948), p. 166; see also Quincy Wright, "The Cuban Quarantine" AJIL, Vol. 57 (1963), p. 546.

[39] M.K. Nawaz, "Limits of Self-Defence : Legitimacy of Use of Force Against Economic Strangulation ?", IJIL, Vol. 16 (1976), p. 252 at p. 264.

[40] I.C.J. Reports 1986, p. 14.

[41] Para 233 of the majority judgment.

[42] Para 211 of the majority judgment.

[43] Ibid. pp 103-104.

*Distinction between self-defence and self-preservation.**—A few words will not be out of place here to explain the distinction between "self-defence" and 'self-preservation'. Under the traditional or general international law, there was hardly any distinction between the two terms. However, it must be noted that the term 'self-preservation' is much wider than the term 'self-defence'. Under the traditional international law, intervention on the ground of self-preservation was permitted. Even military preparations in the neighbouring State could justify intervention in the affair of that State. The Charter of the U.N. does not at all mention the term 'self-preservation'. The Charter recognizes retaliatory measures or use of force only on the ground of 'self-defence'. As compared to 'self-preservation', right of 'self-defence' is a very much restricted right and can be exercised only when an armed attack occurs. Other conditions mentioned in Article 51, as explained earlier, must also be fulfilled.

Distinction between self-defence and self-help : It is sometimes said, international Law, in its technical aspects, is a primitive law functioning in a society yet in an embroynic state and characterised by the technique of self-help."** This view does not seem to be correct. The traditional or general international law recognised the right of self-help in many situations. The Charter of the U.N. has greatly restricted this right. The Charter confers on each ~~State the~~ right of individual and collective self-defence in case an armed attack occurs. Thus in case of an armed attack, even the Charter recognises the right of self-help. But this right recognised under the Charter is subject to several restrictions as pointed out earlier including the review by the Security Council. The right recognised under the Charter is thus distinct from that of self-help and is therefore, and rightly too, referred as the right of 'self-defence'. As remarked by Gerald Fitzmaurice, "The Charter frowns on self-help ; it goes far towards rendering unenforceable by direct action the whole of international law except the breach of peace.*** Article 2(4) of the Charter provides that all members shall refrain in their international relation from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Moreover, it is one of the purposes of the U.N. to maintain international peace and security, and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about the peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace.[44] The Charter, however, recognises the right of individual and collective self-defence if an armed attack occurs. But even this right which may to some extent be called the recognition of the right of self-help is subject to the review and control of the Security Council which, as Article 24 provides, has the primary responsibility for the maintenance of international peace and security and acts on behalf of the members of the U.N.

Thus, there is a difference between self-defence and self-help. Self-help is a right which existed in the primitive legal order. In an advanced international legal order, it is prohibited. So long as international law was a primitive legal order, there was provision for self-help in the form of war and reprisal. On the contrary, self-defence is based on the illegality of war. As aptly pointed out by Josef L. Kunz, "Self-defence as a truly judicial institution presupposes an advanced legal order and international self-defence is therefore closely bound up with a more advanced international organisation.[45] As pointed out earlier, Article 51 of the U.N. Charter which provides the right of self-defence, also provides for its limitations. Moreover, it is subject to the control of the Security Council.

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* See also for P.C.S. (1985) Q. 10(b).

** Asked in P.C.S. (1975) Q. No. 1.

*** Asked in I.A.S. (1964), Q. No. 7.

[44] Article 1(1) of the United Nations Charter.

[45] Josef L. Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the U.N.", AJIL, vol. 41 (1947), p. 872 At p. 875.

(2) *Intervention on humanitarian ground.**—Intervention was permitted in past on humanitarian grounds. After coming into force of United Nation's Charter, the United Nations has done commendable work in the field of human rights. If at all intervention is permitted on humanitarian grounds, it may be done only by the United Nations. On the basis of Articles 1, 55 and 56, it may be said that Charter provisions relating to human rights create legal obligation upon the members in respect of human rights. But the Charter does not authorise any State to intervene in the affairs of another State. This is clear from Article 2(4). Even U.N. has been prohibited, under Article 2(7), from intervening in the domestic affairs of Member States. Consequently, on the ground of human rights alone, even the U.N. cannot intervene in the affairs of any member State. It can, however, do so by connecting or linking the matter of human rights with that of the maintenance of international peace and security. That is to say, if under Article 39 the Security Council determines that violation of human rights in any State poses a threat to peace or amounts to breach of peace then the Security Council may intervene for then the provision of Chapter VII of Charter become applicable.[46] The glaring example of this is recent intervention by the U.N. in Iraq on behalf the Kurdish people.

(3) *To enforce treaty rights.*—Intervention was also permitted in past under International law to enforce treaty rights. The Charter of the U.N. does not permit intervention on this ground.

(4) *Intervention to prevent illegal intervention.*—In past there have been several cases of intervention by States in order to prevent illegal intervention by other States. Intervention by one State in the affairs of another State on this ground is no more permissible.

(5) *Balance of Power.*—In past there have been many cases of intervention in order to maintain balance of power. Under the United Nations Charter this is not at all valid ground. Thus no State can intervene in the internal or external affairs of another State in order to maintain the balance of power. As a matter of fact, International law today tends to convert the system of balance of power into a system of collective security.** The system of balance of power has been replaced by a system of collective security.[47]

Though intervention by a State or U.N. in the domestic affairs of a State on the ground of balance of power is no more permissible, politically reference of this ground is still not uncommon. A major nuclear confrontation between the two super powers—the U.S. and the U.S.S.R., has so far been avoided on the basis of balance of power in respect of nuclear weapons. It would not be wrong to say that in all talks of disarmament between the two super powers, balance of power forms the basis directly or indirectly. Besides, whenever India protests against U.S. supply of dangerous weapons to Pakistan, reference of the disturbance of balance of power in the sub-continent is made.

(6) *For Protection of persons and property.*—In past, International Law permitted intervention by a State for protection of the persons and property of its citizens. This ground is no more permissible under the Charter of the U.N.

(7) *Collective intervention or collective measures.****—Under the U.N. Charter 'Collective intervention' can be made to check an aggression on the breach of international peace and security. Under Chapter VII, Security Council has been empowered to take collective action if there exists a threat or a breach of international peace and security or an aggression has taken place. In the first stage, the Security Council takes such collective measures as do not involve the use of force. But if such an action does not prove to be adequate, the Security Council is empowered to employ armed

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* See also for P.C.S. (1964) Q. 9(b) ; C.C.S. (1981) Q. 5(b).

[46] See also Chapter on "Human Rights".

** See for P.C.S. (1969), Q. No. 2.

[47] For a detailed discussion of this see Chapter on "Collective Security".

*** See also for P.C.S. (1985) Q. 5 ; For detailed answer see also Chapter on "The Security Council".

forces. The United Nations took such action in Korea (1950) and in Congo (1961). The recent example of such action is Gulf War (1991) for the vacation of Iraqi aggression and occupation of Kuwait. (See Appendix II.) This has been discussed in detail in Chapter on "The Security Council".

(8) *Intervention to maintain International Law.*—Before the establishment of League of Nations and United Nations, International Law permitted intervention for maintenance of International Law. Intervention on this ground is no more permissible.

(9) *Intervention in Civil Wars.*—In view of the continuous growth of International community, nations of the world have established close relations with each other. If anything happens in a State, it is quite natural that it makes its effect on other States as well. If there is a civil war in a State, it is likely to affect directly or indirectly other States. In past there have been interventions by States in affairs of other States on this ground. For example, in 1934-38 Germany and Italy intervened in the war of Spain. In 1968, Russia intervened in the Civil War of Czechoslovakia. Similarly, Russia intervened in the affairs of Hungary. The question arises how far such type of intervention is justified in view of the fact that United Nation's Charter has propounded the principle of non-intervention by States in the affairs of other States. Jurists are of the view that Russian interventions in Czechoslovakia and Hungary were not justified. But Russia claimed that it intervened in the affairs of Czechoslovakia and Hungary on the request of their respective governments. It has been suggested that in civil war the United Nations should have the right to intervene. The United Nations should take necessary action to check such type of war. Prof. R.P. Dhokalia has pointed out that a successful example of intervention by United Nations is the case of Congo in 1961. In Congo United Nations succeeded in ending the civil war and in establishment of law and order.[48] It may be noted here that the U.N. can intervene in civil war only if the Security Council first determines under Article 39 of the Charter that it poses a threat to the peace, breach of the peace, or amounts to an act of aggression. If the Security Council makes this determination, provisions of Chapter VII of the Charter become applicable. The recent examples of such intervention by the U.N. Security Council are : (i) intervention in Iraq on behalf of the Kurdish people and (ii) intervention in civil war of Yogoslavia ; and (iii) Somalia.

Conclusion.—In view of the above discussion it may be concluded that a State may intervene in the affairs of another State only on the ground of self defence. The U.N. may intervene in the domestic affairs of member State on the ground of maintenance or restoration of international peace and security. That is to say, it can take collective measures or can make collective intervention if an aggression has taken place or there is a threat to international peace and security. The U.N. may also intervene in case of civil wars between two member States or in case of violation of human rights in a member State if the Security Council under Article 39 first determines that the civil war or the violation of human rights poses a threat to international peace and security.

Intervention under League of Nations and United Nations and the Concept of Domestic Jurisdiction*.—Article 2(7) of the United Nations' Charter provides, "Nothing contained in the present Charter authorises the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State ...." According to Prof. Quincy Wright, it is clear that the obligations which arise from the implementation of the provisions of Charter are matters which are not within the domestic jurisdiction of any State. Article 2(7) has made it clear that the prohibition regarding non-intervention by the United Nations in the domestic jurisdiction of any State will not apply to the Security Council when it takes any enforcement or preventive action against any State for the maintenance of international peace and security.

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[48] R.P. Dhokalia, "Civil Wars and International Law", IJIL Vol. II (1971), p. 219 at p. 238 ; see also "Biafra, Bengal and Beyond : International Responsibility and Genocidal Conflict," AJIL, Vol. 66 (1972), p. 89 at p. 94-95.

* See also for I.A.S. (1971), Q. No. 11 (a) ; P.C.S. (1973), Q. No. 10(e) and P.C.S. (1967), Q. No. 8 ; C.C.S. (1981), Q. 5(a) ; C.S.E. (1994) Q. 8(a).

Comparison with League of Nations.—Article 15 of the Covenant of the League of Nations was to a great extent, similar to Article 2(7) of the United Nations' Charter. Article 15 of the Covenant of the League of Nations provided that the League of Nations could not intervene in matters which were "solely within the domestic jurisdiction" of the States. Prof. Julius Stone[49] has pointed out the following differences in the League provisions and the provisions of the United Nations' Charter :—

(i) Under the League of Nations, the League Council had to decide whether a matter was within the domestic jurisdiction of a State or not. There is no such provision in the United Nations' Charter. According to Prof. Kelsen, this will mean that under the United Nations' Charter each State is free to determine whether a particular matter is within its domestic jurisdiction or not. Prof. Julius Stone does not agree with this view. In his view, each organ of the United Nations before which the matter arises is entitled to determine whether a particular matter is within the domestic jurisdiction of a State or not.

(ii) Under the League of Nations, any State which claimed that a particular matter was within its domestic jurisdiction, had to prove it. There is no clear provision in this connection in the United Nations' Charter.

(iii) Under the League of Nations, a matter could be within the domestic jurisdiction of a State if it was not covered by international law. Under Article 2(7) of the United Nations' Charter, it is not necessary.

Thus the provisions of the Covenant of League of Nations and the United Nations' Charter are different. As regards the words "a matter which by international law is solely within the domestic jurisdiction of a State", Prof. Brierly has expressed the view that no matter which is regulated by international law can be a matter within the domestic jurisdiction of a State.[50] Thus it is clear that United Nations cannot intervene in domestic jurisdiction of any State. But "what these matters would be was not settled once and for all in advance. This was left to be decided pragmatically in the practice of the United Nations".[51] On a perusal of the historical perspectives, debates and conferences, it is clear that the representatives of the States in San Francisco Conference intended that the United Nations should neither discuss nor pass any resolution in regard to matters which are within the domestic jurisdiction of any State.[52] However, this conception has undergone significant changes. It is now well recognized that the discussions in the United Nations and the passing resolution to implement the provisions of the Charter do not amount to intervention in the domestic affairs of any State.[53] Inclusion of any matter in the agenda of General Assembly, discussion on it, its study or the passing of a general resolution would not amount to intervention[54] Famous Indian Jurist M.S. Rajan has also made it clear in his book, that the resolutions of the General Assembly which are passed to fulfil international obligations of members are within the jurisdiction of the United Nations. As pointed out above, the United Nations is empowered to intervene in civil wars of States. Examples of Congo and Cyprus may be cited in this connection. In his view when the civil wars reach a stage which endangers international peace and security it becomes necessary for the United Nations to take necessary collective action.[55]

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[49] Julius Stone, Legal Control of International Conflicts (London, Stevens & Sons), 1954 pp. 254-56.

[50] J.L. Brierly, "Matters of Domestic Jurisdiction," BYBIL, Vol. 6 (1925), at p. 8.

[51] G. Schwarzenberger, Power—Politics, Second Edition (1951), p. 449 ; see also Waldock, 31 BYBIL, p. 96.

[52] D. Gilmour, "The meaning of 'Intervene' within Article 2(7) of the U.N. Charter,—An Historical Perspective," I.C.L.Q., Vol. 16 (1967), p. 300 at p. 349.

[53] Ibid, at p. 251.

[54] See Quincy Wright, "Is discussion Intervention?" A.J.I.L., Vol. 50 (1956), p. 102

[55] See R.P. Dhokalia, "Civil Wars and International Law", IJIL, Vol. II (1971), p. 219 at p. 238.

Legitimacy of use of force against economic coercion : Example of Bangladesh.[56]— It is generally and universally recognized that human rights were openly violated in Bangladesh in 1971. Even after the elections, the elected representatives of the people were not allowed to form their government. The violation of human rights in Bangladesh reached such a magnitude that it ceased to be a matter within the domestic jurisdiction of a State and became an international matter. In the view of Dr L.M. Singhvi, the influx of lakhs of refugees to India endangered international peace. Besides this, the crime of genocide, which was perpetrated, was an international crime and did not come within the domestic jurisdiction of any State. "The Genocide Convention is the expression of the world's conscience through law and makes it plain by affirming that crimes referred to in Articles II and III thereof are a matter of international concern and so outside the matters essentially within the domestic jurisdiction of any State of Article II, Para 7 of the United Nations' Charter."[57]

The United Nations could intervene in Bangladesh on humanitarian grounds for the genocide committed and atrocities caused by Pakistani armed forces were clear violation of human rights and posed a grave threat to peace. It must however be noted that the U.N. could intervene only if the Security Council determined under Article 39 that the situation there posed a threat to the international peace and security. But under the charter no state can intervene in the affairs of another state on the ground of violation of human rights. But it has been pointed out : "......the essence of aggression is that a State poses a threat to the socio-political fabric of another State. All the underlying idea of individual self-defence is that if a State's fabric is threatened by another State, it has a right to take all the steps it may deem necessary to terminate that threat to protect itself .... An obvious corrollary to this is that a State's right of self-defence is not confined to cases of armed attack only."[58]

It was alleged by Pakistan that Indian armed forces went into action on 21st November, 1971, and from 3rd December, they were collaborating with the guerrillas of Bangladesh. The Indian representative in the U.N. admitted that India took military initiative on 21st November, 1971, but he added that it should not be looked at in isolation from other events which had occurred and were occurring. The influx of refugees continued and it endangered India's social and political life. As pointed out by Prof. K.P. Misra, "...... civil aggression as it took place in India cannot be excluded from the concept of aggression. Once this is accepted it logically allows the victim of aggression the right of self-defence.[59] This is the only justification which one can give in favour of India's action. The provisions of the Charter as they stand at present do not permit such type of intervention.[60] But it has been pointed out, "A large number of the Third World and Socialist States have taken the view that the term 'force' must be construed as to include not only physical or armed force, but also all forms of coercion, including those of economic, political and other character." [61] Further, overwhelming majority of States now subscribe to the view that "economic and other forms of coercion are violative of the principle of non-intervention." [62]

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[56] See for P.C.S. (1972), Q. No. 9; C.C.S. (1981), Q. 5(b).

[57] V.R. Krishna Iyer, "Laws Trust with the Dead in Bangladesh *vis-a-vis* Punishment of Humanicidists "National Herald," February 4, 1972.

[58] K.P. Misra, The Role of the Indo-Pakistan Conflict, 1971 (Vikas Publications House, Pvt. Ltd., Delhi, 1973) p. 130.

[59] Ibid ; see also S.K. Kapoor, "Humanitarian Intervention : Could U.N. Intervene in Bangladesh on Humanitarian Grounds ?" Law Review, Vol. 2, (Sept. 1974), p. 9.

The situation with which India was confronted was unprecedented and if India had not taken the said action probably it would have become impossible to ensure the return of the refugees. The framers of the charter probably never envisaged such a situation. The U.N. Charter should, therefore, be suitably amended to cover such situations. It would not be wrong to say that India's action has already modified thinking of the international community in this respect. The General Assembly on 18 November, 1987 adopted a Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or use of Force in International Relations. In this Declaration, the General Assembly solemnly declared :

"States have the duty to abstain from armed intervention *and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.*"

Monroe Doctrine[*].—This doctrine was propounded by President Monroe of United States of America. This doctrine was in fact the reaction of the treaty which Nepoleon had entered into with some European States. In American continent all those States which were previously the colonies of Spain and other States, had become independent. The European States wanted to re-establish their colonies in America and wanted to help Spain. In the background of these events the American President Monroe made a declaration in 1823 which is called Monroe doctrine. The Monroe doctrine contained three important points : (i) The States of American continent would no more be made subject of colonisation in future. (ii) America would not interfere in the mutual wars of European States. (iii) If European States interfered in the affairs of American continent, America would consider it unfriendly act, and would take necessary action in this connection. In short, Monroe doctrine was based on the principle of non-intervention. Through this doctrine, President Monroe declared that America would neither interfere in the affairs of European States nor would it tolerate the interference of European States in the States of American continent. "The importance of the Monroe doctrine is largely of a political, not of a legal character......while its claim to legal validity has never been admitted, it has not been actively opposed by the European powers. It was given a quasi-legal status by Article 21 of the Covenant which lays down that it does not affect, regional understandings like Monore doctrine." [63] In the presence of U.N. Charter it has lost all its significance.

Drago Doctrine.—This doctrine is called Drago doctrine because it was propounded by Mr. Drago, foreign minister of Argentina. In fact, this is complementary of the Monroe doctrine. According to this doctrine European States could not intervene in the affairs of States of American continent on the ground of claiming public debts. This principle was propounded because European States had started using military force to enforce the claims of their citizens. For example, England, Germany and Italy had enforced blockade against Venezuela. This blockade was imposed because Venezuela had failed to fulfil its financial obligations. As noted earlier, Drago doctrine is complementary to Monroe doctrine and has less significance than he Monroe doctrine. It may be noted here that United Nation's Charter has propounded the principle of non-intervention and in this context both Monroe doctrine and Drago doctrine have lost their importance and utility.

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[60] For Example Prof. M.K. Nawaz writes : "The Charter of the United Nations has rightly restricted self-defence to armed attack. The solemn words of the Preamble of the U.N. Charter that the 'scourge of war which twice in our lifetime has brought untold sorrow to mankind' warn against an interpretation of the Charter which extends the scope of self-defence beyond the limits of Article 51. International Law 'de legelatta' prescribes the exercise of force as a measure of self-defence in case of economic strangulation 'Limits of Self-Defence : Legitimacy of Use of Force Against Economic Strangulation ?" IJIL, Vol. 16 (1976), p. 252 at p. 264 ; See also discussion under the heading "Article 2(4) and the Limits of the Use of Force" made earlier in this Chapter.

[61] V.S. Mani, "The Concept of Economic Coercion", India Quarterly, Vol., XXXIII No. 3 (July-September, 1977, p. 334 at p. 337.

[62] Ibid, at p. 341.

[*] See also for I.A.S. (1973), Q. No. 3(a) : I.A.S. (1961), Q. No. 5, for answer of this question see also discussion of the law of intervention made earlier.

[63] Oppenheim, see supra note 1 at p. 316.

Historical precedents of intervention on the grounds of self-defence and on other grounds

Following are some of the main historical precedents of intervention :

(1) *The Caroline,* 1841[64].*

N.B.—The facts of this case and the principles propounded have been discussed earlier under the ground of 'Self-defence'.

(2) *Corfu Channel case* (1949)[65] : *N.B.*—This has been discussed earlier in this Chapter.

(3) *Case of Korea,* 1950.—In 1950, North Korea invaded South Korea. This invasion was also not justified on the ground of self-defence. The Security Council of the United Nations, therefore, decided to take enforcement action against Korea. China also intervened in Korea. China claimed that the presence of the United Nations forces in Korea was against the interest and self-preservation of China. But the United Nations declared the intervention of China as illegal intervention.[66]

(4) *Russian intervention in Hungary,* 1956.**—In 1956, there took place a Civil War in Hungary. Russia sent its forces in Hungary and, suppressed the revolt there. Imri Negi, the then Prime Minister of Hungary, requested the United Nations to intervene. Before the United Nations could take action, Imri Negi was removed from the Post of Prime Ministership. Russia claimed that she intervened in Hungary on the request of the Hungarian Government. But the United Nations established an Enquiry Committee which reported that Russian intervention in Hungary was not justified. The Civil War in Hungary started in October 1956. The people of Hungary wanted complete independence and with this objective in view they wanted to get rid of Russian influence and control. Imri Negi was the favourite leader of the people and they wanted to make him the Prime Minister. Martial law was declared in Hungary but even this failed to establish peace. Ultimately Imri Negi was made the Prime Minister. Respecting the wishes of the people he announced his decision to do the following : (a) To give representation to all the political parties in the Government ; (b) To have relations with Soviet Union on the basis of equality and to end Russian control in Hungary ; (c) To ensure withdrawal of Russian armed forces from Hungary ; and (d) To hold elections from the Legislative Assembly of Hungary. But in the meantime Janos Kadar established a parallel government at a distance of 50 miles from Budapest and asked Soviet Union to intervene in Hungary. On the other hand, Negi reacted by ending the Warsaw Pact. But Soviet Union contended that Warsaw Pact can be terminated with the consent of all parties to the treaty. At the request of Kadar, Russian armed forces entered Hungary. The wishes and aspirations of the Hungarian people were ruthlessly crushed by force. Negi took asylum in Yugoslavian embassy and later on he was expelled and sent to Rumania. The Soviet Union argues that she intervened under the provisions of the Warsaw Pact and at the request of Hungary. At the instance of the Communist Party, people's movement was crushed by force. Such an intervention is not permissible under the U.N. Charter.

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[64] The Caroline Case, Moore's Diggest of International Law, Vol. II, p. 412.

* See also for I.A.S. (1957), Q. No. 6(c).

[65] I.C.J. Reports (1949), p. 5.

[66] See also Chapter on "Security Council" for a little detailed discussion.

** See also for I.A.S. (1957), Q. No. 5 : To elaborate it connect it with principle of non-intervention discussed earlier.

(5) *Intervention by U.K., France and Israel in Egypt* (1956)*.—In 1956, Egypt nationalised Suez Canal on the ground of obtaining money to build Aswan Dam. France, Britain and Israel reacted strongly against this action of Egypt and jointly made armed intervention in Egypt in order to prevent Egypt from nationalising the Suez Canal. This was a flagrant violation of provisions contained in Articles 2(4) and 51 of the U.N. Charter. The problem was resolved through the efforts of Soviet Union, Security Council and General Assembly. Subsequently it was agreed that Egypt was entitled to realise taxes for the use of canal but the canal would remain free from international politics and would remain open for shipping, to all States.

(6) *The case of Goa.***—After the exit of Britishers from India, Goa could not become a part of the Indian Republic because the Portuguese continued their occupation over Goa. India was committed to free Goa which was an integral part of India historically, geographically and on other grounds. In between 1947 and 1961, the people of Goa several times revolted against the established government but the rulers of Goa ruthlessly suppressed their revolt. In 1955 unarmed satyagrahis were fired at. Consequently India recalled its Consul and ordered the closure of the offices of the Portuguese Consul in Bombay and Madras. In 1961, certain incidents took place because of which it became necessary for India to take some action. In 1961 the Portuguese soldiers fired at Indian ships. Besides this, the fishing vessels were also fired at. The Portuguese aircrafts also crossed Indian borders several times. The Indian Government protested against this and communicated warning for the same but with no response. Consequently, it became necessary and expedient for India to take some action. On December 17, 1961 Indian forces entered Goa, and within a short time liberated Goa, Daman and Diu. This action of India was severely criticized by Western Countries. The then Prime Minister of India, Sri Nehru propounded a doctrine similar to that of Monroe doctrine in 1955. In this declaration Prime Minister Nehru made it clear that India would not tolerate the Portuguese presence on her land. After the exit of Britishers, the Portuguese should also have left India, but they continued their occupation over the land. Consequently, India had to take the said action to end the occupation of Portugal over Indian land.

It may be noted here that in the last 25 years, the States of Africa, Asia and other States have started wars of liberation. They have contended that on this ground intervention in the internal affairs of a State may be permitted.[67] It would not be wrong to say that the United Nation's Charter can be enforced in civil wars of a State.[68] In the view A. Rigo Sureda,[69] Portugal lost legal title to Goa when it was declared a non-self governing territory within the meaning of Article 73 of the UN. Charter. According to the principle of self-determination, as expounded by the General Assembly in its *Declaration of Principles of International Law concerning Friendly Relation and Co-operation among States in accordance with the Charter of the United Nations* : Every State has the duty to refrain from any forcible action which deprives peoples of ....their right to self-determination and freedom and independence. In their action against, and resistence to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.[70] The General Assembly further declared that "Principles of the Charter which are embodied in this Declaration constitute basic principles of the International law" and appealed to all States, including the non-members, "to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles." "All these declarations are not ordinary international treaties or conventions and were not subject to ratification. Nevertheless, there is a wide consensus that these declarations actually established new rules of international law binding upon all States. This is not treaty-making but a new method of creating customary international law.[71]

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* See also for P.C.S. (1967), Q. No. 5(b).

** See also for C.S.E. (1983) Q. 7(b) (i).

[67] See R.P. Dhokalia, Supra note 43 at p. 236.

[68] Ibid, at p. 250.

[69] A. Rigo Sureda, The Evolution of the Right of Self-Determination (A.W. Sijhoff, Leiden, 1973), p. 353.

[70] General Assembly Resolution 2625 (xxv) of 24th October, 1970 : General Assembly Official Records, Twenty-fifth Session, Suppl. No. 28 (1971) at p. 124.

The Goans were fighting for their liberation and were entitled to seek Indian help for their liberation and self determination. India assisted the Goans in their efforts to achieve this objective. Thus although it is very difficult to find a precedent to justify India's action in Goa, yet it can be justified on the support of U.N. resolutions. A General Assembly resolution is generally of recommendatory nature and lack binding force. But a resolution interpreting the provisions of the U.N. Charter or expounding general or customary international law, creates legal implications and may assume binding force. In the light of the above discussion, it would not be wrong to contend that India's action in Goa can be justified on the ground that it was to give support to Goans asserting their right to self-determination which has become a binding principle of international law for *"Peoples under alien subjection."* [72] It has been argued by some authors[73] that under special circumstances, the principle of self-determination may be applied even to a non-colonial setting. But this is very controversial. It is, however, now generally agreed that the principle of self-determination has become binding principle of international law in the context of colonialism.

It may, be noted that justification or otherwise of Indian action in Goa has now only an academic interest because on 31st December, 1974, a treaty between India and Portugal was signed wherein Portugal has recognised the full sovereignty of India over Goa, Daman and Diu, Dadra and Nagar Haveli.

(7) *American intervention in Cuba.**—In 1962, America enforced blockade against Cuba and justified its action on the ground of self-preservation. America referred in this connection, Article 3 of the Treaty of Havana. America claimed that the nuclear weapons which were going to be supplied by Russia, would have jeopardised the security of America. The jurists are, however, of the view that the Cuban blockade enforced by America was not justified on the ground of individual and collective self-defence. "It is difficult to find out that the Soviet Union violated any obligation of international law in shipping misiles to, and installing them in Cuba, at the request of the Castro Government." [74] Further, "The quarantine itself was a preventive measure to be enforced with conventional weapons, prior to an armed attack by Cuba or the Soviet Union upon the United States, or any other American country and without authority of the United Nations or the consent of all the States which might be injured by its application. It could not, therefore, be justified under the terms of Article 2, paragraph 4, of the Charter and the recognized exceptions, such as that in Article 51 to this general prohibition against the threat or use of force in international relation." [75]

(8) *Vietnam.*—In Vietnam also, America had tried to justify its action on the ground of individual and collective self-defence. But the majority of the jurists have expressed the view that American action is not covered under Article 51 of the Charter, which

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[71] Louis B. John, "The Development of the Charter of the United Nations : the Present State" : in the Present State of International Law and other Essays, Edited by Prof. Marten Bos. (1973), p. 33 at p. 52.

[72] Rupert Emerson, "Self-determination", Revisited in the Era of Decolonization", Occasional Papers in International Affairs, No. 8 (Dec. 1964). Harvard University Centre for International Affairs, Cambridge, Mass, 1964, p. 64.

[73] Ved P. Nanda, "Self-determination in International Law : The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)", AJIL, Vol. 66 (1972), p. 321 at p. 336, see also for a little detailed study of the Principle of self-determination ; S.K. Kapoor, "The Principle of Self-determination Under International Law and the Indian Practice" Lawyer, Vol. VIII—(11 November, 1976), p. 167. See also Suprata Chowdhury, "Portuguese Territories in India—Some Aspects of International Law", A.I.R. 1957 Journal Section, pp. 23-31.

* See also for P.C.S. (1967), Q. No. 5(c).

[74] Quincy Wright, "The Cuban Quarantine," AJIL, Vol. 57 (1963), p. 546.

[75] See also Covey Oliver, "International Law and Quarantine in Cuba," AJIL (1963), p. 588. Brunson Machsney, "Some Comments on the 'Quarantine' of Cuba", Ibid., p. 592; Myres S. MacDougal, "The Soviet-Cuban Quarantine and Self-Defence", Ibid, p. 597; "Intervention and Cuba in 1961", Proc. ASIL (April 27-29, 1961) p. 2 ; For Contra see also Leonard C. Meeker, "Defensive Quarantine and the Law", AJIL, Vol. 57 (1963), p. 515.

provides the right of individual and collective self-defence. Prof. Quincy Wright[76] and William Standard[77] have repudiated the claim of America that its action was justified on the ground of collective self-defence. As rightly pointed out by the Lawyers Committee on American Policy Towards Vietnam, the U.S. intervention in Vietnam was illegal".[78] The Committee based its decision on the following points : (i) The Unilateral military intervention of the United States violates the Charter of the U.N. The Charter's exceptional authorisation of individual and collective self-defence "if an armed attack occurs against a Member of the United Nations" cannot apply in the case of Vietnam. (ii) The military presence of the U.S. in Vietnam violated the Geneva Accords of 1954. (iii) The U.S. was not committed by the SEATO Treaty or otherwise to intervene in Vietnam. (iv) The intensity and destructiveness of U.S. Warfare in Vietnam was contrary to international law.

(9) *American Intervention in Cambodia.*—America had tried to justify its intervention in Cambodia on the ground of collective self-defence. Jurists have refuted the American claim. American Intervention in Cambodia is not justified on the ground of collective self-preservation.[79] The U.S. action does not satisfy even the traditional law requirements for military intervention, because "the preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment for deliberation, (*The Caroline case,* Moore's Digest of International Law, II, 412)."[80] Further, "the only legal remedy available to the U.S. was to take the issue to the U.N. Cambodia like the U.S. is an independent Sovereign member of the U.N. and a recourse to the U.N. would have been the appropriate action for the U.S. Instead, President Nixon took the law into his own hands on the mistaken hope that in politics the end justifies the means and that he would be rejected by the American electorate and condemned by history, only if his gamble failed. Legal considerations do not appear to have weighed with him".[81]

(10) *The Afghan Issue—Soviet Afghan Treaty of Friendship.*—The contention of the then Soviet Union was that it sent Soviet troops to Afghanistan at the request of Afghan Government and that it was in conformity with the Soviet-Afghan Treaty of Friendship, Good-neighbourliness and co-operation and Article 51 of the United Nations Charter. Under Article 4 of the Treaty, Soviet Union had pledged to come to the rescue of Afghanistan if it was involved in armed conflict. This Treaty, it may be submitted is in conformity with Article 52, para 1 of the Charter. The essential condition under which Article 51 can be validly invoked is that "an armed attack occurs". Though ordinary border conflicts do not constitute "armed attacks", these words also do not necessarily connote a full-fledged war. Arms and weapons were being supplied to the dissidents in Afghanistan to strengthen the anti-Soviet elements so as to engineer the overthrow of the new Afghan regime headed by Babrak Karmal. In this context, President Babrak Karmal was fully entitled and competent to seek Soviet assistance and the Soviet Union was justified in responding to the request. As regards the contention that Soviet Union sent troops at the request of Kabul, this statement has been corroborated by the new Afghan regime at the U.N. and elsewhere several times. Even if the words 'armed attack' are given very narrow and strict interpretation and it is conceded that Article 51 could not be validly involved,

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[76] "Legal Aspects of the Vietnam Situation", AJIL (1966), pp. 750-69; see also J.N. Moore, "The Lawfulness of Military Assistance to the Republic of Vietnam" AJIL (1967), pp. 1-34.

[77] "U.S. Intervention in Vietnam is not Legal", AJIL (1966) pp. 633-34, see also R.P. Dhokalia, "Civil War and International Law", IJIL, (1971), p. 219 at pp. 241-42.

[78] The New York Times (January 15, 1967), p. E 9 appearing in Edward Collins' International Law in a Changing World (1969), pp. 378-84.

[79] B.S.N. Murty, "The U.S. intervention in Cambodia", IJIL (1970) p. 196 at p. 198.

[80] Ibid, pp. 197-198.

[81] Ibid. at p. 202 ; For detailed study see also Richard A. Falk, "The Cambodian Operation and International Law", AJIL (1971), p. 1 ; William Rogers, "The Constitutionality of Cambodian Incursion", AJIL (1971) p. 26 ; John Norton Moore, "Legal Dimensions of the Decision to Intercede in Cambodia", AJIL (1971), p. 38.

sending of troops by Soviet Union under Soviet-Afghan treaty at the request of Kabul does not constitute violation of International Law including the Charter of the U.N. so long as Soviet troops remain in Afghanistan and do not attack any other Sovereign State. It may be noted here that on 15 October, 1986, the Soviet Union started pulling out some of its troops stationed in Afghanistan. Earlier the Soviet leader, Mikhail Gorbachov declared on 28 July, 1986 that six Soviet regiments would be withdrawn from Afghanistan before the end of this year. Subsequently, all Soviet troops were withdrawn from the Afghanistan.

(11) *Argentine Intervention in Falkland Islands.**—Falkland islands were discovered by Spanish navigators in the 16th century. Nearly 150 years later, a British navigator, John Strong passed through the islands, and without occupying them, named "Falkland" after Viscount Falkland who was the treasurer to the British navy in those days. Thus Falkland Islands first belonged to Spain followed by France. They became British in 1765, Spanish in 1770 and Argentine from 1822 to 1833. On 2nd January, 1833, at Port Soleded, British captain John James Orslow, in command of the Corvette "Clio" took the Islands by force, expelling the Argentine population and authorities residing in them.[82] Since at that time in war much less use of force, was not prohibited, under international law, annexation of territory by force could not be termed as illegal. War was then considered as an attribute of sovereignty. The position has altogether changed after the adoption of the Charter of the United Nations. The Charter prohibits not only, war but also 'use of force' for the settlement of international disputes.

On 2 April, 1982, the military government of Argentina declared that the country's armed forces had 'recovered' Malvinas (Falkland), South Georgia and South Sandwick Island through a successful military operation. On 3, April, 1982 Britain ordered a large naval task force to the Falklands and froze Argentine assets in retaliation of military invasion. On April 4, 1982, the Security Council passed a resolution calling for immediate withdrawal of Argentine troops from Falkland Islands. On 30 April, 1982, Argentine accepted, rather was forced to accept due to British action, the Security Council resolution to withdraw its forces from Falkland Islands.

Argentina's action was clearly violative of Article 2(4) and Article 2(3) of the U.N. Charter. It amounted to aggression and therefore, Britain was justified to exercise her right of self-defence under Article 51 of the Charter. The Argentine action cannot be justified even on the ground of the principle of self-determination.[83] Unlike, India's action in Goa, inhabitants of the Falkland Islands had opted to remain in and with Great Britain, they even resisted the capture of the Islands by Argentina. But as a colonial situation, British action deserves condemnation. Sooner it quits the Islands the better.

(12) *American Intervention in Grenada.*—On 25 October, 1983, America and 6 Caribbean countries (Antigua, Barbados, Dominica, Jamaica, St. Jucia and St. Vincent) attacked Grenada. The U.S. claimed that its troops had participated in the joint action to protect U.S. citizens and evacuate those who wished to leave and to provide support for the Eastern Caribbean forces in helping the people of Grenada and restore order in that country.

America is guilty of making unilateral armed intervention in Grenada.[84] It is a flagrant violation of International Law including the Charter of the U.N. America has sought to justify its action in Grenada on the following three grounds—(1) Safety of innocent people including 1,000 Americans ; (2) To arrest or check increasing disorder in Grenada, and (3) To establish law and order in governmental institutions in Grenada. The first ground is totally unjustified because in accordance with international law including the charter of the U.N., no State is entitled to intervene in the affairs of another State except on the ground of self-defence. As regards the ground of self-defence, a member State of the U.N. can intervene in the affairs of another State if an armed attack on it has taken place. Moreover, other conditions mentioned in Article 51 of the charter must be fulfilled. It may be added here that leaving apart the legal position even on facts American action cannot be justified. Out of 1000 Americans in Grenada, 800 are the students of a Medical College. The Chancellor of the said Medical College made it clear that there was no danger to the security of American students. Therefore, legally or otherwise, American claim is untenable.

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* See also for C.S.E. (1988) Q. 8(b).

[82] For more details see Madan Lal, "The Falkland Crisis : A Preliminary Assessment" Foreign Affairs Reports, Vol. XXXI No. 6 (June, 1982) pp. 99-113.

[83] See also Thomas Frank, "Dulce et Decorum Est The Struggle of Legal Principles in Falklands War," AJIL, Vol. 77 (1983) p. 109.

[84] See also Christopher C. Joyner, "The U.S. Action in Grenada Reflections on the Lawfulness of Invasion", AJIL, Vol. 78 (1984) p. 141 at p. 144 ; "International Lawlessness in Grenada", AJIL Vol. 78 (1984) p. 174.

The second ground is also untenable. The disorder, if any, in Grenada is internal and domestic affairs of Grenada and no other State is entitled to intervene in Grenada on this ground.

The third ground is also untenable and unjustified. On the basis of facts also American claim is wrong because the military coup had not led to an increase of disorder in Grenada. Even if there was some increase in the disorder, the conditions were rapidly returning to normalcy.

It may, therefore, be concluded that American intervention in Grenada cannot be justified on any ground whatsoever. It is clear and flagrant violation of the rules of International Law including the Charter of the U.N. and deserves to be condemned by all the member-States of the U.N. and other States.

(13) *U.S. Intervention in Nicaragua**.—On 9 April 1984, Nicaragua filed a case against the United States of America in the International Court of Justice at Hague charging the U.S. with waging of "covert" war to topple the Government in Managua (Nicaragua). Nicaragua told the world court that (i) more than 6,000 counter-revolutionaries raided Nicaragua in last month, (ii) they mined the three main sea ports damaging ships besides threatening to cut off Nicaragua economically from the rest of the world, and (iii) the Reagan Administration was seeking $21 million in funding to support contra activities. President Reagan of the U.S. expressed the view that Nicaragua's Sandinista government must be overthrown if it continued to refuse to share power. He further said that unless the Nicaraguan government sought democracy the only alternative for the rebels would be "to have their way and take over."

In *case concerning Military and Para Military Activities in and against Nicaragua (Nicaragua* v. *U.S.)*[85] International Court of Justice indicated interim measures on 10 May, 1984 holding unanimously that the U.S. should immediately cease and refrain from any action restricting blocking or endangering access to or from Nicaragua ports, and in particular the laying of mines. The world Court further held that the right to sovereignty and to political independence possessed by Nicaragua, like any other State of the region or of the world should be fully respected and should not in any way jeopardized by any military and para-military activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any States and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the U.N. Charter and the charter of the organization of American States.

The world Court gave its final verdict on 27 June, 1986. The Court held : "......the arming and training of the contras is a violation of the prohibition of the force (as laid down in the U.N. charter) ......The financing of the contras undoubtedly constitutes intervention in Nicaraguan Sovereignty by the U.S.A." The U.S. government announced its decision to ignore the verdict of the court. The U.S. charged that the objectives of the court were being subverted by Nicaraguan's effort to use the court as a political weapon. Thus there was no justification whatsoever for the U.S. to intervene in the affairs of Nicaragua. American intervention in Nicaragua was a flagrant violation of the basic provisions of the U.N. charter. The U.S. assumed upon itself the role of international policeman in central America. This is prohibited by the charter of the U.N. and deserves to be universally condemned. The main reason given by the U.S. to give aid to Nicaraguan rebels was to overthrow dictatorship or oppressive government or to restore democracy. International Law does not permit intervention on this ground.

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* See also for C.S.E. (1996) Q. 8(c).

[85] I.C.J. Rep. (1984) p. 169.

(14) *U.S. Attack on Libya (1986).*—On 15 April, 1986 American aircrafts attacked two cities of Libya—Tripoli and Bengazi. According to the American government, the said air attack was a reprisal against terrorist activities against American nationals and was launched to discourage Libya from engaging in such terrorist activities. It was the immediate reaction of Berlin explosion wherein one American and one Turkish had dead. Holding Libya responsible for the explosion, President Ronald Reagan of the U.S. declared that such attacks would be repeated if Libya did not cease terrorist activities against the Americans.

The main target of the attack was the residence of Col. Gaddaffi. Though Col. Gaddaffi himself escaped, his 15 months adopted daughter died and his two sons were injured. The matter was raised in the Security Council and an endeavour was made to condemn American action through a resolution but it was defeated by triple veto exercised by the U.S., U.K., and France. However, the General Assembly of the U.N. on 21 November, 1986 passed a resolution condemning the U.S. military attack against Libya. The resolution affirmed the right of Libya to receive appropriate compensation for the material and human loss inflicted upon it. The U.S. attack was rightly described as violation of international law including the charter of the U.N. Besides being violative of Article 2(4) of the U.N. charter American action was also not justified on the ground of reprisal. There was no reasonable proportion between American air attack and the alleged terrorist acts of Libya. As regards triple veto exercised by the U.S., U.K., and France, though it cannot be termed as a violation of the U.N. charter, it is definitely an abuse of the power conferred on the permanent members of the Security Council.

(15) *Dropping of supplies by Indian Aircrafts in Sri Lanka, despite opposition of Sri Lanka.*—The dropping of supplies in Jaffna (Sri Lanka) by Indian aircrafts on humanitarian grounds amounted to intervention in the internal affairs of Sri Lanka and cannot be justified on any ground whatsoever under international law. As held by the International Court of Justice in *Case Concerning Military and Para-Military Activities in and against Nicaragua (Nicaragua* v. *U.S.)* [Judgment dated 27 June, 1986] in the absence of the request of a sovereign State concerned, entry of aircrafts in the air space of that State amounts to intervention. Since Indian action was not on the request of Sri Lanka, rather it was opposed by Sri Lanka, it was clearly violative of Article 2(4) of the United Nations charter. It may, however, be noted that the matter of dropping of supplies by Indian aircrafts has now only academic interest because of the Indo—Sri Lanka Accord of 29 July, 1987 and subsequent events.

(16) *Questions of the withdrawal of Indian Peace Keeping Forces (I.P.K.F.) from Sri Lanka.*—Para 6 of the Indo-Sri Lanka Agreement of July 29, 1987 provided the following :

> The Prime Minister of India and President of Sri Lanka also agree that in the terms of paragraph 2.14 and paragraph 2.16(c) of the agreement, an Indian peace-keeping contingent may be invited by the President of Sri Lanka to guarantee and enforce the cessation of hostilities, if so required."

I.P.K.F. were sent on the request of the President of Sri Lanka and hence when the latter requested for their withdrawal, they ought to have been withdrawn forthwith. When President Premdasa asked India to withdraw I.P.K.F. by the end of July 1989, India instead of withdrawing the I.P.K.F. as desired connected the withdrawal of I.P.K.F. with the devolution of powers in the north-east provinces. India, however proposed to withdraw I.P.K.F. by 31 December, 1989. The I.P.K.F. were not withdrawn even by 31 December, 1989.

It was wrong and unjustified on the part of India to connect the withdrawal of I.P.K.F. with devolution of powers in north-east provinces. As pointed out by Sri V.R. Krishna Iyer, retired Judge of the Supreme Court, "our army went in only on condition that it would be there only .... on invitation by the President and agreeing to leave on request by him......... To turn an invited army into a defiant foreign force, refusing to quit when demanded is blatant breach." [86] Further, "Even an infant in international law will call this negative aggression......... negative aggression is where a foreign force, once in by invitation for a limited purpose, exceeds that purpose or refuses to return on revocation of the invitation." [87] Thus continued presence of I.P.K.F. after the request of Sri Lanka was clearly violative of international law.

During the Prime Ministership of Mr V.P. Singh India adopted a reasonable attitude and agreed to withdraw I.P.K.F. by 31 March, 1990. In pursuance of the said agreement, India withdrew I.P.K.F. even earlier than the said date *i.e.* by 24 March, 1990.

(17) *American Intervention in Panama.*—American intervention in Panama has rightly been termed as brutal and wholly unwarranted interference in the affairs of a small country. General Manuel Noriega was the Panama's top military officer and effective ruler since 1983. In February he formally seized power of the ruler. Elections were held in 1989 but when it became clear that the opposition was gaining a decisive victory and that Mr Guillermo Endara had won the Presidential election, Gen. Noriega annulled elections. Besides doing his best to destroy democratic norms in Panama, he deserved universal condemnation for his connection with drug business. He was accused of accepting millions of dollars in bribes from the Colombian Madelin drug cartel to protect shipments of cocaine.

The immediate cause or excuse for U.S. intervention arose when an unarmed U.S. officer was shot and killed in confrontation, another was injured and third was manhandled and his wife was abused. On the midnight of 19 December 1989, U.S. forces invaded Panama and removed Gen. Noriega from power. President Bush of the U.S. had ordered U.S. military forces into Panama city in order to "protect American lives, restore the democratic process, preserve the integrity of the Panama canal treaties" and apprehend General Manuel Antonio Noriega who was under indictment in U.S. on drug trafficking charged. The U.S. claimed to have removed a 'dictator' and restored 'democracy'.

After seeking political asylum in Papal Nuncio in Panama for some time, Gen. Noriega ultimately surrendered to the U.S. troops on 4 January, 1990. Noriega was immediately taken to the U.S. for his trial. None of the grounds advanced by the U.S. justify U.S. invasion of Panama. Since the U.S. not at all the victim of an "armed attack" U.S. intervention on the ground of self-defence was not at all justified and it was clearly violative of Article 51 of the U.N. charter.

Yet another ground advanced by the U.S. to justify its action in Panama was to remove a dictator and to restore democracy. Intervention on this ground is not at all permissible under the charter of the U.N. The U.S. intervention was clearly violative of Article 2(4) of the charter. In *Case concerning Military and Para-Military Activities in and against Nicaragua*[88], the International Court of Justice held that "no general right of intervention in support of an opposition within another state exists in contemporary international law."[89] Further, "under international law in force today whether customary international law or that of the United Nations system, states do not have a right of collective armed response to acts which do not constitute an 'armed attack'." [90] Thus America's intervention on the ground of restoring democracy in Panama cannot at all be justified.

Yet another ground taken by America as justification of its action in Panama was to apprehend Gen. Noriega and try him in America on the charge of drug trafficking. But even this was violating of Article 2(4) and Article 51 of the charter. The U.N. is based on sovereign equality of all its members. Even the drug menace cannot dilute that principle.

(18) *Iraqi invasion and annexation of Kuwait* .—On 2nd August, 1990, Iraq invaded Kuwait. Subsequently Iraq annexed Kuwait and declared it to be 19th province of Iraq. An

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[86] V.R. Krishna Iyer, "Aggression in a Huff of Hagemoney", Indian Express, 27 July 1989.

[87] V.R. Krishna Iyer, "Peace Even at the Cost of Prestige", Indian Express, 28 July 1989.

[88] I.C.J. Rep. (1986) p. 14.

[89] Para 209 of the Judgment.

[90] Ibid., para 211.

* See also for C.S.E. (1996) Q. 6(a).

emergency session of the Security Council was immediately called on 2nd August, 1990. The Security Council passed a resolution condemning Iraqi action and asking Iraq to withdraw its forces unconditionally from Kuwait. On 6th August, 1990, the Security Council passed another resolution declaring commercial, financial and military blockade against Iraq. On 9th August, 1990, the Security Council passed yet another resolution declarating 'Null and void' Iraq's annexation of Kuwait and declaration of Kuwait as 19th province of Iraq and asking all other States not to recognize Iraq's annexation of Kuwait. Subsequently Security Council passed a number of other resolutions in this connection but none of the above resolutions had any effect on Iraq.

Consequently, the Security Council took action under Chapter VII of the Charter of the U.N. On 29th November, 1990, the Security Council passed its twelfth resolution (Resolution 678) which allowed the States cooperating with Kuwait Government to use *"all necessary means"* to remove Iraqi forces from Kuwait. It may be noted that resolution 678 had also provided that in case Iraq did not implement Resolution 660 and other resolutions by 15th January, 1991, the States cooperating with the Kuwait Government could use *"all necessary means"* to implement resolution 660 and to maintain international peace and security. But even this resolution did not have the desired effect on Iraq.

Gulf war (1991) started on 17th January, 1991. America and its allied forces crippled Iraqi power and forced Iraq to withdraw its forces from Kuwait. On 26th January, 1991, Iraq announced that it was withdrawing its forces from Kuwait. Later on, the Security Council established a committee which would hear claims of States, individuals and corporations who suffered damage during war and to award compensation to them.

Iraq was clearly and without any shade of doubt guilty of aggression against Kuwait, and for that matter against the whole international community. Iraq's invasion and annexation of Kuwait was a flagrant violation of Articles 2(3) and 2(4) of the U.N. Charter. The Security Council, therefore, rightly took action under Chapter VII of the Charter. This is the most successful collective action taken by the Security Council under Chapter VII of the Charter.

(19) *Kurd's Problem and the Legality of the Action taken by America and the U.N.*— After being badly defeated by America and its allies during the Gulf War (1991), Iraq was confronted with many serious problems. One of such serious problems was insurgency of Kurd's people who utilized this opportunity for starting struggle for self-determination and independence from Iraq. Though the armies of President Saddam Hussain of Iraq were badly defeated by America and its allied armies, soldiers loyal to him, ruthlessly crushed the Kurd's revolt. Due to the atrocities caused by the armies of President Saddam Hussain of Iraq, lakhs of Kurds fled crossing the borders of Turkey and Iran. About 15 lakhs Kurds became refugees in their own country as well as in the neighbouring countries. On 4th March 1991, America warned President Saddam Hussain to stop the use of helicopters against the Kurds. On 5th March, 1991, the United Nations Security Council passed a resolution asking Iraq to stop repression of its civilians and to allow international humanitarian agencies to visit Iraq without any obstruction. The resolution condemned Iraqi repression of its civilian population and added that it posed a threat to international peace and security as large number of refugees were fleeing across Iraqi borders.

On 11th April, 1991, America once again warned Iraq not to fly its helicopters and aircrafts on its borders with Turkey. On 12th April, 1991, America announced that it would implement a four-point "operation provide comfort". In the first phase of the operation medicines and materials for shelter were to be air-dropped. In the second phase, America was to construct refugee camps in Iraqi areas, and these camps would later on be entrusted to international agencies. In the third phase, America would ensure that continuous supplies reached the refugees through aircrafts, trucks and helicopters. In the fourth and the last phase, America would entrust the refugee camps to international agencies such as the United Nations and International Red Cross. On 28th April, 1991, U.N. Secretary-General announced that he would ensure that the U.N. took the responsibility of refugee camps from America. There were reports that America and its allied States were constructing a big airport in Iraqi area for rendering assistance to the Kurds.

Legal Aspects.—Iraqi repression against Kurds is a flagrant violation of human rights and deserves universal condemnation. As regards the question of the right of self-determination, it is not a binding principle of international law under ordinary circumstances. The principle of self-determination has become a binding principle of international law only in the context of colonialism. The problem of Kurd's people in Iraq is not a colonial situation. Iraq is an established state and is not bound to give to its own people the rights of self-determination.

The next legal question that arises is whether the U.N. or for that matter any state has the right to intervene in the internal matters of Iraq. International Law prohibits intervention. The charter of the U.N. propounds the principle of non-intervention by states under Article 2(4) and by the U.N. under Article 2(7).

Article 2(4) provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations. Thus even 'use of force' has been prohibited. Individual and collective self-defence is however an exception to this rule. But this is a very limited right and can be exercised under the conditions mentioned in Article 51 of the charter of the U.N. One of the conditions mentioned in Article 51 is "if an armed attack occurs against a member of the United Nations". There is no such thing in respect of Kurds people in Iraq. Hence establishment of refugee camps within the Iraqi area, to provide them armed security, to warn Iraq not to cause repression of Kurd's people and to remove its armies from Southern Iraq, to construct airports in Iraq, to render assistance to Kurds people etc. are flagrant violation of territorial integrity or political independence of Iraq. According to America, it has constructed refugee camps within Iraqi area and rendered assistance on humanitarian grounds. But the charter of the U.N. does not permit any member state of the U.N. to intervene in internal affairs of any other member state on humanitarian grounds. Thus American action is clearly violative of the rules of international law.

Even the U.N. cannot intervene in the internal matters of any member state. Article 2(7) of the U.N. charter provides that nothing contained in the present charter shall authorise the U.N to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the member to submit such matters to settlement under the present charter ; *tnis principle shall not prejudice the application of enforcement measures under Chapter VII.* The words in italics herein show that Article 2(7) provides an exception to the principle of non-intervention by the U.N. in the domestic jurisdiction of any member state. Thus when the U.N. Security Council takes enforcement action under Chapter VII, the principle of non-intervention by the U.N. does not apply.

For taking action under Chapter VII of the Charter, the Security Council has first to determine under Article 39 that the violation of human rights has reached such a stage that it poses a threat to international peace and security. In other words, action under Chapter VII cannot be taken merely on the ground of violation of human rights. Action can be taken on the ground of international peace and security. The resolution passed by the Security Council on 5 April 1991 expressly mentioned that the "repression" of Kurds in Iraq posed a threat to international peace and security. Thus, Security Council's action in taking charge of refugee camps of Kurds in Iraq to render them assistance and to direct Iraq not to cause atrocities upon Kurds people is valid and legal.

(20) *Crisis in Somalia* [91]:

The situation in Somalia was unique and unprecedented. Somalian crisis was due to Civil war since 1991. Gen. Aidid never accepted Ali Mahdi Mohamed as interim President. Apart from these two groups, there are many other armed factions who are engaged in looting and robbery. Due to continuous violence and civil war the social and economic condition is in shambles. In short, violence, civil war, famine and drought are the main problems of Somalia. Armed factions of Somalia have been obstructing the deliveries of humanitarian aid to Somalia people who are dying in large numbers due to starvation and diseases.

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[91] For facts in detail see Dr. S.K. Kapoor, International Law, Tenth Edition, pp. 904-909.

As noted above, on 20th January, 1992, Interim government of Somalia requested the Security Council of the United Nations to consider on the worsening humanitarian crisis in Somalia. The attention of the Security Council was also drawn towards the worsening civil war situation in Somalia. On 23rd January, 1992, Somalia asked all States to refrain from supply of arms and military equipment to Somalia. On 24th April, 1992, the Security Council established UNOSOM to supervise cease-fire in Somalia. On 3rd December, 1992, the Council allowed the use of "all necessary means" to secure the delivery of humanitarian aid to starving people of Somalia. By resolution 794 (1992), the Council acted under Chapter VII of the U.N. Charter which provides for action including the use of force with respect to threats to peace and acts of aggression. This was probably in response to American offer for deployment of American troops to ensure a secure environment for humanitarian relief operations in Somalia. On 26th March, 1993, the Council decided to transfer the task of securing humanitarian aid deliveries from a U.S. led international force to a U.N. Peace-keeping operation *i.e.* expanded U.N. Operation in Somalia called UNOSOM II. It was made clear that like UNITAF forces, UNOSOM II will operate under the provisions of Chapter VII, a mandate not initially given to UNOSOM.

Article 2(7) of the Charter of the U.N. provides : Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter, *but this principle shall not prejudice the application of enforcement measures under Chapter VII.*

It is clear from the above that when the Security Council takes action under Chapter VII of the Charter, the principle of non-intervention by the U.N. in the matter of the member States which are essentially within the domestic jurisdiction, does not apply. As regards Somalia, the interim government of Somalia requested the Council to consider worsening humanitarian problem and civil war. Thus first U.N. took action at the request of Somalia. The Council determined that humanitarian problem and civil war of Somalia posed a threat to international peace and security. When the Council found that action not involving use of force proved to be inadequate, the Council allowed the use of "all necessary means" (as it did earlier in case of Gulf War, 1991) to establish a secure environment for humanitarian relief. Thus United Nations, action in Somalia is fully justified under international law.

Ordinarily, even the U.N. cannot intervene on the ground of a violation of human rights or civil war in a member State. But if the Security Council determines that violation of human rights or civil war reaches such magnitude that it poses a threat to international peace and security, Security Council becomes entitled to take action under Chapter VII of the Charter by virtue of exception provided in Article 2(7) of the Charter. This is what the Council actually did in case of Somalia.

Some persons have criticized U.N. action in Somalia. They contend that in Somalia U.N. seems to be groping in the dark and has lost its way. There seems to be some force in this criticism. It was essential to prevent the wave of violence in Somalia and to achieve this the U.N. took upon itself the task of disarming the warlords of Somalia so as to ensure the secure environment for humanitarian deliveries to the starving people of Somalia. However, it must be kept in mind that the objective of the U.N. was to enforce rather than to impose, peace. After the failure of the American troops to disarm warlords of Somalia, especially to capture Gen. Aidid and his followers, this was realized by the U.N. Security Council. Instead of enforcing peace, American action led to outbursts of violence. American action came up for a lot of criticism. That is why, in January 1994, the Security Council gave U.N. Peace-keepers a limited mission after the withdrawal of American troops. It retreated from aggressive and combative peace-keeping operations and returned to a more cautious, neutral role which the U.N. has traditionally played.

In March, 1994 Gen. Aidid and Ali Mahdi signed an agreement at Nairobi. In this agreement they pledged to establish a government on the basis of national reconciliation. They agreed to abide by a cease-fire, to disarm armed groups and to hold a conference on 15th May, 1994 to elect a President, a Vice-President and a Prime Minister. But even this agreement could not be implemented.

The United Nations has accepted that its mission in Somalia has been unsuccessful. On 4th November, 1994, the Security Council unanimously resolved to withdraw its forces from Somalia by 31st March, 1995. Thus the U.N.'s Somalian mission came to an abrupt and unsuccessful end. However, it must be admitted that the failure of U.N. mission to Somalia was due to Somalian leaders and armed groups there. During the two years of its mission, 130 U.N. soldiers were killed and more than 1 billion dollars a year were spent. It cannot but be denied that during its Somalian mission, the U.N. rendered signal service in rendering humanitarian relief to the millions of Somalians.

(21) Russia—Chechnya conflict and Dagestan War

According to Russia, Chechnya an autonomous Republic of North Cancesus and rich in oil and culturally Muslim, had been smuggling its oil productions in world markets and had been becoming a centre for the crime of terrorism. During the Second World War Stalin had accused Chechens of cooperating with Germans. Since then Chechens had been nurturing bitterness and ill-will against the Moscow administration. In 1991 the Chechens under the leadership of former General of Soviet Air Forces Dudayer declared themselves independent. President Boris Yeltsin of Russia tried to prevent the separatist move of Chechens but with no success.

On 11th December, 1994, the Russian forces entered Chechnya and started attacking Chechen rebels. Thereafter, fierce fighting took place. By 21st December, 1994, Russian forces reached Grozny. In the fierce fighting that ensued nearly 1,000 Chechens were killed on 26th December, 1994 Russia announced the establishment of a new government in Chechnya. Though the Chechen rebels were defeated, they were, by no means, disgraced. They fled to mountain and continued guerilla war. Since then Chechens have become an eye-sore for Russians. On 30th July, 1995, an agreement was reached between Russians and Chechens on military issue but the critical problem of the breakaway republic's political futures remained unresolved.

In the second half of the year 1999 the separatist movement assumed serious proportions. In the first week of October, 1999 the separatist Government of Chechnya threatened to declare Martial Law and start a holy war (Jehad). In reply the Russia increased its military activities against Chechnya. To suppress the Chechnya rebels, Russian aircraft bombed Chechnya, especially its Capital Grozny. In a full-fledged war between the rebels and the Russian army large number of military and civilian persons have been killed. The Russian army surrounded the Capital Grozny from all sides. Being compelled the elected President of Chechnya, Asian Mashkhadov appealed for peaceful settlement of the dispute and to hold talks for the same. This appeal was made in the second week of October, 1999. But even this could not end the Chechnya war. The Russian Armed Forces accelerated their actions against the rebel causing heavy casualties. In February, 2000 Russians claimed to have complete control over the situation. They claimed that most parts of Chechnya including Grozny were under their control. But what happened subsequently falsified their claim. In the beginning of the first week of March, 2000 the Chechnya rebels killed twenty Russian soldiers by laying ambush.

Dagestan War

There is yet another fact that shows that Russian problems are not yet over. Similar to Chechnya, the conflict has also started in Caspian province of Dagestan. In Caspian area Dagestan is a small republic of 32 tribes. Most of the people of this province are followers of Islam. The conflict in Dagestan started when in August, 1999 a large number of extremists revolted under the leadership of a Chechnya rebel. Though the Russian armed force have started their action, it seems that like Chechnya war, Dagestan war may also last long.

Legal Aspects.—Chechnya-Russia conflict is clearly an internal matter of Russia. Therefore, the principle of self-determination contained in Article 1 of the U.N. Charter cannot be applied in case of Chechnya. The principle of self determination has become a binding principle of international law in the context of colonialism only. For nearly 130 years Chechnya has been a part of Soviet Union. Taking advantage of the breaking up of Soviet Union Chechnya unilaterally declared independence in 1999, but the Soviet Union never recognized it, will any established state of the world ever recognize such a unilateral declaration of its own people.

After the breaking up of the Soviet Union in 1991, many former Soviet Republics became independent. But they became independent by proper agreement and not through unilateral declarations. Similar developments took place in former Yugoslavia and Czechoslovakia. Infact Chechnya revolted against Russia and declared its independence. Under such circumstances the established State (Russia) is entitled to take proper action.

It may, however, be noted that human rights do not fall within the internal or domestic jurisdiction of any State. But on the ground of violation of human rights no State has the right to intervene in the affairs of another State. If any body can play some role in such a situation, it is the Security Council of the United Nations. It deserves mention that even the Security Council cannot intervene on the sole ground of violation of human rights. The Security Council can intervene only if it first determines that the violation of human rights has reached such a magnitude that it poses a threat to international peace and security. But in case of Chechnya the Security Council cannot take such a decision because Russia being a permanent member of the Security Council will veto any such move.

Reference may also be made to the four 1949 Red Cross Conventions which prohibit the attack on civilians. Russian forces and aircraft have been guilty of violation of these conventions. America and some other countries have expressed concern in this respect. Though such violations deserve condemnation by all, the fact remains that, as in the state field in the international field as well, it is difficult rather impossible to take action against the mighty ones. Though the principle of sovereign equality of states is enshrined in Article 2 of the U.N. Charter, in fact, states especially the mighty ones like Russia are unequal. This inequality also finds mention in the Charter itself because it confines veto on permanent members. Unless and until the international community finds alternative to veto, the world will have to learn to cope and learn to live with it.

Last but not the least, the principle of self determination, which is often invoked to challenge the territorial integrity of sovereign state, does not include a unilateral right to independence, or secession. Nor does the identity of different groups mean a right for members of these groups to dismember the state or destroy the fabric of the multi-cultural society. These conclusions have been drawn by a study prepared by the U.N. Human Rights Commission. Thus Chechnya rebels cannot successfully invoke the principle of self-determination.

(22) Pakistan's Intrusion in Kargil Area of Kashmir.

N.B. : For this please *see* Appendix II.

(23) Attack on America's World Trade Centre (11th September, 2001)

N.B. : For this also please *see* Appendix II.

(24) U.S.—North Korea Issue (2006)

N.B. : For this please *see* Appendix II.

CHAPTER 14

STATE JURISDICTION

Jurisdiction generally describes any authority over a certain area or certain persons. In the law jurisdiction refers to particular area containing a definite legal authority. Jurisdiction also refers to the origin of a Courts authority. Jurisdiction can also be used to define the proper Court in which to bring a particular case. Finally jurisdiction refers to the inherent authority of a Court to hear a case and to declare a judgment.

As pointed out by an author, "State jurisdiction is the power of a State under international law to govern persons and property by its municipal law. It includes both the power to prescribe rules (prescriptive jurisdiction) and the power to enforce them (enforcement jurisdiction). The latter includes both executive and judicial powers of enforcement. Jurisdiction may be concurrent with the jurisdiction of other States or it may be exclusive. It may be civil or criminal. The rules of State jurisdiction identify the persons and the property within the permissible range of a state's law and its procedures for enforcing that law. They are not concerned with the content of a State's law except in so far as it purports to subject a person to it or to prescribe procedures to enforce it." [1] State jurisdiction connotes "essentially the extent of each State's right to regulate conduct on the consequences of events." [2] A State may regulate its jurisdiction by legislation, through its courts or by taking executive or administrative action. State Jurisdiction concerns both international law and internal law of the State. While the former determines the permissible limits of a State's jurisdiction in the various forms it may take, the latter prescribes the extent to which, and manner in which, the State in fact asserts its jurisdiction.[3] Though the relationship between jurisdiction and sovereignty is close, jurisdiction is not co-extensive with State sovereignty.[4] Each State has normally jurisdiction over all persons and things within its territory.

Distinction between exercise of jurisdiction and basis of jurisdiction:*—"In general, every State has exclusive jurisdiction within its own territory, but this jurisdiction is not absolute, because it is subject to certain limitations imposed by international law." [5] Thus in practice it is not always necessary that a State may exercise jurisdiction in its territory; on the other hand, in some circumstances, a State may exercise jurisdiction outside its territory. Moreover, there is a distinction between the exercise and basis of jurisdiction. J.E.S. Fawcett[6] has explained this with the help of the following illustration. An Englishman and a German murder a French man in Paris and thereafter run away to England. So long as they are in France, they can be arrested and tried by French Courts for they have committed the murder in France and the fact that they are foreigners does not make any difference. The very fact of their presence in France gives jurisdiction to the French Courts over them. Neither Germany nor England can interfere in this although they may demand their extradition. When they come to England, the English Courts can try the Englishman but they cannot try the German although the German accused for the time being is within the jurisdiction of the English Courts. This is due to the fact that there is no basis for jurisdiction for English Courts cannot try a foreigner for having committed murder in some foreign State.

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1. D.J. Harris, Cases and Materials on International Law (London, Sweet & Maxwell, 1973) p. 235.
2. Oppenheim's International Law, Vol. I, Ninth Edition, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group UK Limited and Mrs. Tomoko Hudson, 1992, p. 456.
3. Ibid, at pp. 456-457.
4. Ibid, at p. 457.

* See also for P.C.S. (1957, Q. No. 2(a) ; IAS (2006) Q. 6(b).

5. J.L. Brierly, The Law of Nations p.222.
6. J.E.S. Fawcett, The Law of Nations (1968) p. 55.

Almost the same rule is applicable in India. Reference may be made here to a Supreme Court case *Central Bank of India* v. *Ram Narain,*[7] wherein the Supreme Court considered the question whether Penal Code could be applied to a person who was not a citizen of India at the time of committing the offence. The Supreme Court observed : "A foreigner was not liable to be dealt with in British India for an offence committed outside British India under the provisions of the sections as they stood before the adaptations made in them after the partition in India. Illustration (a) to Section 4, I.P.C. delimits the scope of the section. It indicates the extent and ambit of this section. It runs as follows : '(a) *A*, a coolie, who is native Indian subject commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found. In the illustration, if *A* was not a native Indian subject at the time of the commission of the murder the provisions of Section 4, I.P.C. could not apply to the case. The circumstances, that after the commission of the offence a person becomes domiciled in another country, or acquires citizenship of that country cannot confer jurisdiction on courts of that territory retrospective for trying offences committed and completed at a time when that person was neither the national of that country nor was he domiciled there." [8]

Other Illustrations

(i) A French armed public ship flying the flag of France was in the British territorial waters when M, the Cabin boy of the ship, committed the offence of murder by shooting dead D, the captain of ship. Both M and D were British nationals serving at that time as members of the officer crew of the cruiser. Immediately after the incident the offices of a British police petrol launch were obtained and the injured was taken to the nearest British port to render medical help to the captain, if the doctors found that the life was not extinct. Extradition proceedings instituted by the French Government failed. M, who had been kept under arrest during extradition proceeding was released but arrested immediately thereafter for the murder committed within British territorial waters. During the trial that took place, M, pleaded that the British courts had no jurisdiction to try him for the murder committed on board a French cruiser flying French flag.* In this case the defence cannot succeed because the theory that the public ship of a State should be treated to be a floating portion of that State has long been discarded. Secondly, the offence was committed within the territory of Britain. Thirdly, seeking good offices of British police and medical aid, etc. amounted to a waiver of the immunity. Thus M could be tried by British courts.

(ii) A British subject was a member of the crew of a Chinese public ship. He murdered the captain on board the ship while in the territorial waters of Hong Kong. He then tried to commit suicide but failed. He was taken to a hospital in Hong Kong and (with the consent of the Chinese Government) was tried and convicted in a Hong Kong Court. On appeal to the Privy Council it was argued that the Hong Kong Court had no jurisdiction, over the accused as the public ship is extra-territorial and must, therefore, be considered a foreign territory.** In this case also, the defence cannot succeed because firstly, accused was a British subject, secondly, he was tried with the consent of the Chinese Government. Thus the Chinese Government instead of claiming immunity from the jurisdiction, submitted to its jurisdiction. Lastly, the theory of extra-territoriality has long been discarded and cannot be accepted.

It may be noted here that the facts of the above illustration resemble those of *Chung Chi Cheung* v. *The King.*[9] The facts of this case are as follows :—

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[7] AIR 1975 S.C. 36.

[8] Ibid, at pp. 38-39 ; The Supreme Court further observed : "........Ram Narain's domicile of origin was in the district of Multan and when the District of Multan fell by partition of India in Pakistan, Ram Narain had to be assigned Pakistan domicile till the time he expressed his unequivocal intention of giving up that domicile and acquiring Indian domicile and also took up his residence in India .... the decision of the High Court that Ram Narain could not be tried in any court in India for offences committed in Mailsi in November, 1947 is right and that the Provincial Government had no power under Section 188, Criminal Procedure Code to accord sanction to this prosecution." Ibid, at pp. 40-41.

* Asked in P.C.S. (1970), Q. No. 5.

** Asked in I.A.S. (1965) Q. No. 6(b) ; see also for C.S.E. (1995) Q. 7(c).

[9] (1939) A.C. 160.

Chung Chi Cheung was a British citizen, and was a cabin boy in a Chinese Armed Ship. On January 11, 1937, when the said ship reached the territorial waters of Hong Kong, Chung Chi Cheung shot dead the Captain of the ship and injured the Acting Chief Officer of the ship. Even in the wounded state, the Acting Chief Officer ordered the ship to be taken into the territorial waters of Hong Kong. When the ship reached Hong Kong, he called the police and got the cabin boy arrested. The Chinese authorities started the proceeding for the extradition of the accused but with no success because the accused was a British citizen. Consequently, immediately after the release of the accused he was re-arrested and was tried in the Court of Hong Kong. The Court sentenced him to death. The accused filed an appeal in the Privy Council against the said decision. In the Privy Council the appellant (accused) contended that the ship on which the crime was committed was the public property of the Chinese Government and in accordance with the principle of extra-territoriality the said ship should be treated as the floating part of the State of China. The Court of Hong Kong could have jurisdiction over such a ship only when the Government of China waived its immunity. He further contended that in the present case the Government of China had not waived its immunity or exemption. It was also contended by the appellant that the servants of the ship also have immunity from being tried in the court of another State and that the Acting Chief Officer of the ship was not entitled to waive this immunity. The Privy Council dismissed the appeal and held that the Court of Hong Kong had jurisdiction to try this case. The Privy Council observed that the principle of extra-territoriality was not correct. Lord Atkin observed that it was not proper to say that the public ship of a country is the floating part of that State. In his opinion, the correct view is that according to International Law the Court grants certain immunities or exemption to the ships and crew of another State. The said immunities are conditional and may be waived by the State concerned. In the present case the Chinese Government submitted to the jurisdiction of the court and as such it would be deemed to have waived its immunity. Instead of demanding immunities the Chinese Government sent four witnesses to give evidence against the accused.

Territorial Sovereignty

N.B.—For this please see also Chapter 9 entitled "Nature of State and Different kinds of States and Non-State Entities".

Subjective and objective Territorial Principles*

It has been rightly pointed out : "The term 'jurisdiction' refers to the legal competence of State officials to prescribe and enforce rules with regard to persons, things and events. By distinguishing between those situations in which a State may exercise its jurisdiction and those situations in which it may not, international law serves to clarify the authority of officials and to minimize friction among States. The essence of the distinction is contained in the concept of Sovereignty, the principal collaries of which are an exclusive jurisdiction over the territory of the State and a consulative duty of non-intervention in the area of exclusive jurisdiction of other States.'[10] As remarked by Lord Macmillan, "It is an essential attribute of the sovereignty of this realm, as of sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes, civil and criminal arising within its limits." In his dissenting opinion in the *Lotus* case[11], Judge J.B. Moore observed : "It is an admitted principle of international law that a nation possesses and exercise within its own territory an absolute and exclusive jurisdiction and that any exception to this right must be traced to the consent of the nation, either express or implied." But there are certain exceptions to this rule. For example, in Britain Courts have jurisdiction over British nationals in respect of treason, murder, bigamy, etc., wherever committed. Reference may also be made here to subjective and objective territorial principles.

Subjective Territorial principle.—This is regarded as the technical extension of the territorial principles. According to this principle, a State may claim jurisdiction over crimes commenced within its territory but completed or consummated outside its territory. The State where the crime commenced or was initiated may enact under its criminal law that it will have jurisdiction over such preparatory acts. Ordinarily, States do not exercise this type of jurisdiction. There are, however, certain situations wherein States where the crime commenced or was initiated, are under duty to punish the accused. This is provided for example, under the Geneva Convention for the Suppression of Counterfeiting of Currency (1929) and the Convention for the Supervision of the Illicit Drug Traffic (1936). State parties to these conventions have accepted this obligation so as to prevent commission of crime in other States.

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* See for I.A.S. (1974), Q. No. 4.

[10] Edward Collins, International Law in a Changing World (1969), p. 188

[11] P.C.L.J., Series A, No. 10 (1927), pp 68, 88.

Objective Territorial Principle.—According to this principle, a State gets jurisdiction over the crime, if any of the constituent elements of the crime is consummated in its territory. For the State concerned to assume jurisdiction it is also necessary that the act must have produced some harmful effect within or on the territory of State. Hyde has explained this principle in the following words : "The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters its domain." In the *S.S. Lotus* case,[12] Judge Moore observed : "It appears to be now universally admitted that when a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international Law, by reason of the constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction." [13] The objective territorial principle is generally accepted and often applied. "But the objective territorial theory does not meet at the view of States which claim a universal competence for their criminal courts, and even if this claim is limited to a claim to try offences against nationals, it rests on a false view of the nature of the right of protecting nationals which international law recognizes ; States have a right to diplomatic protection, a right to demand reparation for injuries done to their nationals abroad, but not a right to throw the shield of their own criminal law round them at a time when they have left this shelter." [14]

Thus the jurisdiction of a State is not always a co-incident with its territory. As pointed out earlier, each State exercises jurisdiction over its territory. The sovereignty of that State is limited to that territory. But there are certain exceptions to this general rule. There may be certain circumstances wherein a State may exercise jurisdiction outside its geographical limits.

Extra-territorial operation of State Laws and protective Jurisdiction of State over Foreigners.—The law relating to extra-territorial operation of laws has been discussed and clarified in a Full Bench decision of the Madras High Court, namely, *K.T.M.S. Abdul Cader and others* v. *Union of India.*[15] The facts of this case are as follows :—

The petitioner was alleged to have been smuggling or dealing with smuggled goods. This led the Madras State to reasonably apprehend that unless they were detained forthwith they would continue to indulge in similar activities which may prove a hazard to safety and security of the country. Hence detention orders were passed first under section 3(i)(c) of the Maintenance of Internal Security (Amendment) Ordinance, 1974 and then, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ; but the warrant of arrest under the said two Acts, could not be executed because the petitioners continued to live abroad. Therefore, at the instance of the State Government issued proclamations under S. 82 (1), Cr.P.C. on 2-12-1974 and S. 7(1) (c) of the Act of 1974, read with S. 82 (1) of the Cr.P.C. on 16-1-1975. Before the Madras High Court the principal point urged by the petitioners was that the Act has no extra-territorial application and hence the State Government has no power under the Act to pass orders of detention against persons who at the time when the orders were made, were not within

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[12] Lotus case, P.C.L.J., Series A, No. 10 (1927), pp. 68, 88.

[13] See also Rex v. Godfrey, (1932) 1 K.B. 24 (facts of this case have been discussed in Chapter on "Extradition") and Ford v. United States, 273 U.S. 593.

[14] J.L. Brierly, The Law of Nations, Sixth Edition, edited by Sir Humphrey Wadlock, (1963), pp. 301-302.

[15] AIR 1977 Mad 386 : 1977 Cri. L.J. 1708.

India but were outside its territorial limits. It may be noted here that in this case one of the petitioners was a foreign citizen. The Full Bench of the Madras High Court rejected the contention of the petitioners and dismissed the petition.[16] The Supreme Court[17] observed that it is well established that the power of the Parliament to make a law in relation to the topic entrusted to it is plenary, that a law passed by the Parliament under Article 245 cannot be invalidated merely on the ground it has extra territorial operation and that such a law cannot be questioned on the ground that it may not be found capable of enforcement outside its territories.[18] The Full Bench further observed that the words, 'extra-territorial operation' are used normally in two different senses as connoting firstly, laws in respect of acts and events which take place inside the State but have operation outside, and secondly, laws with reference to the national of a State in respect of their acts outside. In its former sense the laws are strictly speaking intra-territorial though loosely termed as extra-territorial under Article 245(1) which are clearly within the competence of the Parliament. Therefore, merely because the law enacted by the Parliament has extra-territorial consequences it cannot be invalidated as has been set out in Article 245(2) of the Constitution. Their Lordships quoted with approval the following observation of Oppenheim :[19] "Many States claim jurisdiction with regard to certain acts committed by a foreigner in foreign countries. States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, foreign banknotes and the like, or against its citizens, such as murder and arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory and comes thereby under their territorial jurisdiction, they have an opportunity of inflicting punishment." The Lordships[20] also referred the following observations from Greig's book.[21] The jurisdictional competence of a State under international law is in many respects ill-defined and the task of determining and explaining of the scope of international law in this field is complicated by the fact that the word 'jurisdiction' is itself used to denote at least two similar, though nevertheless distinct nations, firstly the competence of a Court of law to try a particular dispute, and secondly, the right of a state to control or interfere with a particular person or object, and there is considerable uncertainty as to how far a State can legislate with respect to and its courts decide issues arising out of events taking place entirely abroad. It cannot be doubted that there should be some link between either the offence or the offender and the State claiming jurisdiction and now close that link must be to satisfy the requirement of international law may be difficult to state with accuracy. The State's Sovereign powers including the power to make its laws cannot be limited unless it is prohibited by any international law or by agreement, it has agreed to curtail its jurisdiction. It is true that the territory and population being two essential characteristics of a Statehood and therefore it is natural that territorial supremacy and the bond of nationality should form the basis of the State's jurisdictional competence. There may, however, be other circumstances which can confer the jurisdictional competence on a State. Such circumstances are following :—

(1) Territorial jurisdiction based on the theory that incidents occurring in or persons residing within the territory of the State are subjects to its laws ;

(2) Personal jurisdiction based on the fact that a State has the right to extend the application of its laws to its nationals even with respect to events occurring entirely abroad ;

(3) Universal jurisdiction based on the principle that any State may exercise jurisdiction over a crime committed such as piracy whatever the nationality of the perpetrators ;

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[16] K.T.M.S. Abdul Cader and others v. Union of India, AIR 1977 Mad 386 at pp. 394-396.
[17] Ibid, at p. 394.
[18] See also British Columbia Ele. Rly Co. v. King, A.I.R. 1946 P.C. 180.
[19] International Law, 8th Edn., Vol. I, at p. 331, para 147.
[20] A.I.R. 1977 Mad. 386 at p. 395.
[21] Greig, Treatise on International Law, pp. 164, 167.

(4) Protective jurisdiction—war crimes etc., under which the States are allowed to punish a foreign national by a State, the safety or public order which has been jeopardised by acts committed by persons outside its territory ; and

(5) Jurisdiction based on passive personality principle which enables a State to exercise jurisdiction over a foreigner in respect of an incident taking place abroad resulting in an injury to one of its nationals.

It may be noted that a State cannot exercise its power in any form in the territory of another State except by virtue of a permissive rule derived from international custom or from a convention.[22] In the *Lotus* case,[23] the Permanent Court of International Justice has observed—"the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial ; it cannot be exercised by state outside its territory except by virtue of a permissive rule derived from International custom or from a convention. This discretion left to States by International law explains the great variety of rules which they have been able to adopt without objection or complaints on the part of the other States."

Thus a State may very well exercise civil or criminal jurisdiction over its nationals even with respect to their conduct outside its territory.[24] After reviewing the above authorities the Madras High Court[25] observed .... though a State's jurisdiction is mainly territorial, its jurisdiction can extend in respect of things or acts, done by its nationals even outside its territories. It has also jurisdiction which may properly be called protective jurisdiction to deal with a foreign national whose acts have jeopardised or are about to jeopardise its safety or public order. The protective principle on the basis of which a State exercises its jurisdiction over foreigners for its own preservation is recognized in the international law. If such a protective jurisdiction is not given to a sovereign State, its stability and existence itself can be shaken by acts or things done by foreigners outside its territory and the State will be powerless to do anything against them Therefore, it should be taken to be the basic right of any State to protect itself from such prejudicial acts done by foreigners outside the State by dealing with them in any manner they like. It may be that any action taken by the State against a foreigner some times is ineffective so long as the foreigner is outside its territory. But merely on that ground, the action taken cannot be said to be invalid as the jurisdiction of the State to take action against a foreigner mainly depends upon its competency and not upon its effective execution. The jurisdiction to pass an order is different from the power to execute or effectuate that order. The fact that a foreigner cannot be proceeded against by a State so long as he is outside its power to exercise jurisdiction over foreigners invoking the protective principles."

In *G.B. Singh* v. *Government of India*,[26] the Supreme Court has recognised this protective jurisdiction of a State and observed : "The first duty of a State is to survive. To do so it has got to deal with enemies both overt and covert whether they be inside the country or outside. The fact that the appellant if released would go to England and from there continue to indulge in activities prejudicial to the security and integrity of this country is a relevant factor in determining whether he could be detained in this country when he is found in country."

The difference between power to pass a detention order and its effective enforcement has also been touched upon in the above decision in the following passage. "We are aware that there is no law in this country providing for extradition of persons against whom the country would consider it necessary to pass an order of preventive detention. It is not to be assumed that this country will indulge in such a useless and pointless exercise. But that is quite different from saying that there cannot be a law in this country providing for such detention. But if such a person happens to come to this country, we presume he can be detained. We do not accept the argument that a person like the appellant could be detained only if it is apprehended that if not detained he would indulge in prejudicial activities in this country and not if his activities are outside this country even though they may have a prejudicial effect on this country. Take the case of a person acting prejudicial to the security of a State in this country while residing in another State. We have no doubt that he can be detained by the former State. The same analogy applies to this case. International law does not seem to deal with the case of nationals of one country acting in that country to the prejudice of the security and integrity of another country and whether anything could be done about them."

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[22] Max Sorensen, Manual of Public International Law, page 335, paragraphs 6, 23.

[23] P.C.I.J. Series A, No. 10 at pp. 18-19 referred in Ibid.

[24] See note 22.

[25] A.I.R. 1977 Mad. 386 at p. 396.

[26] A.I.R. 1973 S.C. 2667 : (1973) Cr.L.J. 1801.

After quoting the above observation of the Supreme Court, the Madras High Court finally observed : "Though as pointed out in the above passage, International Law does not directly deal with the case of nationals of one country acting in that country to the prejudice of the security and integrity of another country, it definitely recognizes the protective jurisdiction of one State to deal with foreign nationals acting in their country against its security and integrity."

Some exceptions of the exercise of Jurisdiction*

(1) *Diplomatic agents.*—Diplomatic agents enjoy certain privileges and immunities. They are immune from the jurisdiction of the civil and criminal courts of the receiving State. In this connection the old view was that the diplomatic agents enjoy these immunities and privileges because they were deemed to be outside the jurisdiction of the receiving State. In the present time this theory has been discarded. According to the modern view, diplomatic agents enjoy certain immunities and privileges because of the special functions they perform. This was affirmed in a case *Ex-parte Petroff* (1971) by the Supreme Court of Australia. The facts of this case have been mentioned in chapter on "Diplomatic Agents". Oppenheim also subscribes to this view.

(2) *Foreign embassies.*—Foreign embassies are often considered to be outside the jurisdiction of the State in which they are situated. For sake of convenience, embassies are to be treated a part of their home States. The correct view, however, is that though not part of their home States, embassies enjoy certain immunities because of the special functions performed by the diplomatic agents.

(3) *Foreign sovereigns***.—Foreign sovereigns are often treated to be outside the jurisdiction of other States and possess many privileges and immunities. This is based upon the principle that one sovereign cannot exercise jurisdiction over another sovereign. In the case of *Christina*[27] Lord Wright observed, "there are general principles of international law according to which a sovereign state is held to be immune from the jurisdiction of another Sovereign State ....the rule may be said to be based on the principle of *par in Parem Non habit Imperium,* no state can claim jurisdiction over another state." This rule is subject to waiver by the consent of sovereign who may desire a legal adjudication of his rights. No such writ can be upheld against the sovereign state unless it consents. The principle of immunity of Foreign Sovereigns was developed in the early years of the nineteenth century. According to this principle vast immunities and exemptions were granted to the foreign sovereigns and foreign States. In the case of the *Schooner Exchange* v. *McFaddon,* (1812),[28] a French Naval Vessel stayed in Philadelphia for repairs after a storm. Some persons sought possession of the ship on the ground that in reality the ship was *Schooner Exchange,* an American ship which they owned and was seized by France on the High Seas in 1810 in pursuance of a Napoleonic Decree. The U.S. Government however requested the Court to refuse jurisdiction on the ground of Sovereign immunity. The Court held that the vessel was exempt from U.S. jurisdiction. Marshall, C.J. of the U.S. Supreme Court expounded the principle of sovereign immunity in the following words :

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself .... This full

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* See for I.A.S. (1969), Q. No. 5 ; I.A.S. (1963), Q. No. 2.

** See for I.A.S. (1970), Q. No. 2 ; I.A.S. (1963), Q. No. 2 ; I.A.S. (1965) Q. No. 6(c) ; P.C.S. (1973), Q. No. 6 ; See also for I.A.S. (1977), Q. No. 4 ; C.S.E. (1985) Q. No. 6(a).

[27] (1938) A.C. 485.

[28] (1812) 7 Cranch 116.

and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial powers, would not seem to contemplate foreign sovereigns nor their sovereign rights, as its subjects. One sovereign being in no respect amenable to another, and being a bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him".

In *Vavasseur* v. *Krupp*[29] the plaintiff contended that the Japanese Government had violated his patent rights and therefore he demanded that the delivery of the goods by it be stopped. But the Court held that it had no jurisdiction over the property of the foreign sovereigns "more especially with what we call the public property of the State of which he is sovereign".

Similarly in *Parliament Belge,*[30] it was held that the British Courts have no jurisdiction over the person and property of the foreign sovereigns. In this case, the Parliament Belge was a Belgium mail vessel and was also used for commercial purposes. It collided with a British ship and owners of the ship had filed a case in the Admiralty Division demanding compensation. It was held that court has no jurisdiction over the Parliament Belge. Neither the sovereign of Great Britain nor any friendly sovereign can be impleaded in any of courts of Britain. The mere fact that the ship being used subordinately and partially for trading purposes will not take away the sovereign immunity.

In *Mighell* v. *Sultan of Johore,*[31]* the Sultan of Johore, during his stay in England, promised to marry the plaintiff. When the said promise was not fulfilled, the plaintiff filed a case for the breach of the promise. The Sultan of Johore contended that he was a sovereign of a foreign sovereign State who had not submitted to the jurisdiction of the court and as such the court could not have jurisdiction over him. The court accepted his contention and decided in his favour. Lord Esher, M.R. of the Court of Appeal held : "If it is shown that he is an independent sovereign, and does not submit to the jurisdiction, the court has no jurisdiction over him. It follows from this that there can be no inquiry by the court into his conduct prior to that date." His Lordship referred the following observation made by the Court in *The Parliament Belge* : "The principle .... is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." [32]

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[29] (1878) 9 Ch. D. 351.

[30] (1880) 5 P.D. 197.

[31] (1894) 1 Q.B. 149.

* C.S.E. (1994) Q. 7(b) ; see also for C.S.E. (1995) Q.7 (b).

[32] Other Illustrations :— (i) *X*, a Muslim ruler of State in Malayasia is sued by an Indian Muslim girl in Delhi for breach of promise to marry when *X* was holidaying in Delhi. In this case *X* can take the plea of his sovereign immunity that he is not subject to the jurisdiction of the court. As held in *Mighell* v. *Sultan of Johore,* (1894) discussed above, the Court cannot exercise jurisdiction. [This problem was asked in P.C.S. (1973), Q. No. 6; (ii) The Pakistan Government entered into contract with a foreign Government for the purchase of military equipment which provided that its interpretation should be governed by English law and stated that the Government agreed 'to submit, for the purposes of the agreement, to the jurisdiction of the English courts'. Yet when the dispute arose, the Pakistan Government objected to the jurisdiction of the English Court, saying that its waiver was not express, not made in the face of the court, and therefore, ineffective. [Asked in I.A.S. (1965), Q. No. 6(c)]. The objection of Pakistan is valid. Immunity is to be claimed at the time when the question arises in the court and as held in *Mighell* v. *Sultan of Johore*. "......... there can be no inquiry by the court into his conduct prior to that date." See also for I.A.S. (1977), Q. No. 4(i)] ; for this see also Anglo-Iranian Oil Company case, I.C.J. Rep. (1952), p. 93.

The principle laid down in *Mighell* v. *Sultan of Johore*, was finally approved by the House of Lords in *Duff Development Co. Ltd.* v. *Government of Kelantan*.[33] The facts of *Duff Development Co. Ltd.* v. *Government of Kelantan* are as follows :—

In 1912, the Government of Kelantan granted certain concessions to the appellant in respect of digging mines. etc. The instrument under which these concessions were granted also provided for arbitration in case of a dispute. In 1921, a dispute was entrusted to an arbitrator who gave his award in favour of the Company (appellant). The respondent (*i.e.* the Government of Kelantan) had filed a case to get the said award invalidated, but the case was dismissed by the Court. This decision was approved by the House of Lords. Thereafter in 1922, the appellant-Company filed a case in the King's Bench of England requesting the Court for enforcing the said award, and the Court thereupon issued a garnishee order, but later on this order was declared null and void because the Government of Kelantan was independent sovereign State. The Court of Appeal approved this decision. Therefore, the appellant-Company filed an appeal against the said order in the House of Lords.

The British Foreign Office informed the Court that despite the above agreement British Government had recognised the Sultan of Kelantan as an independent sovereign State and the British Crown neither exercises nor claims sovereignty and jurisdiction over Kelantan.

The House of Lords decided in favour of the Government of Kelantan and dismissed the appeal of the appellant company. Thus the Court held that the Government of Kelantan was a sovereign State and could not be impleaded. The Court also observed that it is the duty of the Court to accept the statement of Secretary of State which if clearly and positively made, is conclusive upon the point of status of a foreign State. *Rahimtoola* v. *Nizam of Hyderabad*,[34] also deserves a mention in this connection.

But if the person concerned who claims immunity is ex or former or deposed sovereign, he will not be entitled to get immunity. Immunity can be granted only when the country where the suit has been filed regards him as Foreign Sovereign. If he is not regarded as foreign sovereign and is former sovereign or deposed King, the courts will not grant immunity. This is clear from the following illustration—

The deposed King of Afghanistan while living in exile in England proposes to marry an English lady. Later on he changed his mind and refused to marry. The lady brings a suit against him for breach of promise to marriage. The defendant contends that the court has no jurisdiction over him as he was the sovereign of an independent state, and that he has not submitted himself to the jurisdiction of an English Court.*

Immunity is given to the existing foreign sovereign. A deposed sovereign is not entitled to claim immunity. The position, however, will be different if England still regards him as foreign sovereign.

(4) *Immunity in respect of public property of Foreign Sovereign State.***—Like the person of foreign sovereign, the property of the sovereign or the public property of the State also receives certain immunities and exemptions from the exercise of jurisdiction. In the *Schooner Exchange* v. *McFaddon* (1812), Marshall, C.J. observed that it is a principle of public law "that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempt by the consent of that power from its jurisdiction." In some countries, distinction is made between sovereign and commercial acts. For example, in America a foreign sovereign is not entitled to any exemption or immunity when engaged in commercial functions. This was held in *Ohio* v. *Helvering*.[35] It is, however, difficult to determine as to whether a particular act is commercial or not. In

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33. (1924), A.C. 797.

34. (1958), A.C. 379; See also Dollfus Mieget Compagnie S.A. v. Bank of England, (1950) 1 All E.R. 747.

* C.S.E. (1987) Q. 6(b) (ii).

** See also for I.A.S. (1963), Q. No. 2 ; C.S.E. (1985) Q. (a).

35. 293 U.S. 360.

this connection, it is worth remembering that many countries have nationalised industries and trades. Hence, classification of commercial functions is a matter of great importance. According to Prof. W. Friedmann,[36] in this connection, three views are prevalent—

(a) All that property which is owned by State is entitled to immunity. This view is followed in England and *Krajina* v. *Tass Agency,*[37] and *Rahimtoola* v. *Nizam of Hyderabad,*[38] deserve mention in this connection.

(b) According to the second view, this immunity is not absolute and it has certain limitation. It depends upon the type of the act. But it is difficult to determine as to whether a particular act is a sovereign act or not.

(c) According to the third view, immunity depends upon the nature of the function. In accordance with this rule, those ships which are owned by the State and perform commercial functions, are treated equivalent to private ships during peace times.

It may be noted here that "………the absolute theory of sovereign immunity is no longer to be considered sacrosant.[39] In *Thai-Europe Tapioca Service Ltd.* v. *Govt. of Pakistan,*[40] the Court of Appeal held that a foreign sovereign has "no immunity when it enters into a commercial transaction with a trader here, and a dispute arises which is properly within the territorial jurisdiction of our courts." [41] Similarly a foreign sovereign has no immunity in respect of debts incurred in England for services rendered to foreign property situated in England. Almost the same view was taken by the Judicial Committee of the Privy Council in *Owners of the Ship Philippine Admiral* v. *Wallem Shipping (Hong Kong) Ltd. and Others.*[42] In *The State of Kerala* v. *K. Cheru Babu,*[43] the Division Bench of the Kerala High Court observed : "The doctrine of absolute immunity never formed part of classical law. Neither Grotius nor Bynkershoek nor Vattel accepted the doctrine in its absolute form. Nor does it find acceptance in modern jurisprudence. The doctrine is now confined to narrow regions, namely, (a) the immunity of a foreign State from the jurisdiction of the local courts in regard to acts *jure imperi* (non-commercial activities of State in its sovereign capacity) as distinguished from acts *jure gestionis* (commercial activities of State) ; and (b) the immunity of a State from the jurisdiction of its own courts in regard to acts of State and matters arising from military operations. The principle of State immunity—Whether of the territorial State or of the foreign State—is a survival of the period when the Sovereign was considered to be above the law. This is no longer the position." As remarked by Steven M. Schneebaum,[44] "Two United Kingdom decisions (*i.e.* the above mentioned two decisions) show the law of sovereign immunity to be undergoing rapid and perhaps dramatic change in a nation not long ago described as 'the only country that persists in the systematic adherence to the archaic view of absolute immunity." [45] What is even more important, however, and not least for its political and diplomatic implications, is the court's treatment of the rationale of the law. The role of the foreign sovereign in British jurisprudence is not what it once was and yet the change, even if a desirable and progressive one, seems based upon principles that are eminently in need of further clarification. Thus it may safely be concluded "that there is a definite trend towards

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36. Law in a Changing Society (First Indian Reprint, 1970), pp. 325-26.
37. (1949) 2 All E.R. 274.
38. (1957) 3 All E.R. 441.
39. Steven M. Schneebaum, "Sovereign Immunity : The End of Absolution" IJIL Vol. 16 (1976), p. 267 at p. 274.
40. (1975) 3 All E.R. 961.
41. Ibid, at p. 966.
42. (1976) 1 All E.R. 71 at p. 95.
43. A.I.R. 1978 Ker. 43 at pp. 48-49.
44. See supra note 39, at p. 267.
45. See generally Sucharitkul, State Immunities and Trading Activities in International Law, 1959, p. 256; M.K. Nawaz : The Problem of Jurisdictional Immunities of Foreign States with particular reference to Indian State Practice, IJIL, (1962), p. 164.

a general acceptance, in the western world of restrictive theory of sovereign immunity in the context of commercial activities."[46]

Reference may be made here to *United Nations Convention on Jurisdictional Immunities of States and their Property* adopted by the U.N. General Assembly on 2 December, 2004. Article 1 of the convention states the scope of the convention. It says that the present convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State. Article 5 of the convention provides that a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present convention. Article 6 further provides that a State shall give effect to state immunity under Article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under Article 5 is respected.

It may be noted here that the convention was offered for signature for States in January, 2005. Only 13 countries have so far become parties to the convention. For the convention to come into force it is necessary for 30 countries to sign and ratify it. As of 7 May, 2013, 28 countries have signed the Convention.

Exceptions of the above rule

(i) **Express consent to exercise jurisdiction.**—A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case :

(a) by international agreement; or

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a special proceeding.[47]

(ii) **Effect of Participation in a Proceeding before a Court.**—A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has :

(a) itself instituted the proceeding; or

(b) intervened in the proceeding, or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim of immunity can be based until after it took such a step, it can claim immunity on those facts, provided it does so at the earliest possible moment.

Further, a State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of :

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.[48]

(iii) **Commercial Transactions.**—If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

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[46] A.O. Adebe, "The Doctrine of Sovereign Immunity under National Commercial Law : An Observation on Recent Trends", IJIL, Vol. 17 (1977), p. 245 at p. 259 ; See also Trendtex Trading Corporation v. Central Bank of Nigeria, (1977) 1 All E.R. pp. 881-911. See also Victory Transport Inc. v. Comisaria General De Abaste Cimentos Y. Transporters, 381 U.S. 934 (1965) : 35 I.L.R. 110 ; Dralle v. Rep. of Czechoslovakia, International Law Reports, 17 (1950), p. 155 (Sup. Ct. of Austria 1950).

[47] Article 7 of U.N. Convention on Jurisdictional Immunities on States and their Property (2004).

[48] Article 8.

The above provision is contained in Article 10 of the convention. But Article 10 adds that Paragraph 1 (i.e. the above paragraph) does not apply :

(a) in the case of a commercial transaction between states; or

(b) if the parties to the commercial transaction have expressly agreed otherwise.[49]

(iv) **Contracts of employment.**—Para 1 of Article 11 provides that unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State. But as made clear in Para 2 of Article 11, Para 1 does not apply if :

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;

(b) the employee is :

  (i) a diplomatic agent;

  (ii) a consular officer;

  (iii) a member of the diplomatic staff of a permanent mission to an international organisation or of a special mission, or is recruited to represent a State at an international conference; or

  (iv) any other person enjoying diplomatic immunity;

(c) the subject matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual.

(d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) the employee is a national of the employer State at the time when the proceeding is instituted unless this person has the permanent residence in the State of the forum or

(f) the employer State and the employee have otherwise agreed in writing subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.[50]

(v) **Personal injuries and damage to property.**—Unless otherwise agreed between States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.[51]

(vi) **Ownership, possession and use of property.**—Unless otherwise agreed between States concerned, a State cannot invoke immunity before a court of another State which is otherwise competent in a proceeding which relates to the determination of :

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[49] Article 10.

[50] Article 11.

[51] Article 12.

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of immovable property situated in the State of the forum;

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vocantia;* or

(c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of winding up.[52]

(vii) **Intellectual and Industrial Property.**—Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to :

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in sub-paragraph (a) which belongs to a third person and is protected in the State of the forum.[53]

(viii) **Participation in Companies or other collective bodies.**—A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body :

(a) has participants other than States or international organisations; and

(b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.[54]

(ix) **Ships owned or operated by a State.**—Para 1 of Article 16 provides that unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship, at the time cause of action arose, the ship was used for other than government non-commercial purposes.

But para 1 as noted above does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non-commercial purposes.

(x) **State Immunity from measures of constraint in connection with proceeding before a court.**—U.N. Convention on Jurisdictional Immunities of States and Their Property (2004) also provides for State immunity from pre-judgment measures of constraint[55] as well as from post-judgment measures of constraint.[56]

The convention also provides that it shall be open for signature by all States until 17 January, 2007 at United Nations Headquarters, New York.

The convention would enter into force thirty days after the deposit of instrument of ratification by 30th Country. As of 7 May 2013, 28 countries had signed and 13 countries had ratified the convention.

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[52] Article 13.

[53] Article 14.

[54] Article 15.

[55] Article 18.

[56] Article 19.

The position of enforcement jurisdiction under English law, which more or less corresponds to Indian law, may be summarised as follows[57] :—

(i) Under international law, there is a distinction between immunity from adjudicative jurisdiction and enforcement jurisdiction of the forum state.

(ii) Such a distinction is recognized under English law and the State Immunity Act, 1978 provides different rules for immunity from execution.

(iii) International law permits waiver of immunity by a State from execution. So is also the case under English law and the opening of a special account or written authorization by State that funds should be placed in a special account to meet commercial creditor's claims constitutes such a waiver.

(iv) As regards enforcement jurisdiction, English law gives effect to it by a ruling that bank account of a State to meet the running expenses of a diplomatic mission is immune from enforcement measures.

(v) Despite the fact that international law permits a limited exercise of enforcement measures against a foreign State, the provisions of the said 1978 Act and the judgment creditor's onus of proof defeat such limited measures.

(vi) Without directly seeking the Amendment of 1978 Act, several methods may be found to ensure a wider power of attachment for commercial judgment debts. For example, the creditor may seek security of his commercial transactions with the State requiring the guarantee of a State trading entity.

(5) *International Organisations.*—International Organisations also enjoy certain immunities and privileges from the jurisdiction of the States in which they are situated. For example, the United Nations International Labour Organisation, and other specialized agencies enjoy several privileges and immunities. For the purposes of granting privileges and immunities to the U.N. a convention known as the Convention on the Privileges and Immunities of the United Nations was entered into. Reference may also be made here to the Act No. XLVI of 1947 to give effect to the Convention on the Privileges and immunities of the Union passed by the Dominion Legislature of India.[58]

Reference may also be made here to the U.N. Convention on Jurisdictional Immunities of States and Their Property. This convention was opened for signature on 17 January, 2005. Austria and Morocco became the first countries to sign the convention. It will enter into force when 30 states have deposited instruments of ratification, acceptance, approval or accession. So far only 13 countries have ratified it.

(6) *Extradition Treaties.*—Under the provisions of the extradition treaties, the persons who run away from their country after committing crimes may be extradited. That is to say, the State where they have committed certain crimes may ask the State where the accused is for the time being to return him so that he could be prosecuted and punished according to the law of the land. Thus in respect of such persons also, State may exercise some sort of jurisdiction even outside its territory.

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[57] See Hazel Fox, "Enforcement Jurisdiction : Foreign State Property and Diplomatic Immunity", I.C.L.Q., Vol. 34 (1985) p. 115 at pp. 140-141.

[58] According to Article I of the Schedule annexed to the Act., the United Nations shall possess juridical personality. It shall have the capacity : (a) to contract ; (b) to acquire and dispose of immovable and movable property ; (c) to institute legal proceedings. (Section 1). Article II provides : The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution (Section 2). The premises of the U.N. shall be inviolable (Section 3). Articles III, IV, VI, VII and VIII deal with Facilities of Communications, the Representatives of Members, Officials, Experts of Missions For the U.N., United Nations Laiseez Passer, and Settlement of Disputes, respectively.

(7) *Foreign Troops.*—As pointed out by Marshall, C.J. in *The Schooner Exchange* v. *McFaddon*,[59] "a sovereign is understood to cede a portion of his territorial jurisdiction where he allows the troops of a foreign prince to pass through his dominions." The grant of free passage therefore implies a waiver of all jurisdictions over the troops during their passage and permits the foreign army authorities to exercise jurisdiction upon the army personnel to maintain discipline and to inflict those punishments which the government of his army may require.

(8) *Immunity of warship and their crew.*—Under international law warships enjoy a great measure of immunity. Warships are immune from legal process, execution or jurisdictional measures of foreign authorities. This immunity is applicable to the commander of the crew as well as to the ship itself. This immunity is not lost for acts of State (*i.e.* official acts) even if they are illicit (but not including crimes under international law). The home state of the warship will be responsible for its acts. Last but not the least, no immunity will be available if the warship, its commander or crew intrudes in a foreign country in *disguise and/or under false pretences*. In such a case the warship may be termed a 'spy' and may then be liable to confiscation and the legal process of the aggrieved coastal state.[60] The immunity of warship, even for illicit activities, "rests on the principle *par in parem non habet imperium, i.e.*, no State can sit in judgment of another State .... even if foreign warships have acted contrary to international law by engaging in 'spy' missions in peacetime, the members of the crew have still acted as State agents and are, as such, immune to legal process in municipal courts. Retaliatory action for their activities must be directed against the sending ship itself and the sending State. The acts of the 'spy' ship have engaged the responsibility of that State, activating far-reaching rights of self-defence against the ship, as well as further retaliation and entitlement to reparation." [61]

Exercise of jurisdiction in case of collision of ships on high sea.*— In case of collision of two ships in the high seas, jurisdiction is ordinarily exercised by the State whose flag flies on the ship. However, on the basis of extra-territoriality that State which has been affected by the said collision may also exercise jurisdiction. The leading case on the point is *S.S. Lotus*.[62] This matter has been discussed in detail below in connection with the criminal jurisdiction in international law.

Criminal Jurisdiction in International Law**

There are several views prevalent in connection with the criminal jurisdiction in international law. There is great controversy among the States in this connection. Following are the three main views prevalent in this connection :

(1) According to the first view, each State can exercise criminal jurisdiction within its territory. This theory is popularly known as the theory of territoriality of criminal jurisdiction. This theory has been supported by Great Britain, America and some other States. These States subscribe to the view that each State is entitled to exercise criminal jurisdiction only within its territory.

(2) The second view is also known as the theory of territoriality, but it admits certain exceptions to this general theory. France, Germany, etc. are its chief supporters. These States have accepted the theory of territoriality with certain modifications. According to them, a State may exercise criminal jurisdiction even outside its territory on the basis of the national security and on economic grounds.

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[59] (1812) 7 Cranch 116, See also G.P. Barton, "Foreign Armed Forces : Immunity from Criminal Jurisdiction", BYBIL, Vol. XXVII (1950), p. 186.

[60] Ingrid Delupis, "Foreign Warships and Immunity For Espionage", AJIL, Vol. 78 (1984) p. 53 at p. 71.

[61] Ingrid Delupis, "Foreign Warships and Immunity For Espionage", AJIL, Vol. 78 (1984) p. 53, at p. 75.

* See also for P.C.S. (1990) Q. 10(a).

[62] (1927) P.C.I.J. Series A, No. 10.

** See also for C.S.E. (1991) Q. 5 (d).

(3) The third theory is popularly known as the theory of extra-territoriality. Turkey, Italy, etc. are its chief supporters. According to this theory, crime is a social evil and it is in the interest of whole international community to ensure that the criminals get due punishment. In international field, there are many such matters in which the States exercise criminal jurisdiction even outside their territory.

The leading case on the point is *S.S. Lotus*[63] decided by the Permanent Court of International Justice in 1927. Facts of the case and principles laid down are discussed below.

*S.S. Lotus**.—A Turkish ship named Bozkourt collided with the French ship *S.S. Lotus*. In consequence of this collision certain Turkish national died. After the collision the French ship *S.S. Lotus* reached the Turkish port, Constantinopole. The Turkish Government arrested French national and the officers of the ship and started criminal proceedings against them in accordance with Turkish Law. They were held guilty and convicted by the Court. The French Government lodged a strong protest against this. Thereupon the Government of France and Turkey agreed to refer this matter to the Permanent Court of International Justice. The Permanent Court of International Justice propounded the following principles in this connection :—

(1) Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all of these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality by criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

(2) That there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.

Judge Moore who gave dissenting opinion agreed with the majority of the court, "............. it appears to be now universally admitted that where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction."

The Court, therefore, ruled that by prosecuting and punishing French national and the officers on the board of the ship, the Turkish government did not act contrary to the rules of international law. It may, therefore, be concluded that even those countries which subscribe to the theory of extra-territoriality define offences in such a way that it is deemed to have committed within their territory if its effect falls upon their territory or if any of its elements is present in their territory.

Thus, "The theory of territoriality for application of criminal law is not an absolute principle of international law and this by no means coincides with territorial sovereignty.

It may, however, be noted that the decision in this case has become obsolete as regards collision cases because Article 11 (1) of the Geneva Convention on the High Seas, 1958[64] provides·: "In the event of collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master of or any other person in the service of the ship, no penal or disciplinary proceeding, may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national." This provision without any change finds mention in Art. 97(1) of U.N. Convention on the Law of the Sea, 1982. A similar provision was earlier made in Brussels Convention of 10 May, 1952, relating to criminal jurisdiction in matters of collisions or other accidents of navigation.

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[63] (1927) P.C.I.J. Series A, No. 10.

* See also for IAS (1975), Q. No. 5(c) ; IAS (1957), Q. No. 6(a) ; PCS (1966) Q. No. 10(d) ; PCS (1983) Q. 10 (g) ; see also for C.S.E. (1993) Q. 7(c) (facts of this problem resemble those of S.S. Lotus).

[64] U.N. Doc. A/Conf. 13/L 53.

Reference may also be made here to the Supreme Court case, *Mobarak Ali Ahmad* v. *The State of Bombay*[65] wherein the Supreme Court observed : "The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give any extra-territorial operation to the law ; for it is in respect of an offence whose locality is in India, that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India for the trial can be secured." [66] The Supreme Court quoted with approval the following dictum of Holmes, J. : "Acts done outside a jurisdiction but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of harm as if he had been present at the effect if the State should succeed in getting him within its power." [67] The Court also quoted with approval the following observation of the Permanent Court of International Justice in *S.S. Lotus*[68] : It is certain that the Courts of many countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense, that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there." The Supreme Court further observed : "In noting the provisions of international law in this context we are conscious that what we have to deal with in the present case is a question merely of municipal law and not of any international law. But as is seen above, the principles recognised in this behalf are virtually based on the recognition of those principles in the municipal law of various countries and is really part of general jurisprudence relating to criminal responsibility under municipal law.

No doubt some of the above dicta have reference to offences actually committed outside the State by foreigners and treated as offences committed within the State by specific legislation. But the principle emerging therefrom is clear that once it is *treated* as committed within the State the fact that he is a foreigner corporeally present outside at the time of such commission is no objection to exercise municipal jurisdiction under the *municipal* law. This emphasises the principle that exercise of criminal *jurisdiction depends on the locality of the offence and on the nationality of the alleged offender* (except in a few specified cases, such as, ambassador, Princes, etc).[69]

But the above principle will not apply in case of Ministers of Foreign Affairs visiting other countries because they enjoy immunity from criminal jurisdiction. This has been held by the International Court of Justice in 2002 in *Arrest warrant of 11 April, 2000 (Democratic Republic of Congo* v. *Belgium*). In this case, an international warrant had been issued in absentia in April, 2000 by an investigating Judge of the Brussel's Tribunal against Mr. Abdonlaye Yerodia Mdmbasi on the charge of having made certain speeches in the Congo in 1998 inciting racial hatred. The Judge charged the Minister who was a Belgiam national and was neither a resident of Belgium nor present in that country with—(i) grave breaches of the 1949 Geneva Convention and of Additional Protocols thereto, and (ii) crimes against humanity.

Congo, on the other hand, asked the court to declare that Belgium should annul that warrant. Congo also argued that the charge had been brought in defiance of the immunity enjoyed by the incumbent Minister of Foreign Affairs.

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65. AIR 1957 SC 857.
66. Ibid, at p. 868.
67. Appearing in Hackworth's Digest of International Law, (1941 Edition), Vol. 11 at p. 188.
68. (1927) P.C.I.J., Series A, No. 10, 23.
69. See supra note 65, at p. 869.

The International Court of Justice held by 13 to 3 votes that the issue of the international circulation of the disputed arrest warrant had failed to respect the immunity from criminal jurisdiction and inviolability which Mr. Yerodia enjoyed under international law. Clarifying the scope of immunity enjoyed by Minister of Foreign Affairs, the court concluded that throughout the duration of his or her office a Minister of Foreign Affairs, when abroad, enjoys full immunity from criminal jurisdiction and inviolability. This is the case whether the Minister is present in foreign territory in an 'official' or 'private' capacity whether the acts in question were performed before he or she assumed office as Minister or during the period of office, and finally, whether, the acts were performed in an official or private capacity. Therefore, the Court ordered that Belgium by means of its own choosing cancel the arrest warrant and to inform the authorities to whom the warrant had been cancelled. Thus the judgment for the first time defined the scope of the immunities of Foreign Affairs and thereby contributed to the development of international law in a field of great topical interest.

N.B.—For criminal jurisdiction under International law see also matter discussed earlier under the heading 'Extra-territorial Operation of State Laws and Protective Jurisdiction of State Over Foreigners' in this Chapter.

Some Illustrations

(i) *K*, a British subject, fires across the channel and kills a Frenchman on the shore of France.* In this case Britain has jurisdiction over criminal *K* because *K* is a British subject and the crime is committed within the territory of Britain. France can also claim jurisdiction because though the crime was initiated in Britain, it was completed or consummated in the French territory. Moreover, the effect of the crime initiated in Britain feil on French territory. So if *K* goes to France, he can be apprehended and tried for murder.

(ii) *K*, an Indian subject, obtains money by false pretences by means of letters posted in Bhutan to a recipient in Pakistan.* *K* can be tried by Bhutan in whose territory the crime was committed by India, whose subject he is and also by Pakistan in whose territory the effect of the crime falls.

(iii) *K*, an American national, published in Texas a libel against a Mexican citizen, Later, *K* is in Mexico on a temporary visit and is arrested by the Mexican Government for prosecution. The Government of the United States protests against this.** In view of the law relating to criminal jurisdiction in international law, and general jurisprudence relating to criminal responsibility under municipal law discussed above, Mexican Government is within its right to arrest *K* for prosecution because the effect of the crime initiated in America fell on Mexico and protest of U.S. is not justified.

Criminal jurisdiction of the Coastal State in the Territorial Sea.—The sovereignty of a coastal State also extends to its territorial sea. This is, however, subject to the condition that ships of all States enjoy the right of innocent passage through the territorial sea. So far merchant ships are concerned, Article 19(1) of the Geneva Convention on the territorial sea and the contiguous zone, 1958, provides that the criminal jurisdiction of coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases : (a) If the consequences of the crime extend to the coastal State ; or (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea ; or (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies ; or (d) If it is necessary for the suppression of illicit traffic in narcotic drugs. Article 19(2) provides that the above provisions do not affect the right of the coastal State to take any steps authorised by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.[70] Under Article 17 of the U.N. convention on the Law of the Sea, 1982, subject to the convention, ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea. According to Article 18, passage shall be continuous and expeditious. However, passage includes stopping and anchoring but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in dangers or distress. As regards innocent passage, Article 19 provides that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with the convention and with other rules of international law.

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* Asked in I.A.S. (1970), Q. No. 5(a) ; For the answer of this and the two succeeding illustrations refer the law as discussed above.

* Asked in IAS (1970), Q. No. 5(b).

** Asked in I.A.S. (1970), Q. No. 5(c).

U.N. Crime Commission

N.B.—For this please see Chapter on "International Criminal Law and the Establishment of an International Criminal Court."

State Jurisdiction According to the Universal Principles*

As pointed out by Starke, "An offence subject to Universal jurisdiction is one which comes under the jurisdiction of all States wherever it be committed inasmuch as by general admission the offence is contrary to the interests of the international community, it is treated as a delicate *jure gentium* and all States are entitled to apprehend and punish the offenders. Clearly the purpose of conceding Universal jurisdiction is to ensure that no such offence goes unpunished."[71] Further, "There are probably today only two clear-cut cases of Universal jurisdiction, namely, the crime of piracy, *jure gentium* and war crimes .... The principle of Universality of war crimes was affirmed by the Geneva Conventions of 1949 relative to prisoners of war, protection of civilians, and sick and wounded personnel .... crimes or delicts *jure gentium,* other than piracy and war crimes, raise somewhat different considerations." [72] The principle of Universal jurisdiction was propounded first in respect of the crime of piracy. Since pirates were considered enemies of whole mankind, it was provided that any State could apprehend, try and punish pirates irrespective of the fact as to whether piracy was committed within or outside the jurisdiction of the State concerned. The law in this connection was codified in the Geneva Conference on the Law of the Sea, 1958. Article 19 of the Geneva Convention on the High Seas[73] provides that on the high seas or in any other place outside the jurisdiction of any State, every State may seize pirate ship or aircraft, or a ship taken by Piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Since 'piracy' as defined in Article 15 of the Convention includes illegal acts of violence, detention or any act of deprecation, etc. against aircraft also, a case can be made out that the Universal jurisdiction principle should apply to the crime of hijacking also. The features of jurisdiction incorporated under the Hague Convention on Hijacking, 1970 have brought the offence of hijacking very near to piracy under International Customary Law.[74] As rightly remarked by Michael Akehurst, "......... although hijacking is not piracy, there is doctrinal authority for the view that it is subject to universal jurisdiction nevertheless. Hijacking threatens International communications to the extent as piracy ; it is an attack on international order and injures the international community as a whole, which means that all States have legitimate interest in repressing it. The policy reasons which justify universal jurisdiction over piracy justify it equally in the case of hijacking. It might also be possible to justify Universal jurisdiction over hijacking on wider grounds ...."[75]

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[70] Provisions of Article 19(1) and (2) of the Geneva Convention, 1958 as referred above have been retained in Article 27(1) and (2) of the U.N. Convention on the Law of the Sea, 1982.

* See also for I.A.S. (1971), Q. No. 7 ; C.S.E. (1991) Q. 5(c).

[71] J.G. Starke, Introduction to International Law, Tenth Edition, (1989), p. 234.

[72] J.G. Starke, Introduction to International Law, Tenth Edition, (1989), pp. 234-235.

[73] See U.N. Doc., A/Con F. 53.

[74] See Sami Shubber. "Aircraft Hijacking Under the Hague Convention 1970—A New Regime", I.C.L.Q., Vol. XXII (October 1973), p. 687 at p. 725; see also B. Cheng and R.H.F. Austin "Air Law' in the Present State of International Law and other Essays, Edited by Prof. Maarten Bos (Kluwer Netherlands 1973), p. 183 at pp. 196-97.

As regards war crimes, it is now generally agreed that States have Universal jurisdiction to apprehend, arrest and try the persons accused of war crimes. Reference may be made here to *Eichmann* case[76] wherein it was argued on behalf of the accused that when the crimes (*i.e.*, war crimes of which he was accused) alleged were committed, Israel did not exist as a State and hence the Israeli court had no jurisdiction over the crimes committed by him. The Supreme Court of Israel rejected this argument and held: "...... it is the Universal Charter of the crimes in question which vests in every State the power to try those who participated in preparation of such crimes, and to punish them therefor .... " Further, "The abhorrent crimes .... are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations are grave offence against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal." Thus it may be concluded that the principle of Universal jurisdiction applies to international crimes of piracy and war crimes and to some extent also to aircraft hijacking. It may be suggested that it will be in the interest of international community to extend the principle of Universal jurisdiction to some other international crimes such as genocide, *apartheid* and international terrorism. An international Criminal Court should be established to try persons accused of the said international crimes.

International Servitudes.*—"International servitudes" or "State servitude is the term sometimes used to denote exceptional restrictions made by treaty or otherwise on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way to serve a certain purpose or interest of another State." [77] Further, "It should, however, be said that there has always been some doubt how far the classical concept of servitude is either apposite or acceptable. The notion of servitude is not a happy one politically. Moreover, its use nurtures the temptation to argue from the concept, even though this imports an analogy between territorial sovereignty and land ownership, which is outmoded." [78] Servitudes may be of following four types :[79]

(1) Positive.—The question of positive servitude arises when a state permits another state to do some work over a certain part of its territory.

(2) Negative.—The question of negative servitude arises when a state claims that other states should not work in its territory or a part of its territory in a particular way and if this claim is accepted by the state concerned.

(3) Military.—Military servitudes to fulfil the military requirements. To keep military or armed forces in another state is a type of military servitude. For example the state of Malta has given an island to Britain on lease and has allowed Britain to have its Military base on it. It may be termed as a type of military servitude.

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[75] Michael Akehurst, "Hijacking", I.J.I.L., Vol. 14 (1974), p. 81 at pp. 83-84.

[76] Eichmann v. Attorney-General of the Government of Israel, (1962) 136 I.L. 277. For facts of the case see, Chapter on "War Crimes".

* See also for I.A.S. (1959) Q. No. 3, : P.C.S. (1966), Q. No. 9 ; I.A.S. (1956) Q. No. 5 ; P.C.S. (1995), Q. No. 8(a).

[77] Oppenheim's International Law, note 2 at pp. 670-671.

[78] Ibid, at p. 671.

[79] L. Oppenheim's International Law, Vol. I, 8th Edn., pp. 540-541.

(4) Economic servitude.—Economic servitudes are common and they arise when one state allows another state certain commercial or transport facilities.

In Teen Bigha case or *Union of India* v. *Sukumar Sen Gupta*,[80] Sabyasachi Mukherji, C.J. of the Supreme Court observed :

> "Acceptance of servitude does not represent any negation of sovereignty. The term 'servitude' means nothing more than accepted restrictions and grant of servitude does not amount to cession." [81]

In 1974 an agreement was entered into between India and Bangladesh regarding the land boundary and related matters including transfer of enclaves. The Agreement provided that Indian enclaves in India should be exchanged expeditiously excepting the enclaves mentioned in para 14 without claim to compensation for the additional area, going to Bangladesh. Thereafter, an understanding was reached in October 1982 between the two Governments in connection with the "lease in perpetuity" in terms of item 14 of Article 1974 Agreement. Item 14 provided the following :

> "India will remain the southern half of South Berubari Union No. 12 and the adjacent enclaves, measuring an area 2.54 square miles approximately, and in exchange Bangladesh will retain the Dahagram and Angerpota enclave. India will *lease in perpetuity* to Bangladesh an area of approximately 178 metres × 65 metres near 'Tin Bigha' to connect Dahagram and Panbari Mouza (S. Patram) of Bangladesh."

Thus the agreement provided that the said land would be given on lease to Bangladesh to enable it to exercise sovereignty over Dahagram and Angerpota but India would continue to retain sovereignty over the said area and the rent for the lease area shall be Re. 1/- (Bangladesh Taka one) only per annum. The agreement added that Bangladesh shall not however be required to pay the said rent and the Government of India waived its right to charge such rent in respect of the leased area. Though the said agreement used the term "lease in perpetuity", the Supreme Court held that it was "servitude suffered by India in its territory, as known in international law". In the words of Sabyasachi Mukherji, C.J., who delivered the judgment of the Full Bench of the Supreme Court :

> "A fortiori, the said transaction did not amount to cession of the said area of Teen Bigha in favour of Bangladesh .... the rights intended to be conferred on Bangladesh under the said agreements would amount to what is known as 'servitude' in international law." [32]

Further, "the term 'servitude' means nothing more than accepted restrictions and grant of servitude does not amount to cession of territory." [83]

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[80] AIR 1990 S.C. 1692.

[81] Ibid, at pp. 1706-1707.

[82] AIR 1990 S.C. 1692 at p. 1706.

[83] Ibid at p. 1707.

CHAPTER 15

STATE TERRITORY

The concept of State Territory :

State territory has been defined as "portion of globe which is subjected to the sovereignty of a State. A State without a territory is not possible, although the necessary territory may be very small, as with Vatican city............A wandering tribe, although it has a government and is otherwise organised, is not a State until it has settled down in a territory of its own." [1] Further, "the importance of State territory is that it is the space within which the State exercises its supreme and normally exclusive authority. State territory is an object of international law, because that law recognises the supreme authority of, which authority must of course be exercised in accordance with international law............The exclusive domain of a State within its territory is basic to the international system and Article 2(4) of the U. N. Charter accordingly requires all members to refrain in their international relations from the threat or use of force against the territorial independence of any State." [2]

The territory of a State comprises not only its land mass but also its national waters (*i.e.*, rivers, lakes, bays, estuaries, other enclosed areas and territorial waters, and the air space above its land and water territory.* According to Article 8 (i) of the U. N. convention on the Law of the Sea, 1982, waters on the land ward side of the baseline of the territorial sea form part of internal waters of state.[3] But this is subject to Part IV of the convention which deals with Archipelagic states. Article 47 of Part IV of the convention provides that an archipelagic state[4] may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1". Further the length of such baselines shall not exceed 100 nautical miles, except that up to 3 percent of the total number of baselines enclosing any archipelago may exceed that length up to a maximum length of 125 nautical miles. Moreover, the drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago. According to Article 50, within its archipelagic waters, the archipelagic state may draw closing lines for the delimitation of internal waters, in accordance with Articles 9, 10 and 11.

It may be further noted that if a river flows into the sea the baseline shall be a straight line across the mouth of the river between points on the low waterline of its banks.[5] As regards bays, the convention provides that if the distance between the low-water marks of the natural enterance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters. Where the distance between the low-water marks of the natural enterance points of a bay exceeds 24 nautical miles a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.[6] As regards ports, the convention provides that for the purposes of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast off-share installations and artificial islands shall not be considered as permanent harbour works.[7]

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[1] Oppenheim's International Law, Vol. 1, 9th Edition, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U.K. Ltd. and Mrs. Tomoko Hudson, 1992 pp. 563-564.

[2] Ibid, at p. 564.

* See also for P.C.S. (1964), Q. No. 7 ; I.A.S (1978), Q. No. 5(a).

[3] See also Article 5 of the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958.

[4] That is a state constituted wholly by one or more archepelago and may include other Islands.

[5] Article 9 of the U. N. Convention on the Law of the Sea, 1982.

[6] Article 10.

Maritime Territory

Beyond inland waters, the sovereignty of a coastal state extents to maritime belt or territorial waters. Besides, territorial waters, the coastal state also exercises sovereign rights, for certain limited purposes, over continental shelf and exclusive economic Zone. The coastal state also exercises some control over contiguous zone. Each of these maritime Zones are critically discussed in a separate chapter entitled, "The Law of the Sea."

Modes of Acquiring Territory*.—Under international law, a state may acquire territory through any of the following modes—

(1) Occupation**.—"Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as it is at the time not under the sovereignty of another State." [8] Further, "It is therefore an *original* mode of acquisition in that the sovereignty is not derived from another State. Occupation can only take place by and for a State; it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance." [9] Thus, "occupation consists in establishing sovereignty over a territory not under the authority of any other State whether newly discovered or an unlikely case-abandoned by the State formerly in control." [10] In order to see whether a State has occupation over a particular territory it is seen whether there is effective occupation of that State over the territory concerned.[11] The two essential elements or facts that constitute an effective occupation—(i) Possession ; and (ii) Administration.[12] The State acquiring territory must formally announce that the territory has been taken possession of and that it intends to keep it under its sovereignty. After taking the territory into possession, the possessor must establish some kind of administration thereon which shows that the possession really governs the territory. This must be done within reasonable time after taking the territory into possession.[13] The leading case on the point is *Island of Palmas Arbitrations.*[14] As regards the sovereignty over the Island of Palmas there was a dispute between America and Netherlands. While America contended that it had acquired the Island under a treaty of 1898 with Spain, Netherlands contended that the Island was never under the occupation of Spain and as such Spain had no authority to transfer it to any other State. Both the States referred the matter to arbitration. Deciding in favour of Netherlands, the arbitration court held that for acquiring sovereignty over a particular territory effective occupation is necessary. That is to say, there should be occupation and contacts with the inhabitants of the territory should be established. Occupation involves two elements—(a) will to exercise sovereignty, and (b) an exhibition of actual authority. The Arbitrator observed that if the Islands was discovered by Spain, there was nothing on record to prove that the Spaniards ever went to the Island, occupied it and established contacts with the inhabitants of the Island and established some sorts of administration. On the other hand, Netherlands had not only established contacts with the people of Islands but also had exercised sovereignty over it since 1700. Thus according to the Court of Arbitration, the Island of Palmas was a part of Netherlands which it had incorporated in its territory through occupation.[15]

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[7] Article 11.

* See also for IAS (1971), Q. 8 ; IAS (1954), Q. 3 ; PCS (1976), Q. 4 ; PCS (1973), Q. 7 ; PCS (1971), Q. 8 ; PCS (1972), Q. 8 ; PCS (1981), Q. 8(b), PCS (1984), Q. 3(a).

** See also for PCS (1965), Q. 7 (c) ; IAS (1964), Q. 12 ; IAS (1959), Q. 6(c) ; C.S.E. (1993) Q. 6(a) ; C.S.E. (1995) Q. 5(b) ; UPPCS (2004) Q. 7(b).

[8] Oppenheim, International Law, Vol. 1, Eighth Edition, p. 555; See also Oppenheim's International Law, note 1, at p. 686.

[9] Oppenheim's International Law, ibid, at pp. 686-687.

[10] J. G. Starke, Introduction to International Law. Tenth Edition (1989) p. 160.

[11] See J.E.S. Fawcett, The Law of Nations (1968), p. 58.

[12] See Oppenheim's International Law, note 1, pp. 688-689.

[13] Ibid. at p. 689.

[14] Award of the Permanent Court of Arbitration (1929), Hudson cases p. 361; See also A.J.I.L., Vol. 22(1968), pp. 867-912.

In another case, namely, *Eastern Greenland Case,*[16] the Permanent Court of International Justice propounded the following two principles : (i) It is necessary for the occupation over the territory that there should be intention to establish sovereignty over the territory concerned; and (ii) There should be some actual exercise of such authority. The facts of this case are as follows : On July 10, 1931, Norway declared her sovereignty over the eastern part of Greenland through a Government decree. On the other hand, Denmark also claimed her Sovereignty over the said area during the Second World War and afterwards several allied powers had declared that the whole Greenland was a part of Denmark. They had also made it clear that they would not object to the sovereignty of Denmark over Greenland. The Foreign Minister of Norway had also accepted this fact and had made it clear that Norway would have no objection in this connection. By a majority of 12 against 2, the Permanent Court of International Justice decided that Eastern Greenland was under the sovereignty of Denmark. The Court held : "A claim to sovereignty based not upon some particular act or title such as treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist : the intention and will to act as Sovereign and some actual exercise or display of such authority. "Reference may also be made here to *Minquires and Ecrehos* (*France* v. *U.K.*) case[17] decided by the International Court of Justice. In this case, the court had to determine whether the sovereignty over the islets and rocks of the Minquires and Ecrehos groups respectively belonged to the U. K. or the French Republic. The Minquires and Ecrehos are two groups of islets situated between the British Island of Jersy and the coast of France. After the conquest of England by William, Duke of Normandy, in 1066, the Island formed part of the Union between England and Normandy which lasted until 1204, when Philip Augustus of France conquered Normandy but failed to occupy the Island. It was contended by the U. K. that the Islands then remained united with England and this situation was placed on a legal basis by subsequent treaties between the two countries. On the other hand, it was contended by France that the Minquires and Ecrehos were held by France after 1204, and referred to the same medieval treaties as those relied on by the U. K. In its judgment of 17 November, 1953, the Court observed that none of those treaties stated specifically which Island were held by the King of England or by the King of France. The Court added, what was of decisive importance was not indirect presumption based on matters in middle Ages, but *direct evidence of possession and the actual exercise of sovereignty.* After going through the evidence, the Court unanimously decided that "the sovereignty over the islets and rocks of the Ecrehos and Minquires groups in so far as these islets and rocks are capable of appropriation, belongs to the United Kingdom." Thus the two essential elements of occupation are : (i) direct evidence of possession; and (ii) actual exercise of sovereignty or eastablishment or some sort of administration exhibiting exercise of sovereignty.

Illustration.—(1) The State of Indonesia claims a fishing island in Indian Ocean as part of its territory because it is close to Indonesian shore. The island has been in Indian occupation for over a century though there is no permanent population on the island.* The claim of Indonesia is not justified because the island has been in Indian occupation. Mere proximity or contiguity is not a valid test to determine as to which State the territory in question belongs. In *Island of Palmas Arbitration* it was rightly observed : "The principle, of contiguity in regard to island, may not be out of place when it is a question of alloting them to one State rather than another, either by agreement between the parties or by a decision not necessarily based on law, but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation to between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this Principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results." Moreover, since the island has been in Indian occupation for over a century, India has acquired title over it by prescription also.[18]

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[15] It was held in the Palmas Island Arbitration that "Continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as title." The Arbitration Court finally concluded : "The Netherland's title of Sovereigty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore hold good...........The Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory."

[16] P.C.I.J. (1933), A/B No. 53 (3 W.C.R. 151).

[17] I.C.J. Reports 1953, p. 47.

* Asked in P.C.S. (1973), Q. No. 7; P.C.S. (1984) Q. 3(b).

(2) State *A* discovers a new island and displays its flag there. Thereafter State *B* occupies the island. After a few years State *A* desires to recover the island from State *B*.*

The facts of this problem resemble the facts of the case of *Island of Palmas Arbitration* which has been discussed above. For answer of this problem see the matter discussed above under the heading "occupation".

Arctic and Antarctic*.—Some States have asserted claims of sovereignty by occupation over some parts of Arctic and Antarctic on the basis of contiguity or proximity. As pointed out above for occupation two essential elements must be present—(i) direct evidence of possession ; and (ii) administration or actual exercise of sovereignty. Since such claims do not satisfy the above essential elements, they are not valid. They are also not valid under international law because effective occupation of these areas is not possible because of the extreme climate of these areas. Moreover, occupation of territory is not possible merely by declaration.

Argentina, Australia, Chile, France, New Zealad, Norway and U. K. are States who asserted claims over parts of Antarctic. U.S.A. and U.S.S.R. also asserted a basis for a claim to territorial sovereignty. They did not make any specific claim nor can it be made now in view of the Antarctic Treaty which prohibits new claims.

The Antarctic Treaty.—The Antarctic Treaty of 1 December, 1959 established a special regime over the Antarctic area south of 60^0 lattitude. The original State parties to the treaty are : Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom and the United States. The main provisions of the Treaty are :

(1) During the continuance of the treaty existing sovereignty claims shall remain in a state of suspense. No new claim shall be asserted. This provision shall not affect previously asserted rights and that nothing done the treaty regime shall either further or prejudice the existing claims.[19]

(2) The Antarctic shall be used for peaceful purposes only. The treaty forbids the establishment of military basis and fortifications and the testing of any type of weapons.[20]

(3) Nuclear explosions and the disposal of radio-active waste material are prohibited.[21]

(4) The treaty establishes freedom of Scientific investigation.

(5) There shall be periodic consultative meetings in which recommendations may be made to governments for taking measures in furtherance of the objectives of the treaty.[22]

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[18] See law relating to prescription discussed below.

* C.S.E. (1994) Q. 7(b).

** See also for P.C.S. (1984) Q. 3(a); P.C.S. (1973) Q. 7.

[19] Article 4.

[20] Article 1.

[21] Article 5.

[22] Article 9.

(6) The Treaty is of indefinite duration but is open to review after 23 June, 1991.[23]

A convention on the Regulation of Antarctic Mineral Resource Activities was concluded at Wellington in 1988. Some States, however, opposed it, mainly on environmental grounds, to any mineral resource activity. This movement was led by Australia and France. Consequently, an agreement was reached in October 1991 at Madrid banning for a period of 50 years any mineral resource activity other than scientific research.

Distinction between Occupation and Subjugation.—The distinction between occupation and subjugation is that in subjugation, the State subjugated was previously under the sovereignty of another country whereas in the case of occupation no country exercised sovereignty over it previously.

(2) *Prescription**.—Yet another mode of acquiring territory is prescription. If a State exercises control and establishes occupation over a particular territory for a long time and thus exercises *de facto* sovereignty over it, then the territory concerned becomes a part of that State. "Title by prescription (*i.e.*, acquisitive prescription) is the result of the peaceable exercise of *de facto* sovereignty for a very long period over a territory subject to the sovereignty of another, and this may be as the consequence of immemorial exercise of such sovereignty (*i.e.*, for such period of time as in effect to extinguish memories of the exercise of sovereignty by a predecessor) or as the result of lengthy adverse possession only." [24] Some jurists are of the view that international law does not recognize acquiring of territory through prescription. But some jurists are of the view that there are some precedents under international law, for example the case of *Island of Palmas Arbitration.* However, international law does not prescribe any fixed period for prescription. It may, therefore, be concluded that if any State exercises control over particular territory peacefully for a long time and establishes its sovereignty over it, then the territory concerned becomes a part of it. So far as the question of the period is concerned, the treaty of Washington, 1871 and British Gyanna Arbitration, 1899, fixed it for 20 years. This is however not a generally agreed period of acquiring of territory through prescription.[25] A State may acquire some territory by prescription only when some conditions are fulfiled. These conditions are : (i) A State may acquire some territory by prescription only when it has not accepted the sovereignty of any other States over the said territory; (ii) Possession should be peaceful and uninterrupted; (iii) Possession should be in public; and (iv) Possession should be for a definite period.[26] It may, however, be noted that in the presence of some treaty or convention, territory cannot be acquired by prescription through administrative acts only. *Frontier Lands case* (*Belgium-Netherlands*)[27] *and case Concerning the Temple of Preah Vihar* (*Merits*) (*Cambodia* v. *Thailand*)[28] deserve a special mention in this connection.

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[23] Article 12.

* See also for I.A.S (1970), Q. No. 10(c).

[24] J. G. Starke, Introduction to International Law. Tenth Edition (1989) p. 168.

[25] According to D.H.N. Johnson, "Acquisitive prescription" is the means by which, under international law, legal recognition is given to the right of a State to exercise sovereignty over land or sea territory in cases where that State has, in fact, exercised its authority in a continuous uniterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected States (in the case of land territory the previous possessor, in the case of sea territory neighbouring and other States whose maritime interests are affected) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected States have failed within a reasonable time to refer the matter to the appropriate international organisation or international tribunal or exceptionally in cases where no such action was possible have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic interests. The length of time required for a prescriptive title on the one hand and the exent of the action required to prevent the establishment of a prescriptive title on the other hand, are invariably matters of fact to be decided by the international tribunal before which the matter is eventually brought for the adjudication." "Acquisitive Prescription in International law", BYBIL, Vol. XXVII (1950), p. 332 at pp. 353-354.

[26] See ibid, pp. 344-347

[27] I.C.J. Rep. (1959), p. 209.

[28] I.C.J. Rep. (1962), p. 6.

It may also be noted that mere silence of a state in respect of a territory will not deprive it of its claim. In the *Frontier Lands case* (*Belgium-Netherlands*)[29] the International Court of Justice held that mere administrative and routine acts done by a state officials (in this case Netherlands) in a particular area cannot deprive the legal title of other State (*i.e.*, Belgium) to the said area under a convention. In this case, the dispute was relating to sovereignty over two plots of land situated in an area where the Belgo-Dutch frontier presented certain unusual features. It was contended by Netherlands that the provision by which the two plots were attributed was vitiated by a mistake, and that Netherlands' sovereignty over the said plots had been established by the exercise of various acts of sovereignty since 1843. After considering the evidence adduced the court held that sovereignty over the disputed plots belonged to Belgium.

Illustration.—A range of hills separates the territories of two states A and B. There is a boundary dispute between A and B, A contending that the watershed has been traditionally the boundary, and B that the boundary is the line up to which each has been actually exercising sovereign authority, which differs from the watershed. Both sides negotiate and fail to agree. B finds a temple of great acheological interest on the A's side of the watershed, but within the boundary it has been claiming, and carries excavations for ten years. A comes to know about the temple and institutes proceedings before the International Court of Justice for a declaration of its title to the temple area.*

The excavation of a temple of archeological interest, in A's side shows that the area is under the sovereignty of A. Excavations for ten years etc. are simply administrative acts which cannot deprive A's claim of soverignty over the area in the absence of signs of effective occupation. The facts of the above problem resemble those of the *case concerning the temple of Preah Vihear* (*Cambodia* v. *Thailand.*)[30] In this case Cambodia contended that Thailand occupied a piece of its territory surrounding the temple of Preah Vihear, a place of pilgrimage and worship for cambodians. Cambodia therefore requested the court to declare that territorial sovereignty over the temple belong to it and Thailand was under obligations to withdraw the armed detachments stationed there since 1954. The Court held that the temple was situated on Cambodian territory and that Thailand was under obligation to withdraw any military or police force stationed there and to restore any objects removed from the ruins since 1954. The court held that merely the acts of local administrative authorities in a certain disputed area shall not negative a consistent attitude of Thailand to regards valid a certain frontier line according to which the sovereignty of Cambodia.

Distinction between Occupation and Prescription**—As noted above, occupation of a territory takes place when a State intentionally acquires sovereignty over such territory which is at that time not under the sovereignty of any other State Occupation involves two elements—(a) will to exercise sovereignty, and (b) show or exhibition of actual authority. On the other hand, title by prescription is acquired by peaceable exercise of *de facto* sovereignty for a long period. As pointed out by Max Huber in *Island of Palmas* case (*The Netherlands* v. *U.S.*)[31] condition of acquisition of sovereignty by prescription i.e. by way of continuous and peaceful display of State authority is that the display of such authority must be open and public. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would not suffice. However, in the absence of an explicit rule of law, there is no obligation to notify to other States. As pointed out in *Western Sahara case*,[32] a cardinal condition of a valid "occupation" is that the territory should be *terra nullius* a territory belonging to no one at the time the act alleged to constitute the "occupation". There is no such condition for acquiring of territory by prescription. In case of prescription the territory to be acquired by prescription may be subject to the sovereignty of another State.

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[29] I.C.J. Rep. (1959), p. 209.

* (C.S.E. (1980) Q. No. 9(a).

[30] I.C.J. Rep. (1962) p. 6.

** See also for C.S.E. (1994) Q. 7(b)

[31] (1928) 2 RIAA 829.

[32] 1975 ICJ Rep. 12 ; See also Legal Status of Eastern Greenland case, PCIJ, Series A/B, No. 53, pp. 44f and 63f.

(3) *Accretion.*—A territory may also be acquired through Accretion, "Title by accretion occurs when new territory is added, mainly through natural causes.........to territory already under the sovereignty of the acquiring State. No formal act or assertion of title is necessary." [33] Thus Accretion "is the name for the increase of land through new formations" which may be artificial or natural. If they are as a result of the human work, they are artificial. On the other hand, if they are as a result of the operation of nature, they are natural. Further, it is a customary rule of international law that "enlargement of territory, if any, created through new formations, takes *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty." [34]

(4) *Cession** .—Through cession also, a territory may be acquired. "The cession of a territory may be voluntary or it may be under compulsion as a result of war conducted successfully by the State to which the territory is ceded.[35] Cession shall be considered valid only when the sovereignty of a territory is transferred to another State. Reference may be made here to *In re Berubari Union and Exchange of Enclaves*[36] wherein the Supreme Court observed, ".........it is an essential attribute of sovereignty that a sovereign State can acquire foreign territory and can, in case of necessity, cede a part of its territory in favour of a sovereign State, and this can be done in exercise of its treaty-making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner State in favour of another State......This power, it may be added, is of course subject to the limitations which the Constitution of the State may either expressly or by necessary implication impose in that behalf.[37] This case related to the exchange of certain territories. The Division of Berubari Union No. 12, and delimitation of the boundaries between India and the then East Bengal in pursuance of an Agreement entered into between India and Pakistan on 10th September, 1958. The President referred certain questions for the opinion of the Supreme Court under Article 143 (1) of the Constitution because some doubts had arisen as to whether the implementation of the Agreement relating to Berubari Union No. 12 and the exchange of Enclaves required any legislative action either by a suitable law of Parliament relatable to Article 3 of the Constitution of India or by amendment of the Constitution relatable to Article 368. The Supreme Court held, "...the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan, and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Article 368......so it follows that acting under Article 368, Parliament may make law to give effect to and implement, the Agreement in question covering the cession of a part of Berubari Union No. 12 as well as some of the Cooch-Behar Enclaves which by exchange are given to Pakistan. Parliament may, however, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed the Parliament may be competent

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[33] Starke, see supra note 24 at p. 167. In the words of another writer, "A State acquires territory by accretion when new land is formed within its existing territorial limits : the Sea recedes, a river dries up, an island appears within the territorial sea. These acquisitions seldom result in either significant additions of territory or in controvarsy." Edward Collins, International Law in a Changing World (1969), p. 131.

[34] Oppenheim's International Law, note 1, at p. 696.

* IAS (2001) Q. 6(b).

[35] Starke, note 24, at p. 167; See also Dr. Nagendra Singh, India and International Law (S. Chand & Co., Delhi, 1972), pp. 29-30.

[36] A.I.R. 1960 S.C. 845.

[37] Ibid, at pp. 856-57.

to make a law under the amended Article 3 to implement the Agreement in question on the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the Agreement."[38]

In the case of *Sugandha Roy* v. *Union of India and others*[39] the question arose whether giving of "Tin Bigha" area to Bangladesh on "lease in perpetuity" under the Agreement of 1974 and 1982 between India and Bangladesh amounted to cession or not ? As regards exchange of enclaves, Paragraph 14 of Article 1 of the Agreement of 1974 provided, "India will retain the southern half of South Berubary Union No. 12 and the adjacent enclaves. ....and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. *India will lease in perpetuity* to Bangladesh an area of approximately......near "Tin Bigha......" In October, 1982 an understanding between the Governments of India and Bangladesh was reached in connection with the so-called "lease in prepetuity" in terms of item 14 of Art. 1 of the 1974 Agreement. It was further provided that it will be an integral part of the 1974 Agreement. The Agreement of 1982 provided, *inter alia* "sovereignty over the leased area shall continue to vest in India further "......Bangladesh shall have undisturbed possession and use of the area leased to her in perpetuity."

Being aggrieved by the said 1974 and 1982 Agreements, the present writ petition was filed. The Calcutta High Court held; "......the implementation of these two Agreements would not involve cession of any territory to Bangladesh in respect of Tin Bigha.........not merely that no exclusive possession of this area is sought to be transferred to Bangladesh, but no legal possession at all is being transferred. There is no question of transfer of sovereignty wholly or partially, in respect of the said area. What has merely been done is to enable the Government of Bangladesh and its nationals to exercise certain rights in respect of the said area which otherwise they would not have been entitled to do......implementation of these two Agreements, so far as 'Tin Bigha is concerned' does not amount to cession of the said territory or transfer of sovereignty in respect of the same and does not require any constitutional Amendment. In spite of such Agreements India would still retain its sovereignty, ownership and control of Tin Bigha."[40] Accordingly the petition was dismissed.

There was an appeal before the Division Bench of the High Court. The Division Bench in judgment under appeal affirmed the decision by the learned single Judge. Against this judgment, appeal by special leave was made in the Supreme Court. In *Union of India* v. *Sukumar Sengupta*[41] i.e., the said appeal by special leave, the Supreme Court held :

> "Cession as understood in international law would result in an actual and physical transfer of the said area to Bangladesh following which Bangladesh would have the exclusive right to treat the said transferred territory as part of its own territory and exercise full control, dominion and right over the same. This is not the position or the situation which is contemplated under the agreements."[42]
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> According to the Court, "A fortiori, the said transaction did not amount to cession of the said area of Teen Bigha in favour of Bangladesh."[43]
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> Further, "...........the complexities of modern developed societies need peaceful co-existence, if the world is to survive. Amicable and peaceful settlement of boundary disputes are in the interests of the international community. The older and absolute ideas of sovereignty and independence has thus necessarily to be modified in the dawn of the 21st century. A perpetual right of passage and other incidental rights given to Bangladesh for the limited purpose for exercising the sovereignty over

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[38] In re Berubari Union and Exchange of Enclavesat, AIR 1960 SC 845 at p. 861.

[39] A.I.R. 1983 Cal. 468.

[40] Ibid, at p. 492.

[41] AIR 1990 SC 1692; the facts of this case have been referred in earlier chapter.

[42] Ibid, at p. 1706.

[43] Ibid.

her own two enclaves within the territory of India and/or if imposed restrictions on itself by India does not tantamount to transfer of interest in land."[44]

As regards the effect of cession on property belonging to the inhabitants, Chief Justice John Marshall of the U. S. Supreme Court observed : The modern usage of nations, which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled......A cession of territory is never understood to be a cession of the property belonging to its inhabitants......The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property.[45] The same view was followed by the Supreme Court in *Union of India* v. *Sudhansu Mozumdar.*[46]The correct position has been summed up by an Indian author[47] in the following words : "The Court's exposition of cession of territory is in accord with the principles of international law in so far as the power to cede territory is an essential attribute of Sovereignty, and as cession involves transfer of soveriegnty from one State to another. However, the Court's general ruling that in a cession there is no transfer of ownership or right of possession in the properties of the inhabitants of the ceded territory, cannot be accepted without a reservation. Although treaties of cession distinguish between the *imperium* of a State in respect of its territory, and the *dominium* held or owned by individuals, it is fairly well established under international law that a treaty of cession transfers only *imperium* and not *dominium* 'unless the latter is expressly or by implication included.[48] If therefore, follows that in the absence of any contrary indication in the treaty, a cession of territory by treaty cannot be held to be a transfer of the property belonging to its inhabitants."

(5) *Annexation.*—When a State conquers another State the conquering State after conquest establishes its sovereignty over the conquered State. It may, however, be noted that only conquest does not amount to establishment of sovereignty over the territory concerned. It is necessary for the establishment of sovereignty that conquering State should occupy effectively the territory concerned. This mode has been greatly affected by the charter of the U. N. under which member States cannot now acquire territories of each other by annexation. Even use of force or the threat thereof in the international relations against the territorial independence of any State or in any other manner inconsistent with the purposes of the U. N. is prohibited under Article 2 (4) of the U. N. Charter.

(6) *Lease.*—The territory may also be acquired through lease. A State may give its territory to another State under lease for a certain period. For the said certain period some rights of sovereignty are transferred to another State through lease although complete sovereignty over the said territory is not transferred. An example of this is the lease of an Island of Malta to Britain for some years. Recently there was a conflict between Malta and Britain in this connection. Malta wanted that Britain should enhance lease money. Thus territory may also be acquired through lease.

In the *Panama Canal's case,* a lease was granted to the United States in perpetuity. The United States was given the occupation and control of the area concerned over and below the surface for the construction and protection of the canal. Moreover, the United States was allowed under the lease to exercise over the canal zone all rights, power and authority which it would possess if it were the sovereign of the territory. This case was referred to by the Supreme Court in *Union of India* v. *Sukumar Sengupta*[49] which related to Agreements of 1974 and 1982 by which India purported to give Teen Bigha to Bangladesh on "lease in perpetuity". Though the said agreements used the term "lease" the Supreme Court held that the concessions given to Bangladesh over the said area amounted to "servitude." [50]

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[44] Union of India v. Sukumar Sengupta, AIR 1990 SC 1692 at pp. 1707-1708.

[45] United States v. Perchmann, (1963) 32 U.S. 51 at pp. 61-87; see also Shapleigh v. Mier, (1937) 292 U.S. 468 at p. 470, per Cardozo, J.; In its advisory opinion of September 10, 1923, on Certain Questions Relating to Settlers of German origin in the territory ceded by Germany to Poland, the Permanent Court of International Justice observed : "Private rights acquired under existing law do not cease on a change of sovereignty" , see also Virendra Singh v. State of Uttar Pradesh, A.I.R. 1954 S.C. 447 at pp. 450-451.

[46] A.I.R. 1971 S.C. 1594 at p. 1599.

[47] V.S. Mani, "The Berubari cases, From the Perspective of International Law", A.J.I.L. Vol. 11 (1971), p. 655 at pp. 659-660.

[48] See Lord McNair, The Law of Treaties (Oxford, 1961), p. 331, citing the Perchman's case (1833), 7 Peters, p. 51, pp. 86-88 (Judgment by Chief Justice Marshall), with approval.

(7) *Pledge.*—Sometimes there arise certain circumstances under which a State becomes compelled to pledge a part of its territory in return of some amount of money for which it is in dire need. In this case also, a part of sovereignty over the territory concerned is transferred. For example in 1768, the Republic of Geneo had pledged the Island of Corsica to France.

(8) *Plebiscite.*—Some writers are of the view that through plebiscite also new territory may be acquired. Although there are no definite rules in regard to acquiring of territory through plebiscite yet modern writers have expressed the view that through plebiscite also, a new territory may be acquired. A recent example of acquiring territory through plebiscite is that of West Irian. Both Netherlands and Indonesia claimed the territory of West Irian. Through the efforts of United Nations, it was decided that a plebiscite in the West Irian should be held and the people of West Irian should be given the freedom to decide whether they would like to merge with Netherlands or Indonesia. Consequently, plebiscite was held under the auspices of United Nations and the inhabitants of West Irian decided to merge with Indonesia. Hence the territory of West Irian is now a part of Indonesia.

Example of Kashmir.—In case of Kashmir, Pakistan claimed that there should be plebiscite and the people of Jammu and Kashmir should be given the freedom to decide whether they would like to merge with India or Pakistan. In Kashmir, the Government of India have taken the position that since the merger of Jammu and Kashmir with India several elections have taken place and the people have voted the question of plebiscite no longer arises. India claims, and rightly too, that Jammu and Kashmir is an integral part of India. It may, however, be noted that in the beginning India had agreed to hold plebiscitie in Jammu and Kashmir. But the position has changed since then, and in the changed circumstances it has become quite obvious that people of Jammu and Kashmir have opted to be within the Union of India and that is why the Government of India have completely rejected the claim of Pakistan to hold plebiscite in Jammu and Kashmir. Some jurists have expressed the view that the principle of self-determination should be applied in this case. But "the principle (*i.e.,* the principle of self-determination) must be deemed to have application in the process of decolonisation alone. It could not be applied to established States in their territorial disputes. No such State is likely to espouse this principle and invite self-destruction. For what else would it be but self-destruction if India accedes to the demands of the Nagas, the Mizos and others or if Iraq concedes to the demands of the Kurdish claim, or if the U. S. allows extremist Black panther demands for a separate Negroland.[51] Thus, support for the principle of self-determination has been obligatory on Member States cannot be found in Article 1 of the U. N. Charter.[52]

(9) Acquisition of territorial sovereignty by newly emerged State.—Yet another method of acquiring of territorial sovereignty is that of a newly emerged State. This is particularly true of those States who were previously the colonies of some States and later on were liberated. After liberation, they acquired territorial sovereignty over that territory.

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[49] AIR 1990 SC 1962.

[50] Ibid, at p. 1706.

[51] Rahmatullah Khan, "The U. N. Handling of the Kashmir Problem", in Asian States and the Development of Universal International Law, Edited by R. P. Anand (1972), p. 108 at p. 118; see also S. K. Kapoor, "The Principle of Self-Determination Under International Law and the Indian Practice," Lawyer, Vol. VIII-11 (1976), p. 168 at pp. 174-175.

[52] Ibid, at p. 115.

In this connection the difficulty is that the territory which was previously a part of another State can acquire sovereignty only after becoming independent. "This abstract difficulty can be resolved by treating the people of the territory, as such, provided that have a sufficient degree of political maturity, as having or acquired sovereignty pending attainment of Statehood. Upon the foundation of the new State, there is simply a crystalization of the situation, territorial sovereignty of the people then becoming that of the State itself." [53]

Modes of Loss of Territory*.—Territory may be lost through the following modes :

(a) *Cession.*—As pointed out earlier, a territory may be acquired through cession. As one State acquires the territory through cession, the other State loses it.

(b) *Operation of Nature.*—Sometimes a State may lose its territory through the operation of nature. For example by earthquake a coast of the sea or an island may altogether disappear. Similarly, the change in the course of rivers may also result in the loss of territory.

(c) *Subjugation.*—As a State may acquire territory through annexation, the other State may lose it through subjugation. But like annexation this is no more a valid mode. For example, Kuwait lost its territory through subjugation by Iraq who declared it to be Iraq's 19th province. The Security Council not only disapproved of Iraq's action but passed a resolution asking all member States of the U. N. not to recognise it. Subsequently, Security Council took action against Iraq under Chapter VII allowing States cooperating with Kuwait to use all means to free Kuwait. Thus Iraq was forced to withdraw from Kurwait.

(d) *Prescription.*—When a State occupies a particular territory for a long period then it is entitled to acquire it through prescription. On the contrary, the State which had occupation over it earlier may lose it.

(e) *Revolt.*—When a new State takes birth in consequence of revolution or revolt, then it may be said that the former State has lost its territory. For example in 1579, through revolution Spain lost Netherland. Similarly in 1776 through the War of Independence of America, Great Britain lost the territory of America. Recently, Pakistan lost her territory of East Pakistan as people of the said territory revolted and formed a new State known as Bangladesh.

(f) *Dereliction.*—The territory may also be lost by dereliction which means by renunciation of a territory. That is to say, a State may slacken its occupation over a territory and in the course of time may lose not only the occupation over it but also sovereignty. Such examples occur very seldom in history.

(g) *Granting of Independence to a colony by the Imperialist State.*—Yet another mode of losing territory is granting of independence to a colony. This newly emerged State acquires territorial sovereignty and the State which grants independence loses that territory. So will be the case if the colony itself acquires independence.

International Rivers.**—Rivers which run through several States are described as 'non-national' rivers. Such rivers are owned by more than one State : each State owns that part of the river which runs through its territory.[54] Rivers which are navigable from the open sea and pass through several States, between their sources and mouths, are called *'International rivers'*. They are termed international "because freedom of navigation in time of peace on all such rivers in Europe and on many of them outside Europe for merchantmen of all nationals is recognised by conventional international law.[55] As regards the utilization of flow of waters of non-national and international rivers,

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[53] Starke, supra 24 at p. 169.

* See also for P.C.S. (1981), Q. No. 8(b).

** See also for P.C.S. (1977) Q. No. 9(c); C.S.E. (1987) Q. 8(b).

[54] L. Oppenheim, International Law, Vol. 1, Eighth Edition, pp. 464-465; In the Ninth Edition of Oppenheim's International Law (note 1, at p. 575) such rivers are described as pluri-national (or multinational) rivers.

[55] Ibid, at p. 461. It is significant to note that this rule does not apply to all rivers outside Europe for Oppenheim uses the word "many".

Oppenheim has pointed out that "it is not within the arbitrary power of one of the riparian States for it is a rule of International Law that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either cause danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part.[56] But this does not seem to be a correct statement of law. As rightly pointed out by Ian Brownlie : "For the most part the legal regime of rivers, creating rights for other riparian and non-riparian States and limiting the exercise of territorial jurisdiction of individual riparians, *depends on treaty.* Particularisation of the regimes for various river systems would seem to be inevitable since each system has its own character and technical problems." [57]

On the basis of treaty-practice sometimes broad principles of International rivers have come into existence,[58] but their precise formulation are yet not settled.[59] Thus, "In this field the lawyer has to avoid the temptation to choose rough principles of equity governing relations between riparians reflected in some treaty provisions and the work of jurists and learned bodies, as rules of customary law.[60] Starke also subscribes to this view and has rightly pointed out : "So far as the injurious use of river waters, or the diversion of and interference with the free flow of rivers is concerned, International Law has not advanced to the stage of settled rules in either domain." [61] The utmost that can be said in this connection is that the riparian State should not make any such use of the river water under its control as may cause grievous or irreparable damage of an economic character to other riparian States.[62] Reference may also be made here to the *Lake Lanoux Arbitration* (*France-Spain*)[63] wherein the Tribunal, held that "there was no duty on a riparian State under customary International Law to consult, or obtain the prior agreement of a co-riparian as a condition precedent of its right to begin new river work, although in carrying out the project it must take into account, in a reasonable manner, the interests of co-riparian." [64] Thus essentially "such problems of the utilization of rivers by one State to the injury of other States are a matter for treaty arrangement of the settlement by arbitration or conciliation in the most equitable manner." [65]

Reference may also be made here to the Indus Waters Agreement signed on 19th September, 1960 by India, Pakistan, and the International Bank for Reconstruction and Development for regulating the use of the Waters of Indus, Chenab and Jhelum rivers. This further confirms that in the absence of a treaty or agreement there can be no definite obligation of a riparian State in respect of the use of waters of a river. Reference may also be made here to Article 3 of the Charter of Economic Rights and Duties which provides : "In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others." * It will be desirable to refer here briefly the background and the controversy that arose before this article was adopted. "Article 3, the subject-matter of which was first suggested by Argentina, became a bone of contention primarily between developing countries............Afghanistan, Bolivia, Brazil, Colombia, Costa Rica, Ethiopia, Nicaragua and Paraguay voted against this article, and 29 countries including China, France, the United Kingdom, Japan, the Federal Republic of Germany, Guyana, Bhutan and Nepal abstained,..................It has not established what the consultations should relate to, or what their scope should be. It would, in their opinion, give to certain States the right to delay or to dilate or even to veto the utilization by a third Sate of its own natural resources. They considered that Article 3 was not in keeping with the principle of the permanent sovereignty of States over their natural resources and the right of every State to the free and sovereign use of those resources which could brook no restrictions.[66] Further, "This article was considered primarily in the context of river resources though other resources, such as, icthyological and maritime wealth were also referred to Brazil. Paraguay and Bolivia, in particular, drew attention to the Declaration of Asuncion on the Use of International Rivers of 3rd June, 1971, to which Argentina, Bolivia, Paraguay and Uruguay have acceded to, and said that they could have accepted a formulation similar to the one contained in that Declaration which stated : *'In Contiguous rivers,* sovereignty is shared and any exploitation of shared their waters must be preceded by a bilateral agreement between the riparian States. *'In rivers or successive course* as sovereignty is not shared, each State may utilize its waters in accordance with its needs provided no significant change is caused to another State in the Basin.' Despite the apprehension expressed to the contrary, no delegation said that Article 3 should be interpreted as implying that any State had a right of veto.[67] Thus, there was disagreement about the content and scope of Article 3. The provisions contained in Article 3 are not binding for a number of reasons. In the first place, the Charter of Economic Rights and Duties was adopted by the General Assembly on 12 December, 1974 through resolution 3281 (XXIX). A General Assembly resolution in itself, is not binding. Secondly, there is disagreement in respect of the content, meaning and scope of Article 3. Last but not the least, provisions of Article 3 were not adopted unanimously. But as remarked by the Australian representative, while speaking on the significance of the Economic Charter : "The Charter might have a significant effect on the development of international economic law ; while it could not itself create law, it might influence the *opinio juris* and decisions by States on what their practice should be in the light of international law.[68]

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[56] Ibid, at pp. 474-475.

[57] Ian Brownlie, Principles of Public International Law, Second Edition (Clarendon Press, Oxford, 1973), pp. 264-65.

[58] See Arbitration between France and Spain concerning waters of Lake Lanoux [A.J.I.L. (1959), p. 156].

[59] J. I. Brierly, The Law of Nations, Sixth Edition, p. 231.

[60] Ian Brownlie, Principles of Public International Law, Second Edition, Clarendon Press, Oxford, (1973), p. 265.

[61] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 194, see also Hyde, International Law, Second Edition (1974), Vol. 1, pp. 565 et seq.

[62] Ibid.

[63] See A.J.I.L., No. 53, (1959), pp. 156-171.

[64] Starke, note 61, p. 194.

[65] Ibid, at pp. 194-195.

* See also for I.A.S. (1977), Q. No. 5.

The Farakka issue*

India has built Farakka Barrage on river Ganges to save the Calcutta port and to improve the lot of millions of people living in Eastern India, Bangladesh demanded uninterrupted flow of Ganga waters all the year round and insisted on India obtaining prior permission before utilizing or diverting any Ganga waters in its own territory. Bangladesh alleged that India made "unilateral withdrawal of water". Instead of settling the issue on bilateral basis, the Bangladesh Government sought to internationalise the issue. India's stand to the issue was that the issue should be settled bilaterally between Bangladesh and India. Its reference to the U. N. would delay the solution of the issue. The problem raised by Bangladesh was of a technical nature involving the fate of the economy of the whole of eastern India. Stressing the importance of the Farakka Barrage to eastern India, the Indian representative said, if Calcutta Port was further silted, the economy of the entire eastern region would be in peril. Further, while Bangladesh needs water only for irrigation, India needs increased flow of Ganga water to save Calcutta port from being choked by silt. On the other hand, Bangladesh contended that Ganga is an international river and demanded equitable sharing of its waters. India refuted this contention by pointing out that for about 90 per cent of course, the river flows through Indian territory and therefore, it cannot be termed as an international river. However, India expressed its willingness to consider sympathetically Bangladesh's requirements and to accommodate them as far as possible. India and Bangladesh agreed to discuss the issue on December, 6, 1976 at Dacca. The Indian team was led by Mr. Jagjiwan Ram the then Minister for Agriculture and Irrigation.

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[66] P. Chandrasekhra Rao, "Charter of Economic Rights and Duties of States", I.J.I.L., Vol. 15 (1975), p. 351 at p. 362.

[67] Ibid, at pp. 362-363.

[68] Adopted from Ibid, at p. 370, note 76.

* See also for I.A.S. (1977) Q. 5 See also matter discussed above under the heading "International Rivers."

On the basis of above discussion it is doubtful whether river Ganges can be termed as an international river, particularly in view of the fact that for about 90 per cent of course, the river flows through Indian territory. Even if river Ganges is regarded a non-national or 'International river', India was under no obligation to obtain prior consent of Bangladesh for any use of diversion of its waters, although as pointed out by India, Bangladesh's allegation of 'unilateral upstream diversion' of waters was false and baseless. Hence India has not violated any principles of International Law. The utmost that can be said is that India should take into consideration the reasonable requirements of Bangladesh. Even for this India cannot be held guilty because time and again India has expressed its willingness to consider sympathetically the reasonable requirements of Bangladesh. It is an issue to be resolved bilaterally. It may be noted that ultimately good sense prevailed on Bangladesh as it agreed to hold talks with India for which December 6, 1976 was fixed.

As regards Article 3 of the Charter of Economic Rights and Duties, it has been pointed out earlier that it is not binding. Nevertheless, India's conduct is not even against it. Although India is not under obligation to obtain prior consent of Bangladesh yet she has time and again expressed her desire to cooperate "in order to achieve optimum use of such recourses without causing damage to the legitimate interest" of Bangladesh. India not only offered to co-operate with Bangladesh but in fact exhibited generosity. This is evident from the agreement entered into between India and Bangladesh on 30 September, 1977. India went a long way to accommodate the interest of Bangladesh. Some members of the Parliament criticised the agreement as sellout of national interest by India.

Conclusion.—The Farakka issue was a matter which could best be decided bilaterally between India and Pakistan. Talks were held in December, 1976, but with no success. A significant headway was made by the delegations of two Sates during the talks held at Dacca in April, 1977. Since then several rounds of talks were held between the two delegations both at New Delhi and Dacca. Finally, India and Bangladesh signed a comprehensive short and long term agreement on September 30, 1977. The agreement provides for withdrawal by India and Bangladesh during the leanest period—from April 21 to April 30—at the rate of 20,800 cusecs and 34,700 cusecs working out at 37.5 per cent and 62.5 per cent respectively of the minimum flow of 55.500 cusecs at Farakka in the lean season. After the leanest 10-day period, India's share will increase at a higher rate to get as closer to 40,000 cusecs as quickly as possible within the lean season. The rate of withdrawal by India during these periods will increase roughly from 2 per cent to 2.5 per cent. On a long term basis the two States have committed themselves to augment the flow of the Ganga. The Joint Rivers Commission will examine proposals made by either to assess their economic feasibility. These recommendations will then be submitted to the two Governments for their consideration within a five-year time frame. A remarkable feature of the agreement is the decision of both the countries to treat the issue and the implementation of the agreement as a bilateral one. The differences that might arise in the interpretation of the agreement are also to be resolved bilaterally.

Inter-Oceanic Canals

By inter-oceanic canals we mean the canals which connect the international waterways and are available for the shipping of all States. Generally the use and control of such canals are governed by international treaties. The more important of the inter-oceanic canals are discussed below :

Suez Canal.—Suez Canal is the most famous among the inter-oceanic canals. In the beginning, it was under the control of a French Company. Later on it came under the control of British Government. In 1954, Britain and Egypt concluded a treaty whereby Britain withdrew its forces from Suez Canal. The next important event took place in 1956 when Suez Canal was nationalised by Egypt. Egypt contended that it was done to derive money to build Aswan Dam. Thus the Government of Egypt took over complete control of the Inter-occanic canal popularly known as Suez Canal. France, Britain, Israel, etc., reacted strongly against this action of Egypt. They jointly made an armed intervention in Egypt in order to prevent Egypt from nationalising the Suez Canal. The problem was resolved through efforts of Russia, Security Council and General Assembly. Subsequently, an agreement was concluded whereby it was agreed that Suez Canal would remain free from international politics and all the States shall have the right of shipping over this canal. However, the State of Egypt shall be entitled to realise taxes for its use. During the Arab-Israeli conflict, the canal became unsafe for navigation and was closed. On June 6, 1975, the Suez Canal resumed full scale operations.[69]

Keil Canal.—Yet another important inter-oceanic Canal is the Keil Canal which connects Baltic Sea and North Sea. In the beginning, this canal was completely under the control of Germany and was built for the requirements of German armed forces. After the First World War, the position changed significantly in connection with this canal as it was thrown open for all the States. *S. S. Wimbledon,*[70] is a leading case relating to Keil Canal. Article 380 of the Treaty of Versalles, 1919, provided : "The Keil Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." On 21 March, 1921 the German authorities stopped a British ship, *S. S. Wimbledon,* on the ground that its cargo comprised of military goods which was being carried to Poland who was at war with Russia at that time. It was also contended by German authorities that if the said ship was allowed passage, it would amount to the violation of the German law of neutrality. The prominent allied powers filed the case in the Permanent Court of International Justice against Germany. The Court held that under Article 380, Germany was under obligation to allow passage to *S. S. Wimbledon,* through Keil Canal and should make reparation. The position changed significantly after the Second World War and now this canal is open to all States.

Panama Canal.—Panama Canal connects Atlantic Sea with the Pacific Sea. It is a very important canal for commercial and transport purposes. Under treaty of 1903 between Panama and the U. S. this Canal came under the control of the United States of America. After helping Panama to achieve independence in 1903, the United States completed the 82-Km. canal in 1914 and protected it with military bases. During the first and second world wars, the warships of all the States had freedom to pass through this canal. But this freedom lasted till America did not enter the war. Recently, there had been a lot of controversy in between Panama and America in regard to the use and control of this canal. Panama wanted to exercise greater control over this canal. In March, 1973, the Security Council held a special session in Panama. In this session, the Security Council considered the question of the status of Panama Canal. In the Security Council a proposal was brought which would have removed the control of America from this canal, but this proposal was vetoed by America. America, however, wanted to conclude a fresh treaty with Panama in connection with the use and control of this canal. On February 7, 1974, a joint statement was issued by Secretary of State, Henry H. Kissinger and Juan Antonio Tack, Minister of Foreign Affairs of the Republic of Panama, with respect to the Panama Canal. The Joint statement included a set of principles to serve as guidelines for further negotiation on a new treaty on the Panama Canal.

After prolonged negotiations for more than three years, the U.S.A. and Panama finally signed on 7th September, 1977 two treaties—(i) A treaty guaranteeing the permanent neutrality of the canal, and (ii) A basic treaty governing the use and defence of the canal through December 31, 1999—changing the status of the Panama Canal and the Canal Zone. One of the new treaties provides that the U.S.A. will turn over control of the canal and the Canal Zone to Panama by the end of this century. The other allows the

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69. See also R. Vasudeo Pillai, "The Suez Crisis and its Lasting Judicial Implications—A Plea for an International Waterways Organisation", A.I.R. 1957 Journal Section, pp. 88-94, 97-102.

70. P.C.I.J. (1923), Series A. No. 1 (1 W.C.R. 163).

United States to defend the strategic waterway, if need be, for an indefinite period. The treaties guarantee the permanent neutrality of the canal. The treaties had to be approved by a plebiscite in Panama and a two-thirds majority vote in the U. S. Senate.[71] It has been rightly pointed out, "Clearly, the new accord is more advantageous to the United States. If the phrase 'in perpetuity' in the original 1903 treaty was an irritant that bedeviled U.S.—Panamanian relations in the preceding years, it has been replaced in the new treaty, the United States will have the right to defend the canal from an attack by a third power even after the treaty runs out in the year 2000. By that time the U. S. bases (fourteen at present) would have been consolidated into three defence complexes and they will be governed by a statute similar to that provided for the U. S. bases in Spain, with the difference that the United Sates will not be paying any rent to Panama specifically for these bases..............The other aspects of treaty admittedly, advantageous to the United States relate to the Canal Zone and the North American employees of the Canal Company............It is for these reasons perhaps, the treaty offers generous financial assistance to Panama under different heads.[72] The American Senate ratified the new treaties on 18th April, 1978. Panama has also ratified the treaties. Thus the problem of future use and control of the Panama Canal and Canal Zone has been amicably settled between Panama and the U. S. On October 1, 1979, the U. S. control over Panama Canal Zone ended. The U. S. will, however, retain five military bases and run the canal itself until 2,000 when all Americans are to be withdrawn on 31st December, 1999. The United States handed over the last military bases in fulfilment of the 1977 Canal treaties. President Moscoso of Panama declared that future national security plans would not include the presence of U.S. armed forces in Panama.

Straits.—According to international law, straits extending to the breadth of 6 miles are considered within the territory of the Coastal State, there is a controversy in regard to the straits which extend beyond 6 miles. But most of the jurists agree that the straits, the breadth of which is within 6 miles are within the territory of the Coastal State. There is no general agreement in this connection. However, it is definite that the straits, which are beyond 6 miles are outside the territory of the Coastal State and they are open to all these States without discrimination during war or peace. The Third U. N. Convention on the Law of the Sea has codified the rules of international law relating to Straits used for International navigation.[73]

Bays.—Article 7 (2) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone defines a 'bay' as a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than of the semi-circle whose diameter is a line drawn across the mouth of that indentation. For the purpose of measurement, it is provided that the area of an indentation is that lying between the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.[74] If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall not be considered as internal waters.[75] Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 miles, a straight base-line of 24 miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.[76] It may be noted here that Article 7, as noted above, applies only to bays the coasts of which belong to a single State.[77] Moreover, the foregoing provisions shall not apply to so-called "historic" bays, or in any case where straight baseline system provided in Article 4 of the Convention is applied.[78] It therefore, "leaves room for States to establish sovereign claims to the waters of bays under historic title".[79]

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[71] For background and the circumstances leading to the conclusion of the two treaties see R. Narayanan and Jayashri Deshpande, "The 'Big Ditch' and the 'Big Stick' : Panama Parleys" Foreign Affairs Reports, Vol. XXVI, No. 9 (September, 1977), pp. 179-200.

[72] Ibid, at p. 198.

[73] See Articles 34 to 45 (Part II) of the U. N. Convention on the Law of the Sea, 1982 (U. N. Document No. A/CONF, 62/122). See also for detailed study Manjula Shyam, "International Straits and Ocean Law", I.J.I.L., Vol. 15 (1975), p. 17.

[74] Section 7 (3).

[75] Section 7 (4).

The U. N. Convention on the Law of the Sea, 1982 has retained the above provisions without any change.[80] As of January, 2015, 167 countries (166 countries plus European Union) have become parties to the convention.

Historic waters.—In the *Fisheries case,* the International Court of Justice defined 'historic waters' in the following words : "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title".[81] The concept of historic bays "is but an enlargement of the doctrine of historic bays which developed much earlier". The doctrine of historic bays gradually emerged during the nineteenth century as the freedom of the high seas principle became established as a fundamental rule of international law............"The concept of historic waters, therefore, is a regime of exception to the general rules of law relating to the delimitation of the maritime domain of State.[82] Further,[83] "The 1958 Territorial Sea Convention has gone a long way to obviate the necessity of claiming certain bays on the basis of an historic title by extending the permissible closing line to 24 miles. As pointed out by McDougal and Burke, the role of historic bays largely disappeared, if the Territorial Sea Convention can be considered as representing a general consensus regarding the maximum permissible close lines.[84] Indeed the 1958 Convention having been ratified by some 30 States including most of the major maritime powers, it does represent a general consensus of the international community regarding the basic principle contained therein; consequently, the concept of historic bay does have a more limited application that it formally did".

In summary of his examination of the question of historic waters, Prof. Donat Pharand aptly puts forward following propositions :

> "1. The concept of historic waters constitutes regime of exception to the general rules of law relating to the delimitation of the maritime domain of a State.
>
> 2. The role of historic waters has largely disappeared since the advent of the 1958 Territorial Sea Convention which extends to 24 miles the permissible closing line for bays and permits use of straight baselines for deeply indented coasts to enclose as internal waters large water areas with possible entrances of over 24 miles.
>
> 3. Historic waters have the status of internal waters and innocent passage does not exist as of right.
>
> 4. Two basic requirements are necessary to support a claim to historic waters : (A) the exercise of exclusive authority and control by the Coastal State over a long period of time; (B) acquiescence by foreign States, particularly those affected by the claim in question.

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[76] Section 7 (5).

[77] Article 7 (1).

[78] Article 7 (6).

[79] J. G. Starke, An Introduction to International Law, Eighth Edition (1977) p. 236.

[80] See Article 10 of the Convention.

[81] (1951), I.C.J. Rep. 130.

[82] Donal Pharand, "Historic Waters in International Law with Special Reference to the Article", University of Toronto Law Journal, Vol. XXI No. 1 (1971) p. 1 at p. 2.

[83] Ibid. at p. 4.

[84] McDougal and Burke, The Public Order of the Oceans (1972), pp. 357-58.

5. A State may buttress its claim to historic waters by showing that its vital interests are at stake : considerations of geography, economics, and national security may be invoked.
6. The burden of proving the existence of an historic title to certain water areas rests with the State making such claim."[85]

The above propositions represent the present position of law relating to waters.

Indian position.—Section 8 (1) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, provides that the Central Government may, by notification in the official Gazette, specify the limits of such waters adjacent to its land territory as are the historic waters of India. Section 8 (2) further provides that the Sovereignty of India extends, and has always extended, to the historic waters of India and to the seabed and subsoil underlying, and the air space over such water. The Central Government, through Notification dated 15 January, 1977, notified the limits of the historic waters of India in Palk Strait and Palk Bay,[86] and Gulf of Mannar. The Notification further provided that the historic waters of India in Palk Strait and Palk Bay area of sea are internal waters of India. The historic waters of India beyond the appropriate baseline referred to in Section 3 (2) of the Act in the Gulf of Mannar area of sea have the same status as the territorial waters of India.

Air Space : Various theories regarding Air Space.—*N.B.*—For this please see Chapter entitled "Air Law (including Aircraft-Hijacking)".

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[85] Donat Pharand, see supra note 80, at p. 14.

[86] See I.J.I.L., Vol. 16 (1976), pp. 561-62.

CHAPTER 16

THE LAW OF THE SEA

I. Introduction*

As pointed out by McDougal and Burke,[1] "The historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention of general community interest." The classical law of the sea divided the hydrospace into the territorial and the high seas, endowing the former to the coastal state, and keeping the latter free and open to States under the doctrine of the "freedom of the seas." "For more than three centuries, all the law on and about the hydrospace, covering approximately 71.4 per cent of the earth's surface, could be summed up in a simple formula : 'freedom of the seas'. The hallmark of this law, right upto the first half of the twentieth century, was freedom-meaning essentially non-regulation and *laissez faire.* Apart from a narrow belt of territorial waters with coastal States jurisdiction and a few 'rules of the road' that came to be developed, the whole watery five-sevenths of the globe remained an area of 'no law', free for all to be exploited as they wished, according to the chaotic play of their selfish interests."[2] The classical law of the sea no longer adequately reflects the needs of the international community and is rapidly falling into obsolescence. The once-proud doctrine of 'freedom of the seas' has now fallen on hard time. There was imperative necessity to adapt the traditional doctrine to the present times and circumstances so as to accommodate the interests of all States the developing and the developed.

In the course of time, uses of the sea multiplied resulting in conflicts between the wider claims of coastal States seeking to protect their economic interests over large parts of the sea and attempts by major maritime powers to maintain the *status quo* on the other. These claims and controversies assumed serious magnitude after the Second World War. With a view to reconcile these claims and resolve controversies, the two U. N. Conferences on the Law of the Sea were held in Geneva in 1958 and 1960. In the first conference, *i.e.,* 1958 Geneva Conference on the Law of the Sea, four conventions were adopted—(1) Convention on the Territorial Sea and Contiguous Zone,[3] (2) Convention on the High seas;[4] (3) Convention on Fishing and Conservation of Living Resources;[5] (4) Convention on the Continental Shelf.[6] The second U.N. Conference on the Law of the Sea was held at Geneva in 1960 to fix breadth of the territorial sea but it could not achieve success.

After the two U.N. Conferences on the Law of the Sea, certain developments emerged which considerably changed the situation. In the first place, a large number of new States, mostly in Asia and Africa, emerged. Secondly, rapid progress in science and technology made possible commercial exploitation of mineral and other resources at greater depths of the seabed. One of the most valuable resources on the bottom of the oceans are the black, potato shaped, mineral rich polymetallic nodules, more popularly called manganese nodules. Though containing as many as 40 different metals, the principal components of these nodules are manganese, nickel, copper and cobalt. Thirdly, unprecedented growth in population and demands for higher living standards have intensified demands for food, fuel and other resources. Fourthly, the principal components of polymetalic manganese nodules, namely, nickel, copper, cobalt and manganese are vital minerals for basic industries. Fifthly while a few industrialized countries are the major consumers of these four metals, about 20 countries, most developing, are the major exporters of these minerals.

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* See also for P.C.S. (1987) Q. 6(a) ; C.S.E. (1994) Q. (6(b).

[1] The Public Order of the Occeans, p. 1; see also "Crisis in the Law of the Sea : Community Perspectives v. National Egoism, 67 Yale L.J. 438-39 (1958).

[2] R. P. Anand, "The Legality of Interim Seabed Mining Regime" Foreign Affairs Reports, Vol. XXIX, No. 2 (February, 1980), p. 29.

[3] See U. N. Doc. A/CONF 13/L-52.

[4] See U. N. Doc. A/CONF 13/L-53.

[5] See U.N. Doc, A/CONF 13/L-54.

[6] See U.N. Doc, A/CONF 13/L-55.

The above reasons, *inter alia*, made it imperative that the classical or traditional law of the sea must be re-formulated so as to adopt it to the present times and circumstances and to serve the interests of all States. The credit for making the initiative goes to Arvid Pardo of Malta who on August 18, 1967 submitted a request for inclusion in the agenda of the XXII Session of the General Assembly the item concerning the reservation exclusively for peaceful purposes of the Seabed and ocean flour beyond the limits of the present national jurisdiction (*i.e.*, "the Area" and the use of their resources in the interests of mankind.)[7] Although Pardo's initiative was confined to the "Area", in the course of time it became instrumental for the review and reformulation of the entire law of the Sea. In response to the Maltese initiative, the U.N. General Assembly established an *Ad Hoc* U.N. Seabed committee to study the scope and various aspects of the item submitted by Ambassador Pardo of Malta. Subsequently, this *Ad Hoc* committee was accorded a permanent status. During the deliberations in the committee it became clear that member States would be satisfied with nothing less than the review and re-formulation of the entire law of the Sea. The next landmark was the adoption, by the General Assembly on December 17, 1970, of the Declaration of Principles Governing the Seabed and Ocean-floor, and the Subsoil thereof, beyond the limits of National Jurisdiction.[8]

Following extensive preparatory work and the development of important principles by the U.N. Seabed Committee, the *first* session of the Third U.N. Conference on the law of the sea (hereinafter referred as the UNCLOS) was convened in Newyork from December 3 to 15, 1973 and was devoted to organisation and procedural matters. Thereafter ten more sessions were held. Upto the 9th session America actively participated in the conference and most of the provisions of the draft conventions were agreed to by consensus. In the tenth session America informed the conference that it will review the entire draft convention. After staying away the whole of 1981, America proposed many amendments to the already agreed to provisions. These proposals were rejected by the group of 77 countries.

On 30 April, 1982, the conference adopted the draft of the Convention on the Law of the Sea by an overwhelming majority of 130 States. The U.S. and three other States (Israel, Turkey and Venezuela) voted against it and 17 countries including Britain, Belgium, the Netherlands, Italy, West Germany and Soviet Union abstained. It was also decided that the Convention would be signed in September, 1982.

For signing the convention states assembled at U.N. Headquarters for three days beginning from 22 September, 1982. Soviet Union announced that it would sign the convention. There were also indications that some western countries might also sign the conventions. It was, therefore, decided to hold the signing ceremony of the convention from 6 December to 10 December, 1982. Thus states assembled at Mantego Bay (Jamaica) on 10 December, 1982 and 119 States finally signed the Convention on the Law of the Sea. 22 States including America, Britain, West Germany, Italy, Belgium and Japan did not sign the Convention. Thus ended the longest Conference in the history of International Law.

The U.N. Convention on the law of the sea[9] comprises of 320 Articles (divided into XVII parts) and IX annexes. It is a very comprehensive document and covers almost every aspect of the law of the sea. As many as 159 delegations had recorded their participation in the Third U.N. Conference on the Law of the Sea by signing its final Act.

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[7] See U.N. Doc. A/6695.

[8] See G.A. Res. 2479 (XXV), 17 December, 1970 ; Principles of this Declaration have been mentioned under the heading, "The International Seabed Area".

[9] See U.N. Document No. A/CONF 62/122.

According to Article 308 of the Convention, the Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession. Once the Convention, enters into force, permanent machinery, notably an International Sea Bed Authority and an International Tribunal for the Law of the Sea, will be established to prepare the way for these new bodies, a Preparatory Commission began meeting at Kingston (Jamaica) on 15 March, 1983. The Convention remained open for signature for two years at Jamaican Ministry of Foreign Affairs in Kingston and at U.N. Headquarters. It was closed for signature at both places on 9 December, 1984, but remained open indefinitely for accession.

By 1st November, 1988, the Convention of law of the Sea was signed by 159 States. It obtained 60 ratifications or accessions required for its entry into force with the ratification by Guyana on 16th November, 1993. The convention therefore came into force on 16th November, 1994, *i.e.* one year after the deposit of the 60th instrument of ratification. By 31st January, 1995, the convention had been ratified, acceded or succeeded by 72 states. But some important developed countries such as the U.S., U.K., Belgium, France, the Federal Republic of Germany, Italy, Japan and Netherlands concluded on 3 August, 1984 Provisional undertaking regarding deep Sea-bed matters. This has rightly been termed as Mini-treaty, as contrasted with maxi-treaty *i.e.* the Convention of the Law of the Sea, 1982 and is aimed at erecting an alternative legal regime to facilitate exploitation of deep sea-bed resources on the basis of unilateral legislation. On 1st November, 1988, the General Assembly, through resolution 43/18, called on states that had not done so to consider ratifying or acceding to the 1982 United Nations Convention on the Law of the Sea at the earliest, and to "safeguard the unified character of the Convention and related resolutions". As of 28th January, 2020, 168 countries have ratified the Convention on the Law of the Sea.

A mini-treaty, would clearly be violative of Article 137(3) of the U.N. Convention on the Law of the Sea, 1982 which provides : "No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part, otherwise no such claim, acquisition or exercise of such rights shall be recognized".

Reference may also be made to the Declaration adopted by the Preparatory Commission on 30 August, 1985.[10] The Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea expressed deep concern that some states have undertaken certain actions which undermine the Convention[11] and declared the following :

(a) The only regime for exploration and exploitation of the Area and its resources is that established by the U.N. Convention on the Law of the Sea and related resolutions adopted by the Third U.N. Conference on the Law of the Sea.

(b) Any claim, agreement or action regarding the Area and its resources undertaken outside the Preparatory Commission which is incompatible with the U.N. Convention on the Law of the Sea and its related resolutions shall not be recognized.

The Preparatory Commission rejected such claim, agreement or action as a basis for creating legal rights and regards it as wholly illegal.

Thus there was a clear conflict between the Maxi-treaty (*i.e.*, the Convention) and the Mini-treaty. But as noted above as many as 159 States had signed the Convention. As aptly remarked by Dr. M.K. Nawaz, "This raises a fundamental question whether any state in the 20th Century could long afford to go against world-consensus ? That is what it really amounts to as far as deep sea mining, without a licence from the International Sea-Bed Authority, is concerned. Sooner or later all states interested in deep sea mining must eventually fall in line with the Convention".[12]

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[10] See I.J.I.L., Vol. 25 (1985) p. 358.

[11] See also K.R. Simmonds, "The Status of U.N. Convention on the Law of the Sea", I.C.L.Q., Vol. 34 (1985) p. 364.

[12] M.K. Nawaz, "Has the Law of the Sea Convention Run Aground"? I.J.I.L., Vol. 24 (1984) p. 538 at p. 541.

The obstacle for signing the convention by developed states was removed due to the efforts of the Secretary-General of the United Nations on 28th July, 1994 on Agreement Relating to the Implementations of Part XI of the United Nations on the Law of the Sea of 10 December, 1982. This Agreement was adopted by the General Assembly of the U.N. *vide* its resolution No. 48/263 dated 17th August 1994. While adopting and reproducing the Agreement as Annex to the Resolution, the General Assembly affirmed that the Agreement shall be interpreted and applied together with Part XI as a single instrument. It may also be noted that Article 2 of the Agreement also provides that the provisions of the Agreement and Part XI shall be interpreted and applied together as a single instrument and in the event of any inconsistency between this Agreement and Part XI, the provisions of this agreement shall prevail. As regards entry into force of the Agreement Article 6 of the Agreement provided that the agreement shall enter into force 30 days after the date on which 40 states has established their consent to bound in accordance with articles 4 and 5, provided that such states include at least seven of the states referred to in para 1 (a) of resolution II of the Third United Nations Conference on the Law of the Sea and that at least five of those states are developed states. If these condition for entry into force are fulfilled before 16 November 1994, this Agreement shall enter into force on 16 November, 1994.

It need not be over emphasized here that the agreement for the implementation of Part XI of the Convention on the Law of the Sea takes into account the concern of the developed states. The obstacle for this signing of the Convention by the developed states having been thus removed, it is hoped that the Convention will be signed and ratified by developed states and also by other states who have not so for signed and ratified it and soon this Convention will become universal in the real sense of the term.

It was hoped that realizing this and in the interests of its wider business community, the U.S. might join the Convention in a near future.[13]

Thus the U.N. Convention on the Law of the Sea, 1982 is a great landmark. It "...... is a fact. It exists. Whether or not it becomes a fully operational treaty-signed, ratified, in force, widely supported, generally followed—it is and will be cause of significant effects."[14] The Convention is in fact a comprehensive "constitution" of the oceans embodying hundreds of legal rights and duties for all uses of the sea and accepted a whole by a vast majority of States.[15] Even before the Convention came into force, a large part of it has already became part of customary international law.[16] In *case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* decided on 3 June 1985, the International Court of Justice aptly observed :

> *Nevertheless, it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States, hence it is clearly the duty of the Court even independently of the references made to the Convention by the parties, to consider in what degree any of its relevant provisions are binding upon the parties as a rule of customary international law.*[17]

The Court further added :

> *The Court has thus had occasion to note the development which has occurred in the customary law of the Continental Shelf ; and which is reflected in Articles 76 and 83 of the United Convention on the Law of Sea, concerning the relationship between the concept of the Continental Shelf as the natural prolongation of the land territory of the coastal state and the factor of distance from the coast.*[18]

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[13] See R.P. Anand, "U.N. Convention on the Law of the Sea and the United States", I.J.I.L., Vol. 24 (1984) pp. 198-199.

[14] Philip Allott, "Power Sharing in the Law of the Sea", AJIL., Vol. 77 (1983) p. 1.

[15] R.P. Anand, note 13, at p. 183.

[16] Ibid, at p. 191.

[17] Para 27 of the Majority Judgment,

[18] Ibid., para 77.

There were, however, some provisions which proved to be an obstacle to universal participation in the convention. A number of industrialized countries objected to mandatory and regulatory approach to deep seabed mining. On 28th July, 1994, the General Assembly of the U.N. adopted the Agreement relating to the implementation of Part XI. It removed the final obstacles to broader participation in the treaty. It addressed particular seabed mining provisions replacing them with general principles geared more towards the emerging global consensus around market-oriented economic principles. The Agreement and Part XI are to be applied together. In case of a conflict between the two, the provisions of the Agreement would prevail.[19]

The General Assembly commemorated the tenth anniversary of the Convention's opening for signature in Montego Bay, Jamaica on 10th December, 1982. and 10th December, 2002 was the 20th anniversary of the U.N. Convention on the Law of the Sea, 1982. India ratified the convention on 29th June, 1996. Thus while European Union (on 1 April, 1996), United Kingdom (on 25 July, 1997), Russian Federation (on 12 March, 1997), France (11 April, 1996), Germany (on 14 Oct., 1994) and Australia (including India) have ratified the convention, United States of America has yet not ratified the convention.

Thus the U.N. Convention on the Law of the Sea, 1982 is of major importance and its very existence modifies political, economic and legal relationships in countless ways. It has turned the dream of a comprehensive law for the oceans into reality and is one of the greatest achievement of this century.[20]

To date 167 countries and the European Community have become parties to the convention on the Law of the Sea.

19 countries that have signed the convention but not ratified are :

Afghanistan, Bhutan, Brundi, Cambodia, Central African Republic, Colombia, El Salvador, Ethopia, Iran, Democratic Republic of Korea, Libya, Liechtenstein, Malawi, Nigar, Rwanda, Switzerland, Thailand, United Arab Emirates and United States of America.

The Law of Sea Convention has almost become universal. It is now regarded as codification of the customary Law on the Sea.

II. Maritime Belt or Territorial Waters*

Maritime belt or territorial waters is that belt of the sea which is adjacent to the coastal State and over which the coastal State exercises the sovereignty.[21] Coastal State exercises sovereignty not only over the territorial waters, but also over air space over the territorial sea as well as to its bed and sub-soil.[22] According to Article 2(3) of the U.N. Convention on the Law of Sea, 1982, the sovereignty over the territorial waters is exercised subject to the convention and other rules of international law.

Problem of Breadth of Territorial Waters[23]

Maritime belt is that part of the sea over which the coastal States exercise sovereignty. Since the coastal State exercises sovereignty over this part of the sea, there should be a definite limit of the breadth of the maritime belt. There was a great controversy in this connection under international law for considerable period of time. In the view of the famous jurist Bynkershoek, the breadth of maritime belt extends to that distance where a cannon can fire. Up-to eighteenth century, the range of cannon shot was three miles. Hence the cannon shot rule, *i.e.*, 3 miles of maritime belt, became a prevalent principle. According to Grotius, the sovereignty of the coastal State over the maritime belt

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19. U.N. Chronicle, Vol. XXXII, No. 1 (March, 1995) p. 8.
20. Ibid.
* See also for I.A.S. (1968), Q. No. 6 ; I.A.S. (1960), Q. No. 5 ; I.A.S. (1954), Q.N. 6 ; P.C.S. (1975), Q. No. 2(a) ; P.C.S. (1971), Q. No. 4(b) ; I.A.S. (1978), Q. No. 5(a) ; P.C.S. (1985), Q. No. 10(f) ; C.S.E. (1987), Q. 8(a) ; P.C.S. (1988), Q. 10(d) ; P.C.S. (1991) Q. 8(a) ; UPPCS (2003) Q. 7 ; IAS (2007) Q. 8 (a) ; IAS (2008) Q. 8 (c).
21. Article 1 of the Geneva Convention on Territorial Waters and Contiguous Zone, (1958) ; See also Article 2 of U.N. Convention on the Law of Sea, 1982.
22. Article 2, ibid.
23. See also Dr. S. K. Kapoor, "The Problem of the Width of the Territorial Sea. "Lawyer", (August, 1972), p. 121 ; H. Leauterpacht, "Sovereignty over Submarine Areas", BYBIL, Vol. XXVII (1950), pp. 376-433.

should extend only to that area up-to which it can exercise effective control. Another famous jurist, Vattel also subscribed to this view. In the nineteenth century, 3 miles cannon shot rule became very much prevalent. As a result of the scientific inventions and discoveries, the range of cannon shot considerably increased and hence it became necessary to change this rule.

In order to fix the breadth of the maritime belt, first important attempt was made by the League of Nations. The Hague Conference of 1930 made an unsuccessful attempt to obtain consensus of the nations on a specific breadth of the maritime belt. Since International Law could not fix definite breadth of the maritime belt, different countries claimed different breadths of maritime belt. In order to resolve these conflicts, a conference was called in Geneva, Conference on the Law of the Sea, 1958. Different countries put forward the claims of different breadth of maritime belt. This controversy could not be resolved in the Geneva Conference of 1958. In order to resolve this conflict another Conference, known as II U.N. Conference on the Law of the Sea, was called in 1960. In this conference, America presented a compromise formula which provided that the breadth of territorial waters should be 6 miles and beyond these 6 miles the coastal States should be given rights for fishing etc., for another 6 miles. This proposal could not be accepted as it was defeated by a majority of single vote. The claims of different countries, however, showed that this breadth should be in between 3 miles to 12 miles. A large number of States have now subscribed to the view that the breadth of the territorial waters should be 12 miles and it has already become part of international customary law.

The statement that States are completely free in regard to the fixing of the breadth of territorial waters is far from true. In *Anglo-Narwegian Fisheries* case,[24] the court observed that the States are not completely free in respect of delimitation of territorial waters with regard to other States. The International Court of Justice observed, "The delimitation of the sea areas has always an international aspect, it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily an unilateral act because only the Coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon International law".

The controversy relating to breadth of territorial sea has finally ended with the adoption of the U.N. Convention on the Law of the Sea, 1982.[25] Article 3 of the Convention provides that every state has the right to establish the breadth of its territorial sea upto a limit not exceeding 12 nautical miles measured from base lines determined in accordance with this convention. Under Article 4, the outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline, equal to the breadth of the territorial sea.

Rights and Duties of Coastal State* :—

The Coastal State has complete sovereignty over its maritime belt. This sovereignty extends not only on waters of the sea, but also extends over air space and seabed and subsoil of the sea. But according to Article 2 (3) of the convention on the Law of the Sea, 1982, the sovereignty over maritime belt is subject to other rules of the convention.

According to Article 15 of the convention, where two coastal states are adjacent to each other, the maritime shall be delimited on the median line to be measured from the base-line from which the width of maritime belt is measured.

Since the coastal state has sovereignty over its maritime belt, the coastal state also exercises penal jurisdiction.

Beside this, according to International Law including the U.N. Convention on the Law of the Sea, any state whether coastal or not, can exercise the right of innocent passage of its ships over maritime belt. According to Article 18 of the convention, innocent passage means, to travel without availing facilities of internal waters or port or to reach internal waters or port and to avail the facilities thereof. The passage must be continuous and immediate.

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[24] I.C.J. Rep. (1951), p. 116 ; See also for IAS (2001) Q. 8(b).

[25] See U.N. Document No. A/CONF 62/122.

* See also for UPPCS (2003) Q. 7.

For the use of maritime belt by foreign ships, the coastal state can make laws. For example, Territorial Water, Continental Shelf, Exclusive Economic Zone and other maritime Zones Act, 1976 contains provisions in this respect.

Delimitation of Territorial Sea between States with opposite or adjacent coasts

According to Article 15 of the 1982 Convention on the Law of the Sea provides :

"Where the coasts of two states are opposite or adjacent to each other, neither of two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two states is to be measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance therewith."

The question of delimitation of territorial sea arises before the International Court of Justice in *case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar* v. *Bahrain*). This case was decided by the International Court of Justice on 16th March, 2001. In this case, the world court referred to above Article 15 and pointed out that it is virtually identical to Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the contiguous zone and is to be regarded as having a customary character. It is often referred as "equidistance/special circumstances" rule. The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances. Once it is delimited the territorial sea to the parties, the court will determine the rules and principles of customary law to be applied to the delimitation of the rules and principles of customary law to be applied to the delimitation of the parties' continental shelves and their exclusive zones or fishery zones. The court will further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined.[26]

Further, the equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. It can only be drawn when the baselines are known. In this case neither of parties has as yet specified the baselines which are to be used for determination of the breadth of the territorial sea, nor have they produced official maps or charts which reflect such baselines only during the present proceedings have they provided the court with approximate basepoints which in their view could be used by the court for the determination of the maritime boundary.[27] The court will therefore first determine the relevant courts of the parties, from which will be determined the location of the baselines and the pertinent basepoints which enable the equidistance line to be measured.[28]

In this case, Qatar argued that for purpose of this delimitation, it is the mainland-to-mainland method which should be applied in order to construct the equidistance line. It claimed that the motion of "mainland" applies both to Qatar Peninsula, which should be understood as including the main Hawar Island, and to Bahrain, of which the Islands to be taken into consideration are al-Awal (also called Bahrain Island), together with Musharraff and Sitrah. According to Qatar's view, application of mainland-to-mainland method of calculation could also mean that the equidistance line has to be constructed by reference to the high-water line. A clear distinction must be drawn between the determination of the outer limit of the territorial sea of a state or other territorial entity, and the delimitation of a maritime boundary between two states with opposite courts. In Qatar's view, the low-water line is not obligatory as a rule of general application and the use of the high-water line is justified on both technical and legal grounds, precisely in order to achieve an equitable delimitation. Qatar contended in particular that the low-water line is by definition precarious, subjective or even arbitrary in so far as it may vary with time, whereas the high-water line can be drawn in a sure and objective way, being relatively invariable.

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[26] Para 176 of the judgment dated 16th March, 2001.

[27] *Ibid*, para 177.

[28] *Ibid*, para 178.

On the other hand, Bahrain contended that it is a *de facto* archipelago or multiple-island state, characterised by a variety of maritime features of diverse character and size. All these features are closely inter-linked and together they constitute the State of Bahrain; reducing that state to a limited number of so-called "principal" islands would be a distortion of reality and refashioning of geography. Since it is the land which determines maritime rights, the relevant base-points are situated on all those maritime features over which Bahrain has sovereignty. Bahrain further contended that, according to conventional and customary international law, *it is the low-water line which is* determinative for the breadth of the territorial sea and for the delimitation of overlapping territorial waters. Finally, Bahrain stated that, as a *de facto* archipelagic state, it is entitled to declare itself an archipelagic state under Part IV of the 1982 law of the Sea Convention and to draw the permissive baselines of Article 47 of that convention *i.e.* straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago".

Qatar however, contested Bahrain claim that it is entitled to declare itself an archipelagic state under Part IV of the 1982 Convention, it contends *inter alia* that Part IV has not become customary law, and that consequently it is not opposable to it.

In its application Qatar had requested the world court :

(i) To adjudge and declare in accordance with international law.

A.(1) That the State of Qatar has sovereignty over the Hawar islands,

(2) That Sibal and Qit' at Jaradh shwals are low-tide elevations are under Qatar sovereignty.

B.(1) That the State of Bahrain has no sovereignty over the island of Janan;

(2) That the State of Bahrain has no sovereignty over Zubarah;

(3) That any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case;

(II) To draw a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain, that boundary.

On the other hand, Bahrain requested the court to adjudge and declare that :

1. Bahrain is sovereign over Zubarah.
2. Bahrain is sovereign over the Hawar islands, including Janan and Hadd Janan.
3. In view of Bahrain's sovereignty over all the insular and other features, including Fasht ad Dibab and Qit at Jaradah, comprising the Baharains archipelago, the maritime boundary between Bahrain and Qatar, is as in Part two of Bahrain's Memorial Part two of Bahrain's counter Memorial and in reply.

The world court observed that in previous cases the court has made clear that maritime rights derive from coastal state's sovereignty over the land, a principle which can be summarized as "the land dominates the sea".[29]

It is thus the terrestrial situation that must be taken as starting point for the determination of the maritime rights of a coastal state. In accordance with Article 121, paragraph 2, of the 1982 Convention on the law of the sea, which reflects customary international law, islands regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights as other land territory.[30]

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[29] Para 185; see North Sea Continental Shelf, I.C.J. Reports (1969) p. 51, para 96; Aegean Sea Continental Shelf, I.C.J. Reports (1978) p. 36, para 86.

In order to determine what constitutes Bahrain's relevant coasts and what are the relevant baselines on the Bahraini side, the court must first establish which islands come under Bahraini sovereignty.[31]

The legal definition of an island is "a naturally formed area of land surrounded by water, which is above water at high tide" (1958 Convention on the Territorial Sea and contiguous zone, Article 10, para 1, 1982 Convention on the Law of the Sea, Article 121, para 1.)

According to the relevant provisions of the conventions on the Law of the Sea, which reflect customary international law, a low-tide elevation is a naturally formed area of land which is surrounded by and above water a low-tide but submerged at high-tide (1958 Convention on the territorial sea and the contiguous zone, paragraph 1 of Article 11, 1982 Convention on the Law of the Sea, paragraph 1 of Article 13.

Under these provisions, the low-water line of a low-tide elevation may be used as the baseline for measuring the breadth of the territorial sea if it is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island. If a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea, it has no territorial sea of its own. The above mentioned conventions further provide that straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them. (1958 Convention, para 3 of Article 4, 1982 Convention).

According to Bahrain this is the case with low-tide elevations which are relevant in the present case for the delimitation process.[32]

When a low-tide elevation is situated in the overlapping area of the territorial sea of two states, whether with opposite or with adjacent coasts, both states in principle are entitled to use its low-water line for the measuring of the breadth of their territorial sea. The same low-tide elevation then forms part of the coastal configuration of the two states that is so even if the low-tide elevation is nearer to the coast of one state then to the other, or nearer to an island belonging to one party than it is to the mainland coast of the other for delimitation purposes the combating rights derived by both coastal states from the relevant provisions of the law of the sea would by necessity seem to neutralize each other.[33]

The few existing, rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute *terra firma,* and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the view point of the acquisition of sovereignty be fully assimilated with islands or other land territory.[34]

Further, the rule is that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own. A low-tide elevation, therefore, as such does not generate the same rights as island or other territory. Moreover, it is generally recognized and implicate in the words of the relevant provisions of the conventions on the law of the sea that, whereas a low-tide elevation which is situated within the limits of the territorial sea may be used for determination of its breath, this does not hold for a low-tide elevation which is situated less than 12 nautical miles from that low-tide elevation but is beyond the limits of the territorial sea.[35]

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[30] Para 185; see North Sea Continental Shelf, I.C.J. Reports (1969) p. 51, para 96; Aegean Sea Continental Shelf, I.C.J. Reports (1978) p. 36, para 86.

[31] Para 186.

[32] Para 201.

[33] Para 202.

[34] Para 206

[35] Para 207.

Paragraph 3 of Article 4 of the 1958 general convention on the Territorial Sea and the contiguous zone and paragraph 4 of Article 7 of the 1982 Convention on the Law of the Sea provide that straight baselines shall not be drawn to and from low-tide elevations unless light houses or similar installations which are permanently above sea level have been built on them. These provisions are another indication that low-tide elevations cannot be equated with islands, which under all circumstances qualify base-points for straight baselines.[36]

The court, consequently is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevation which are situated in the zone of overlapping claims, for recognizing Qatar as having such a right. The court accordingly, concludes that for the purposes of drawing the equidistance line, such low-tide elevation must be disregarded.[37]

According to Bahrain, as a multiple island state characterized by a cluster of islands of the court of its main islands, it is entitled to draw a line connecting the outermost islands and low-tide elevations. According to Bahrain, in such cases the external fringe should serve as the baseline for the territorial sea.[38] But the court observed that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. The method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along coast in its immediate vicinity.[39] The fact that a state considers itself a multiple island state or a *de facto* archipelagic state does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met. The coasts of Bahrains main islands do not form a deeply indented coast, nor does Bahrain claim this. It contends, however, that the maritime features off the coast of the main islands may be assimilated to a fringe of islands which constitute a whole with the mainland.[40]

The court, therefore, concluded that Bahrain is not entitled to apply the method of straight baselines. Thus each maritime feature has its own effect for the determination of the baselines, on the understanding that, on the grounds set out before, the low-tide elevations situated in the overlapping zone of territorial seas will be disregarded. It is on this basis that the equidistance line must be drawn.[41]

On the basis of the above observations, *inter alia,* the World Court drew the equidistance line between Qatar and Bahrain and held the following :

(1) that the State of Qatar has sovereignty over Zubarah (unanimously);

(2) that the State of Bahrain has sovereignty over the Hawar Islands.

(3) the State of Qatar enjoys the territorial sea of Baharain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law (unanimously)

(4) the State of Qatar has sovereignty over Janan Island including, Hadd Janan (13 votes to four)

(5) that the State of Bahrain has sovereignty over the island of Qit' at Jaradah (12 votes to five)

(6) that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of State of Qatar (unanimously)

(7) that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be drawn as indicated in para 250 of the judgement.

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[36] Para 208.

[37] Para 209.

[38] Para 211.

[39] Para 212.

[40] Para 213.

[41] Para 215.

Indian position* —Upto 1956, India recognised 3 miles of territorial waters but in that year, it was extended to 6 miles by Presidential Proclamation and later on it was extended to 12 miles in 1967. The main reason for this extension was that it was discovered that India's territorial waters contained huge quantities of thorium.[42] In 1976 Article 297 of the Constitution was amended by Fortieth Amendment of the Constitution of India.[43] According to the amended Article 297, all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone of India shall vest in the Union and be held for the purposes of the Union.[44] It is also provided that the limits of territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones of India shall be such as may be specified, from time to time, by or under any law made by Parliament.[45] In the same year the Parliament passed the Territorial Waters, Continental Shelf, Exclusive, Economic Zone and other Maritime Zones Act, 1976[46]. According to the Act, the limit of the territorial waters is the line every point of which is *at a distance of twelve nautical miles from the nearest point of the appropriate base line.*[47] Thus India's position corresponds to the rule adopted in the U.N. Convention on the Law of the Sea, 1982. India has signed the U.N. Convention on the Law of the Sea, 1982.

Innocent Passage**.—Although 1958 Geneva Conference on the Law of the Sea failed to fix a definite breadth of territorial waters yet it laid down certain important principles in this connection. The 1958 Convention on the Territorial Waters and Contiguous Zones made it clear that the coastal State exercises sovereignty over the territorial water. But this is subject to certain exceptions. For example, the ships of other States are entitled to get passage through this part of the sea. In other words, we may say that although the coastal State exercises sovereignty over this part of the sea, yet it is the duty of the coastal State to provide innocent passage to the ships of other States. Moreover, it has also to provide facilities for laying cables, etc. In short, we may say that the coastal State exercise sovereignty over this part of the area and exercises general control over this area, but for international transport and communication some facilities are provided to other States. In *Corfu Channel* case,[48] the International Court of Justice ruled that during peace time the warships of the other States may pass through the territorial waters of a State. In this case, the Court ruled that Albania was guilty of causing loss to the British ships by firing at them or otherwise by laying mines in that part of the sea and it was, therefore, a clear violation of international law and the Court gave its verdict that Albania should pay appropriate compensation to Britain for this violation. Thus it is a well-recognised principle of customary International Law that foreign merchant vessels have a right of 'innocent passage' through the territorial waters.[49] The law in this connection was codified in the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958. Section III of which (comprising of Articles 14 to 23) deals with the right of innocent passage. Article 14 provides that ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the Territorial Sea. Article 17 of the U.N. Convention on the Law of the Sea, 1982 also provides that subject to this Convention, ships of all states, whether coastal or landlocked enjoy the right of innocent passage through the territorial sea. Passage means navigation through the Territorial Sea for the purpose either of traversing that Sea without entering internal waters, or of proceeding to internal waters, or making for the high seas forms internal waters. Passage includes stopping and anchoring but only in so far as the same are incidental to or are rendered necessary by *force majeure* or by distress.[50] Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State such passage shall take place in conformity with these articles and with other rules of International Law.[51] Further, passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea. Submarines are required to navigate on the surface and to show their flag. It is also provided that the coastal State must not hamper innocent passage through the territorial sea. The coastal State is, however, required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.[52] Article 16 of the Geneva Convention empowers the coastal State to take necessary steps in its territorial sea to prevent passage which is not innocent. Further, foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the Coastal State in conformity with the Convention and other rules of International Law and, in particular, with such laws and regulations relating to transport and navigation.[53]

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* See for IAS (1976), Q. No. 9(V).

[42] See K.P. Mishra, "Territorial Sea in India", 6 I.J.I.L., p. 470; see also statement of India's representative (Dr. Pannikkar) in Sub-committee of the Peaceful Uses of the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction, 17 Aug., 1971 (U.N. Doc. A/C 1331 S.C. II Sr. 16, pp. 13-17) appearing in I.J.I.L., Vol. II (July, 1971), pp. 343-48.

[43] See Gazette of India, 27-5-1976, Part II-S I, Ext., p. 639; see also A.I.R. 1976 Journal section, pp. 225-26.

[44] Article 297 (1).

[45] Article 297 (3).

[46] It received the assent of the President on 25-8-1976 : For the text of the Act : See Gazette of India 26-8-76. Part II-S. I., Ext., p. 1067; see also A.I.R. 1976, Journal Section, pp. 268-72.

[47] Section 3(2).

** See also for C.S.E. (1994) Q. 7 (c).

[48] I.C.J. Rep. (1949), p. 4.

[49] J.G. Starke, An Introduction to International Law, Eighth Edition (1977), p. 232.

It may be noted here that the 1958 Geneva Convention on Territorial Sea and the Contiguous Zone is conspicuous by its silence in respect of foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substance. The United Nations Convention on the Law of the Sea, 1982, has taken into account this matter and hence in Article 23 it is provided that foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious nuclear substance shall, when exercising the right of innocent passage through the territorial sea carry documents and observe special precautionary measures established for such ships by international agreements. Obviously, it is far from satisfactory to ensure, peace, good order and security of the coastal State but it is only this provision which most of the States seemed to agree upon. As regards the duties of the coastal State, Article 24 of the 1982 convention provides that the coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this convention. In particular in the application of this convention or of any laws or regulations adopted in conformity with this convention, the coastal State shall not : (a) impose requirement on foreign ships which have the practical effect of denying or impairing the right of innocent passage ; or (b) discriminate in form or in fact against the ships of any state or against ships carrying cargoes to, from or on behalf of any State. Further, the coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.

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[50] Some little change has been brought about in this provision by the U.N. Convention on the Law of the Sea, 1982; Article 18(2) of the convention provides : "Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

[51] Article 19(2) of the U.N. Convention on the Law of the Sea has clarified and elaborated it by providing the following : Passage of a foreign ship shall be considered to be prejudicial of the peace, good order or security of the State, if in the territorial sea it engages in any of the following activities : (a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) Any exercise or practice with weapons of any kind; (c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State ; (d) Any act of propaganda aimed at affecting the defence or security of the coastal State ; (e) The launching or taking on board any aircraft ; (f) The launching, landing or taking on board any military device ; (g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State ; (h) Any act of wilful and serious pollution, contrary to the present convention; (i) Any fishing activities ; (j) The carrying out of research of survey activities ; (k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State ; (1) "Any other activity not having a direct bearing on passage".

[52] Article 15(1) of the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958 ; In Corfu Channel Case (Merits), I.C.J. Reports (1949) 4 et seq : it was held that during times of peace, warships are entitled to innocent passage through such parts of the territorial waters as from international highway. To quote the words of the World Court : "It is, in the opinion of the Court, generally recognised and in accordance with International custom that States in time of peace have a right to send their warship through straits used for International Navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through Straits in time of peace".

[53] Article 17, ibid.

Indian Position.—In the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, Article 4 provides for the use of territorial waters by foreign ships. It provides that without prejudice to the provisions of any other law for the time being in force all foreign ships (other than warships including submarines and other under water vehicles) shall enjoy the right of innocent passage through the territorial waters.[54] Foreign warships including submarines and other underwater vehicles may enter or pass through the territorial waters after giving prior notice to the Central Government provided that submarines and other underwater vehicles shall navigate on the surface and show flag while passing through such waters. It is further provided that the Central Government may, if satisfied that it is necessary so to do in the interests of peace, good order or security of India or any part thereof, suspend, by notification in the Official Gazette, whether absolutely or subject to such exceptions and qualifications as may be specified in the notification, the entry of all or any class of foreign ships into such area of the territorial waters as may be specified in the notification. Lastly, India is one of the signatories of the U.N. Convention on the Law of the Sea, 1982.

III. Contiguous Zone*

Contiguous zone is that part of the sea which is beyond and adjacent to the Territorial Sea of the coastal State. According to Article 33 of the U.N. Convention on the Law of the Sea, 1982 : "In a zone contiguous to its territorial sea, the coastal State may exercise the control necessary to—(a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea ; (b) punish infringement of the above regulations committed within its territory or territorial Sea". Thus the contiguous zone imposes certain restrictions on the freedom of the high seas. Further, contiguous zone may not extend beyond 24 nautical miles baseline from which the breadth of the territorial sea is measured.

Indian Position.—India's position is in conformity with the above provisions. India is one of the signatories of the U.N. Convention of the Law of the Sea, 1982.

Distinction between Maritime Belt and Contiguous Zone.—Maritime Belt extends upto 12 nautical miles from the baseline. The coastal state has complete sovereignty over its maritime belt and extends not only to its waters but also to airspace above it and seabed and subsoil thereof. The coastal state also exercises penal jurisdiction over it. This sovereignty is only subject to the exception of giving innocent passage to foreign ships. The contiguous zone extends upto 24 nautical miles to be measured from the baseline from which maritime belt is measured. Since maritime belt extends to 12 miles, contiguous zone extends 12 miles further from the maritime belt.

IV. Straits Used for International Navigation.—As noted above, in *Corfu Channel case* (1949) the International Court of Justice has held that states in time of peace have a right to send their ships through straits used for International navigation between two parts of the sea without the previous authorization of a coastal State, provided that the passage is innocent. The same rule has been adopted in the U.N. Convention on the Law of the Sea, 1982. As regards straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic Zone, Article 38 of the Convention provides that all ships and aircraft shall enjoy the right of transit passage, which shall not be impeded, except that, if the strait is formed by an island of a state bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics. Further, transit means the exercise of the freedom of navigation and over flight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that state.

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[54] Explanation to section 4(1) adds that for the purposes of this section, passage is innocent so long as it is not prejudicial to the peace, good order or security of India.

* See also for I.A.S. (1960), Q. No. 5 ; P.C.S. (1964), Q. 9(b) ; C.S.E. (1987), Q. 8(a) ; P.C.S. (1988), Q. 10(d).

As regards duties of ships and aircraft during transit passage, Article 39 provides the following :

(1) Ships and aircraft, while exercising the right of transit passage, shall : (a) proceed without delay through or over the strait ; (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering the strait or in any other manner in violation of the principles of international law embodied in the charter of the United Nations ; (c) refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress ; (d) comply with relevant part of Part III of the Convention.

(2) Ships in the transit passage shall : (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the international regulations for preventing collisions at sea ; (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of population from ships.

(3) Aircraft in transit passage shall : (a) observe the Rules of the Air-established by the International Civil Aviation Organization as they apply to Civil aircraft ; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation ; (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

The Convention makes provision for laws and regulation of states bordering straits relating to transit passage. Further, foreign ships exercising the right of transit passage have to comply with such laws and regulations.[55] As regards duties of States bordering straits, Article 44 of the convention provides that states bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or over flight within or over the strait of which they have knowledge. There shall be no suspension of transit passage. Further, the provisions relating to innocent passage discussed earlier shall apply in straits used for international navigation : (a) excluded from the application of the regime of transit passage under Article 38; (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state. There shall be no suspension of innocent passage through such straits.[56] Last but not the least, the regime of passage through straits used for international navigation thus established shall not in other respects affect the legal status of the waters forming such straits or the exercise by the states bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and sub-soil. But the sovereignty or jurisdiction of states bordering the straits is exercised subject to Part III of the Convention and to other rules of international law.[57]

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[55] Article 42.

[56] Article 45.

[57] Article 34.

V. Archipelagic Waters of an Archipelagic State

An "archipelagic State" means a state constituted wholly by one or more archipelogs and may include other islands.[58] "Archipelago" means a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such.[59] An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main island and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.[60] The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent. of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.[61]

Article 48 of the U.N. Convention on the Law of the Sea, 1982, provides that the breadth of the territorial sea, the contiguous zone, the Exclusive Economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with Article 47. As regards baselines, Article 47 provides the drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island. Further, the system of such baselines shall not be applied by an archipelagic state in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another state.

As regards the legal status of archipelagic waters, Article 49 of 1982 convention provides, the sovereignty of an archipelagic state extends to the water enclosed by the archipelagic baselines drawn in accordance with Article 47, described as archipelagic waters, regardless of their depth or distance from the coast. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and sub-soil, and the resources contained therein. Article 50 provides that within its archipelagic waters, the archipelagic state may draw closing lines for the delimitation of internal waters, in accordance with Articles 9, 10 and 11.

Article 52 provides that ships of all states enjoy the right of innocent passage through archipelagic waters. However, the archipelagic state may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships of such suspension is essential for the protection of its security. Article 53 further provides that an archipelagic state may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea. All ships and aircrafts enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.

Nature of Archipelagic Waters and Distinction with Territorial Waters and Inland Waters

While in some respects archipelagic waters resemble internal waters and territorial waters, in certain other respects they are different from such waters. The archipelagic waters resemble the territorial waters in so far as the sovereignty of the archipelagic state over the resources of the water column and the sea-bed and sub-soil is subject to the right of innocent passage in favour of foreign vessels and it is in this respect that it is distinct from the internal waters. But these waters are distinct from the territorial waters because of the extensive control and limitation of this passage by the archipelagic state.[62] Further, the right of innocent passage in case of archipelagic state is distinct from the right of innocent passage in case of territorial waters. "The right of passage through archipelagic waters is more limited than the right of innocent passage through the territorial sea at least in the three respects : (i) there is no express provision for the right of ships to stop and anchor where such stops and anchoring are incidental to ordinary passage or are required by reasons of *force majeure* ; (ii) the right of the coastal state to designate sea lanes and prescribe traffic separation scheme means that foreign vessels have less freedom than in passage through the territorial sea ; and (iii) the right of the coastal state in respect of warship that does not comply with its laws and regulations concerning passage extends beyond suspension and a request to leave the archipelago sea, to prohibiting the passage of such warships through its archipelagic sea for any length of time ....[63]. As regards the right of passage of foreign vessels through international straits, while in territorial sea foreign vessels possess a special right of passage through international straits under customary and under the Geneva Convention of 1958, such rights cover warships including sub-marines which need not surface and cannot be suspended by the coastal State.

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[58] Article 46(a) of the U.N. Convention on the Law of the Sea, 1982.

[59] Article 46(b), ibid.

[60] Article 47(1).

[61] Article 47(2).

The concept of archipelagic waters is also distinct from the internal waters. "No right of innocent passage is generally conceded in the case of internal waters. In case of archipelagic waters, such a right is recognized in principles, on the other hand, it would seem that the regime of archipelagic waters proposed by the archipelagic states is more akin to that of the territorial sea, although in some respects there are differences in the right of innocent passage conceded the special right of passage through international straits is not recognized." [64]

Thus while the archipelagic waters resemble in certain respects with internal waters and territorial waters, they are clearly distinct from both in certain respects. The territorial sea of an archipelagic state can be delimited only when we first determine the extent of archipelagic waters. Thus the area reserved as the common heritage of mankind, *i.e.* the International Sea-bed Area, as well as the area of the high seas, will be diminished for as against the straight baseline of a single island, straight baseline of an archipelago will result in enclosing a larger part of the sea to be called archipelagic waters. But the inclusive claims of the International community had to concede this much for the exclusive claims of the archipelagic states. This was also necessary because the success of the third U.N. Conference on the Law of the Sea depended upon the acceptance of the package deal and one of the important parts of the package was the acceptance of the claims of the archipelagic states.

VI. Continental Shelf*

Though the geographical and geological concept of the Continental Shelf is quite an old one, the legal concept of the Continental Shelf which was fore-shadowed to some extent, by the U.K. Venezuela Treaty of 1942 providing for the division of gulf of Paria came into limelight since Truman Proclamation of 1945. In the Truman Declaration of 1945, it was declared that the United States considered the resources of the Shelf contiguous to the U.S. as "appertaining to the U.S. and subject to its jurisdiction and control." It was, however, made clear that this was in no way to affect the character of the high sea above the shelf. The said Declaration did not define the continental shelf. A subsequent U.S. State Department press release (dated 18th Sept., 1945), therefore defined it as "submarine land which is contiguous to the continent and which is covered by no more than 100 fathoms of water." Another significant thing to be noted in connection with the said proclamation is that it rejected the concept of the Continental Shelf *as res ominiam communis* and also avoided to make the basis of its right on the concept of the Continental Shelf as *res nullis* and justified it on the ground that since the Continental Shelf is the submarine extension of the coastal State, the latter has reasonable right to have jurisdiction on it.

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[62] C.F. Amarsinghe, "The Problem of Archipelagos in International Law of the Sea," I.C.L.Q., Vol. 23, Part 3 (July, 1974), p. 539 at p. 552.

[63] Ibid, at pp. 554-555.

[64] Ibid.

* See also for I.A.S. (1960), Q. No. 5 ; I.A.S. (1956), Q. No. 4 ; P.C.S. (1974), Q. No. 10(b) ; P.C.S. (1964), Q. No. 9(b) ; I.A.S. (1978) Q. 5(b) ; P.C.S. (1982), Q. No. 7(a) ; P.C.S. (1985), Q. No. 10(f) ; IAS (2002) Q. 5(c) ; IAS (2003) Q. 6(b) ; IAS (2007) Q. 7(a) ; IAS (2008) Q. 8(c).

Being encouraged by the American Proclamation certain other States made similar proclamations, for example Mexico in 1945, Argentina in 1945, Chile in 1947 and Peru, etc. made similar proclamations. These proclamations necessitated that a definite shape and form should be given to the International law relating to the Continental Shelf, because it was feared that in the absence of definite International Law on the point different countries of the world might occupy large portions of sea-bed and incorporate them into their territory.[65] In order to develop and codify definite rules of International Law relating to the Continental Shelf and other aspects of the law of the sea a conference was called at Geneva in 1958. After the discussion over different aspects of the problem a Convention known as Convention of Continental Shelf, 1958 was adopted. This convention has defined the term 'continental shelf' in the following words :

> "The Continental Shelf is—(a) the sea-bed and sub-soil of the submarine areas adjacent to the coast, but outside the area of the territorial sea to a depth of 200 metres or beyond that limit to where the depth of superjacent waters admits of the exploitation of the natural resources of the said areas ; (b) to the sea-bed and sub-soil of similar submarine areas adjacent to the coast of island".

It may be noted that instead of giving a definite form and certainty to the international law relating to the Continental Shelf, the definition adopted in the said convention made the matters more complicated. The definition of Continental Shelf in Art. I of the Geneva Convention is ambiguous and inadequate.

Criticism of the definition of Continental Shelf adopted to Geneva Convention of 1958.—The obvious reason for this definition was that by 1958 the scientific development was not capable of exploring and exploiting the resources beyond the depth of 200 metres. Science has developed by leaps and bounds from 1958 to the present day. Now science and technology have advanced so much so that minerals and oils can be exploited and extracted from the depth of thousands of feet of the oceans. It was feared, and rightly too, that if a clear definition and delimitation of the Continental Shelf were not made at the earliest possible time, the whole sea-bed might be partitioned by the advanced countries among themselves. Moreover, for the establishment of a regime of sea-bed beyond the limits of national jurisdiction, it was necessary first to define and delimit it from other maritime zones. But this in its turn was contingent upon a workable definition of the continental shelf.

The definition of Continental Shelf contained in Art. 1 of the Geneva Convention, 1958, contains the three elements : (1) Adjacency, (2) Depth, and (3) Exploitability.[66] According to Juraj Andrassy,[67] five criteria can be taken as bases for delimitation of Continental Shelf. They are : (1) the other limits of the shelf as defined for geological purposes ; (2) a pre-determined distance from the coast ; (3) a pre-determined depth or isobath; (4) an exploitability test ; (5) an adjacency test. The practice of the States shows that they do not consider all these elements essential. On the contrary, they take it as alternative criteria for example, advanced countries lay more emphasis on the exploitability. It is quite obvious that the advanced countries can very well exploit the resources of the sea-bed up to the depth of thousands of feet. Thus, "The fatal flaw of

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[65] See Daniel S. Cheever, "The Role of International Organisation in Ocean Development", Int.-Organ., Vol. XXIII, No. 3 (Summer 1968), p. 645; see also W. Friedmann, The future of the Oceans Chs. 7 and 8 (1971) ; R.L. Friedheim and J.B. Kadane with J.K. Gamble, Jr., "Quantitative Content Analysis of the U.N. Sea-bed Debate : Methodology and a Continental Shelf case study", Ins. Orgn. Vol. XXIV, (Summer 1970), p. 479 at p. 491.

[66] See for example, "Whose is the Bed of the Sea?" Address by Ambassador Pardo, Permanent Representative of Malta to U.N., Proc. ASIL, April, 25-27 (1968), p. 219.

[67] Juraj Andrassy, International Law and the Resources of the Sea (Columbia University Press, 1970), p. 76.

Article 1 of the Continental Shelf Convention is surely one of the most disastrous clause ever inserted in a treaty of vital importance to mankind." [68] "Unfortunately, although the above interpretation is improper, the precise limits of the Continental Shelf and the appropriate circumstances for applying the exploitability test are unknown, and the adjacency test has never been clearly explained. Until these uncertainties are settled, and an interpretation offering definite boundaries proposed, there is a risk that man's need for precision will encourage him to accept the literal reading of the exploitability test as authoritative. The best way to avoid this possibility would be to redraft Article 1." [69] It may also be noted here that although the concept of legal shelf is different from the geological concept of the shelf, yet the former cannot be altogether divorced from the latter.[70] Obviously, the definition of Continental Shelf as adopted in Geneva Convention on the Continental Shelf, 1958, has not been derived from the geological concept of the time.[71]

Impact of North Continental Shelf cases (1969) on the concept and definition of Continental Shelf.—In the *North Sea Continental Shelf* cases,[72] the International Court of Justice observed, "The rights of the coastal State in respect of the area of the Continental Shelf that constitutes of *natural prolongation* of its land territory into and under the sea exist *ipso facto and ab initio* by virtue of its sovereignty over the land, and as an extension of it in exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources. In short, there is here an inherent right."[73] The World Court further observed, 'More fundamental than the notion of proximity appears to be the principle—constantly relied upon by all the parties—of the *Natural prolongation or continuation of the land territory or domain,* or land sovereignty of the coastal State into and under the high seas, *viz.* the bed of its Territorial Sea which is under the full sovereignty of the State .... What confers the *ipso jure* title with international law attributes to the coastal State in respect of its Continental Shelf is the fact that submarine areas concerned may be deemed, to be actually part of the territory over which the coastal State already has dominion, in the sense that although covered with water, they *are a prolongation or continuation of that territory, an extension of it under the sea."* [74]

It has been aptly remarked by other writer,[75] "The legal regime of the Continental Shelf has undergone profound changes since 1969 when the International Court of Justice handed down its historic verdict in the *North Sea Continental Shelf* cases. The change is in no small measure attributable to the Court's judgment which by its elucidation of the shelf of adjacent States gave a new turn to the law on the subject." Further, "It is of course true that the Court's pronouncement does not mark the outer limits of the Continental Shelf in terms of the continental rise. However, recent trends in International Conferences suggest that the Continental Shelf includes the outer edge of the continental margin, that is, the continental rise. In this connection the Court's Judgment is relied upon by States, advocating the proposition that the Continental Shelf extends up to the edge of the continental margin. The future convention on the Continental Shelf will probably embody this trend."[76]

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[68] W. Friedmann, "Selden Redivivus—Towards a Partition of the Sea", A.J.I.L., Vol. 655 (1971), p. 757 at p. 759.

[69] Andrassy, see supra note 40 at pp. 89-90. See also M.K. Nawaz "Alternative Criteria for Delimiting the Continental Shelf, I.J.I.L., Vol. 13 (1973), p. 25 at p. 39.

[70] Richard Young, "The Limits of Continental Shelf and Beyond", Proc. A.S.I.L. April, 25-27 (1968), p. 230 ; see also Roger Denorme, "The Seaward Limit of the Continental Shelf", in the Law of the Sea-National Policy Recommendations—Proceedings of the 4th Annual Conference of the Law of the Sea Institute, June 23—June 26, 1969 (The University of Rhode Island Kingston Rhode Island, March, 1970), p. 263 at p. 267.

[71] See H.M. Jain, "Continental Shelf—Some Geological Aspects", I.J.I.L. Vol. 12 (1972), 564, 580.

[72] I.C.J. Reports (1969), p. 3. Facts of the case have been discussed later on in this Chapter, See also "Wolfgang Friedmann". The North Sea Continental cases : A critique", A.J.I.L., Vol. 64 (1970), p. 229; R.Y. Zennings, "The Limits of Continental Shelf Jurisdiction : Some possible Implications of the North Sea Judgment", I.C.L.Q., Vol. 18 (1869), p. 819; F.D. Brown, "The North Sea Continental Shelf Cases." Current Legal Problems, Vol. 23 (1970), p. 187 ; S.C. Chaturvedi, "The North Sea Continental Shelf Cases Analysed", I.J.I.L., Vol. 13 (1973), p. 481.

[73] Ibid, at p. 22.

[74] I.C.J. Reports (1969), p. 3 at p. 31.

[75] M.K. Nawaz, "The North Sea Continental Shelf Cases Revisited", I.J.I.L., Vol. 15 (1975), p. 507 at p. 518.

In the Third United Nations Conference on the Law of the Sea, consensus has emerged in favour of the 'natural prolongation' theory.[77] In Art. 76 of U.N. Convention on the law of the Sea, 1982, Continental Shelf has been defined as comprising, "the sea-bed and sub-soil of the submarine areas that extend beyond its territorial sea *throughout the natural prolongation of its land territory to the outer edge of the continental margin*, or to a distance of 200 nautical miles from the baselines from which the breadth of the Territorial Sea is measured where the outer edge of the continental margin does not extend up to that distance." This definition incorporates in first part (this provision is divided in two parts by the word 'or') the concept of the Continental Shelf as highlighted by the world court. The second part provides for a uniform Continental Shelf upto a distance of 200 miles to those coastal States who have a short Continental Shelf and their continental shelf does not extend upto the said distance. The 1982 convention has thus satisfactorily resolved the controversy relating to the definition of the continental shelf.

Outer limits of continental shelf.—Paragraph 4(a) of Article 76 of U.N. Convention on the Law of the Sea, 1982 provides :

> "For the purposes of this convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either :
>
> (i) A line delineated in accordance with paragraph 7[78] by references to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope ; or
>
> (ii) A line delineated in accordance with paragraph 7 to fixed points not more than 60 nautical miles from the foot of the continental slope."

After having provided the above method of establishing the outer edge of the continental margin, the convention on the Law of Sea lays down the formula for fixing the precise limits of the Continental Shelf of a coastal state in paragraph 5 of Article 76 in the following words :

"The fixed points comprising the line of the outer limits of the Continental Shelf on the sea-bed, drawn in accordance with paragraph 4(a) (i) and (ii), either shall not exceed *350 nautical miles* from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metres isobath, which is a line connecting the depth of 2,500 metres."

Illustration.—A State 'C''s Exploration Ship discovers oil below the depth of 1500 metre in the Seabed at a distance of 190 miles from the Indian coast. India claims that she has exclusive rights to exploit and use this oil. Is India's claim justified ?*

India's claim is justified because as for definition of continental shelf in Article 76 of the Law of the Convention, 1982, the continental shelf of a coastal State extends to the edge continental margin or 200 nautical miles where the outer edge of the continental margin does not extend upto that distance. Moreover, outer limit of the continental shelf may be upto 350 nautical miles from the baselines or may not exceed 100 nautical miles from the 2,500 metres isobath. Since 'C' State has discovered oil below the depth of 1500 metres in the Seabed at a distance of 190 miles from the Indian Coast, it is clearly within the continental shelf of India. As regards the rights of the coastal State over the continental shelf, Article 77 of the Law of the Sea Convention, 1982 provides that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. These rights are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the consent of the coastal State. Moreover, the rights of the State over continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

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[76] M.K. Nawaz, "The North Sea Continental Shelf Cases Revisited", I.J.I.L., Vol. 15 (1975), p. 507 at p. 519.

[77] See Surya P. Sharma, "Ocean Law on the Eve of the New York Sessions" , I.J.I.L., Vol. 16 (1976), p. 105 at p. 110.

[78] Paragraph 7 of Article 76 provides : "The coastal State shall delineate the seaward boundary of its Continental Shelf where that shelf extends beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured by straight lines not exceeding 60 nautical miles in length, connecting fixed points, such points to be defined by co-ordinates of latitude and longtitude".

* P.C.S. (1990) Q. 7 (b).

Besides this, the Seabed in question comes within the jurisdiction of India under the concept of Exclusive Economic Zone. According to Article 57 of the 1982 Convention, the exclusive economic zone of a coastal State may extend upto 200 nautical miles. Article 56 of the Convention makes it clear that in the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploration and exploitation etc. of its resources.

Thus India's claim is justified.

Commission on the Limits of the Continental Shelf.—The 1982 Convention on the Law of the sea also establishes a Commission on the Limits of the Continental Shelf. Paragraph 8 of the Article 76 of the Convention on the Law of the Sea provides that information on the limits of the Continental Shelf beyond the 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal state to the Commission on the Continental Shelf set up under Annex III on the basis of equitable geographical representation. The Commission shall make recommendations to the coastal state on matters related to the establishment of the outer limits of their Continental Shelf. The limits of the shelf established by a coastal state on the basis of these recommendations shall be final and binding.

The provisions relating to the Commission are contained in Annex II of the convention. Article 1 of Annex II provides that in accordance with the provisions of Article 76, a commission on the limits of the Continental Shelf beyond 200 nautical miles shall be established. Article 4 of Annex II provides that where a coastal state intends to establish, in accordance with Article 76, the seaward boundary of its 'Continental Shelf beyond 200 nautical miles, the coastal state concerned shall submit particulars of such boundary to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this convention for that State. Further the Commission shall consider data and other material submitted by coastal states and shall then make recommendations in writing to the coastal state which made the submission and to the Secretary-General.[79] In the case of disagreement by the coastal state with the recommendations of the Commission, the coastal state shall, within reasonable time make a revised or new submission to the Commission.[80]

Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles.—As noted above, convention on the law of the sea provides that the coastal state shall delineate the seaward boundary of its continental shelf where that Shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. This provision has been made with two main objectives. One of the objectives is to define the precise outer limits of the continental shelf and this has already been noted above. The second objective is to make the Continental Shelf of a coastal state beyond 200 nautical miles subject to some sort of international control. That is to say, while the coastal states shall have exclusive sovereign rights to exploit the resources of the continental shelf upto 200 nautical miles, they will have to make payments and contributions in respect of the exploitation of the Continental Shelf beyond 200 nautical miles. Article 82 of the convention on the law of the sea, therefore provides that the coastal state shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the Continental Shelf beyond 200 nautical miles from the baselines from which the breadth of territorial sea is measured. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the Sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 percent thereafter. Production does not include resources used in connection with exploitation. The payments or contributions shall be made through the International Sea-bed Authority, which shall distribute them to States Parties to the convention on the basis of equitable sharing criteria, taking into account the interests and needs of developing states, particularly the least developed and land-locked amongst them. However, a developing state which is a net importer of a mineral resources produced from its Continental Shelf is exempt from making such payments of contributions in respect of that mineral resource.

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[79] Article 6.

[80] Article 8, ibid.

Delimitation of the Continental Shelf between two or more States.—Article 6(1) of the Geneva Continental Shelf Convention provides that where the Continental Shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the Continental Shelf appertaining to such State shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea is measured. Article 6(2) further provides that where the same Continental Shelf is adjacent to the territories of two adjacent States, the boundary of the Continental Shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the *principle of equidistance* from the nearest points of the baselines from which the breadth of the Territorial Sea of each State is measured. Reference may be made here to the *North Sea Continental Shelf* cases,*[81] wherein the International Court of Justice considered the principle of equidistance. The Court's judgment "will long be remembered for its classic exposition of doctrine of Continental Shelf delimitation of shelves of adjacent States.[82]

North Sea Continental Shelf Cases (1969).—The facts of the case are as follows :

By the Special Agreements respectively, concluded between the Kingdom of Denmark and the Federal Republic of Germany and between the Federal Republic and the Kingdom of the Netherlands, the parties submitted to the Court certain differences concerning "the delimitation as between the parties of the areas of the Continental Shelf in the North Sea which appertain to each of them with the exception of those areas, situated in the immediate vicinity of the coast which have already been the subject of delimitation by two agreements dated 1st December, 1964, and 9th June, 1965, concluded in the one case between the Federal Republic and the Kingdom of the Netherlands and in the other between the Federal Republic and the Kingdom of Denmark. It was in respect of the delimitation of the Continental Shelf areas lying beyond and to seaward of those affected by the partial boundaries thus established, that the Court was requested by each of the two Special Agreements to decide what are the applicable "principles and rules of International Law."

The waters of the North Sea are shallow, and the whole sea-bed consists of Continental Shelf at a depth of less than 200 metres, except for the formation known as the Norweigian through a belt of water 200-650 metres deep, fringing the Southern and South Western Coasts of Norway to a width averaging about 80-100 kilometres. Much of the greater part of the Continental Shelf has already been the subject of delimitation by a series of agreements concluded between the United Kingdom (which lies along the whole western side of it) and certain of the States on the eastern side, namely, Norway, Denmark and the Netherlands.

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* See also for I.A.S (1976), Q. No. 4 ; observations of the Court regarding the definition of Continental Shelf, Nature and Extent of Coastal State its right etc. have already been referred earlier.

[81] I.C.J. Reports (1969), p. 3.

[82] M.K. Nawaz, see Supra note 75 at p. 506.

The parties took up fundamentally different positions. On behalf of the Kingdoms of Denmark and the Netherlands it was contended that the whole matter is governed by a mandatory rule of law which, reflecting the language of Article 6 of the Convention on the Continental Shelf, 1958, was designated by them as the "equidistance special circumstances" rule. According to this contention, all Continental Shelf boundaries must be drawn by means of an equidistance line, unless or except to the extent to which "special circumstances" are recognised to exist. An equidistance line is a line every point of which is the same distance away from whatever point is nearest to it on the coast of the countries concerned—or rather strictly, on the baseline of the territorial sea along that coast. As regards what constitutes "special circumstances" according to Denmark and the Netherlands, the configuration of the German North Sea coast, its decisive character, and the fact that it makes nearly in a right-angled bend in mid-course, would not of itself constitute, for either of the two boundary lines concerned, a special circumstance calling for or warranting a departure from the equidistance method of delimitation. These various contentions, together with the view that a rule of equidistance—special circumstances are binding on the Federal Republic, were founded by Denmark and the Netherlands partly on the 1958 Geneva Convention on the Continental Shelf and partly on general considerations of law relating to the Continental Shelf lying outside this convention. The Federal Republic for its part, while recognizing the utility of equidistance as a method of delimitation and that this method can in many cases be employed appropriately and with advantage, denies its obligatory character for States not parties to the Geneva Convention, and contended that the correct rule to be applied, at any rate in such circumstances as those of the North Sea, is one according to which each of the States concerned should have a "just and equitable share" of the available Continental Shelf, in proportion to the length of its coastline or sea frontage. The International Court of Justice did not accept the doctrine of the just and equitable share for it is at variance with what the Court entertains no doubt is the most fundamental of all rules of law relating to the Continental Shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, namely, that the rights of the Coastal State in respect of the area of Continental Shelf that constitutes a natural prolongation of its land territory into and under the Sea exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land, and as an extension of it in exercise of sovereign rights for the purpose of exploring the sea bed and exploiting its natural resources. In short, there is here, an inherent right." Thus "even in such a situation as that of the North Sea, the notion of apportioning and as yet undelimitated area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to and inconsistent with the basic concept of Continental Shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitable share, or indeed of a share, as such, at all for the fundamental concept involved does not admit of there being anything undivided to share out."

As regards the principle of equidistance, the court held "the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic Continental Shelf doctrine, is incorrect." By majority of eleven votes to six, the World Court finally held that in each case—

(A) the use of the equidistance method of delimitation not being obligatory between the parties ; (B) there being no single method of delimitation, the use of which is in all circumstances obligatory ; (C) the principles and rules of International Law applicable to the delimitation as between the parties of the areas of the Continental Shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreement of 1st December, 1964 and 9th June, 1965, respectively are, as follows : (1) Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way to leave as such possible to each party all those parts of the Continental Shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other ; (2) if in the application of the preceding sub-paragraph, the delimitation leaves to the parties areas that overlap, these are to be divided between them in agreed proportions or failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them ; (D) in the course of negotiations, the factors to be taken into account are to include, (1) the general configuration of the coasts of the parties, as well as the presence of any special or unusual features ; (2) so far as known or readily ascertainable the physical and geological structure and natural resources, of the Continental Shelf areas involved ; (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with quitable principles ought to bring about between the extent of the Continental Shelf areas appertaining with coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other Continental Shelf delimitations between adjacent States in that same region.

Being influenced by the above verdict of the International Court of Justice, Article 83 of the U.N. Convention on the Law of the Sea, 1982, provides that delimitation of the Continental Shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.[83] If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided in Part XV (*i.e.* settlement of disputes).[84]

Pending settlement, as provided in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature, and, during this transactional period, not to jeopardise or hamper the reading of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[85] Where there is an agreement in force between the States concerned questions relating to the delimitation of the continental shelf shall be determined in accordance with the provision of that agreement.[86] Thus the 1982 Convention does not at all mention the principle of equidistance. It emphasizes agreement between the parties. However parties "in order to achieve an equitable solution" may take into account the principle of equidistance to conclude the agreement.

Case concerning Continental Shelf (Tunisia—Libyan Arab Republic),[87] is the next case decided by the International Court of Justice regarding delimitation of continental shelf between two states. In this case the court stressed the importance of "the satisfaction of equitable principles" in the delimitation process.[88] The court was requested in 1978 to determine principles and rules of international law which were applicable to the delimitation between Tunisia and Libyan Arab Jamahiriya of the respective area of continental shelf appertaining to each. The court considered arguments as well as evidence based on geology, physiography and bathymetry on the basis of which each party sought to claim particular areas of seabed as the natural prolongation of its territory and concluded in its judgment of 24 February, 1982 that the two countries abutted on a common continental shelf and that physical criteria were therefore of no assistance for the purpose of delimitation. Consequently, it had to be guided by "equitable principles" and by certain factors such as the necessity of ensuring a *reasonable degree of proportionality between the areas allotted and the lengths of the coastline concerned, but the application of the equidistance method could not, in the particular circumstances of the case lead to an equitable result. With respect to the course* to be taken by the delimitation line the court distinguished two sectors near the shore, it considered having taken note of some evidence of historical agreement as to the maritime boundary that the delimitation should run in a north-easterly direction at an angle of 26° further seawards, it considered that the line of delimitation should near eastwards at a bearing of 52" to take into account the change of direction of the Tunisian coast and the existence of the Kerkennah Islands.

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[83] Article 83, paragraph 1.

[84] Ibid, paragraph 2.

[85] Paragraph 3.

[86] Paragraph 4.

[87] I.C.J. Reports 1982, p. 21.

[88] Ibid., p. 47, para 44.

By a majority of ten votes to four, the court held that the principles and rules of international law applicable for the delimitation of the areas of continental shelf appertaining to Tunisia and Libya should be following :

(1) The *delimitation is to be effected in accordance with equitable principles and taking into account of all relevant circumstances* ;

(2) The *area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both parties, so that in the present case no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such* ;

(3) In the particular geographical circumstances of the present case, the *physical structures of the continental shelf areas is not such as to determine an ecquitable line of delimitation.*

Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada—U.S.)[89]—Yet another case in which the International Court of Justice was asked to delimit the areas of continental shelf between two states is the *case concerning Delimitation of the Maritime Boundry in the Gulf of Marine Area (Canada v. U.S.)* decided by the court on 12 October, 1984. In this case, Canada and the U.S. requested the International Court of Justice to constitute a chamber of the Court consisting of five judges to delimit the areas of continental shelf between the two countries by a single maritime boundary. The area within which the delimitation sought was to be carried out lies within the ill-defined limits of the "Gulf of Maine area". It may be noted here that there is a profound difference between this case and the two other cases referred above namely *North Sea Continental Shelf Case (1969) and the Case concerning Continental Shelf (Tunisia/Libya)*. In other two cases, the Court was not required to draw a line of delimitation itself but merely to indicate the principles and rules of international law applicable to that determination. In *Tunisia/Libya* case, the court was also asked to clarify the practical method for the application of these principles and rules in the specific situation. Secondly, for the first time, the delimitation which the chamber is asked to effect does not relate exclusively to the continental shelf, but to both the continental shelf and the exclusive fishing zone, the delimitation by a single boundary.

While the parties recognized the "fundamental norm" governing maritime delimitation, each of the parties separately sought to ascertain whether international law might also contain other rules, possibly accompanied by corollaries, of mandatory application in the same field. In this connection, Canada relied on the concept of *geographic adjacency*, since it was convinced that this concept constituted the *"basis of title"* of the coastal State to the partial extension of its jurisdiction to the continental shelf and the waters of which it formed the bed. But the chamber rejected this argument and observed :

> *It should not be forgotten however, that "legal title" to certain maritime or sub-marine areas is always and exclusively the effect of a legal operation. The same is true of the boundary of the title. That boundary results from a rule of law, and not from any intrinsic merit in the purely physical fact. It is therefore correct to say that international law confers on the coastal state a legal title to adjacent continental shelf or to a maritime zone adjacent to its coasts, it would not be correct to say that international law recognizes the title conferred on the state by the adjacency of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences.*

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[89] Judgment of the I.C.J. of 12 October, 1984.

From the principle of 'adjacency' or 'proximity' Canada sought to deduce the existence in customary international law of rules for delimitation of continental shelves or adjacent maritimes zones overlap. Rejecting such contention the chamber observed :

The chamber merely notes it amount just one more, still unconvincing, endeavour to instill the idea that "equidistance" rather than "distance" is a concept endorsed by customary international law, since the objective is to assist that whatever lies less far from he coasts of one state than from those of another should automatically appertain to the former state. It is another attempt to turn equidistance into a genuine rule of law, one to which general international law has supposedly given expression while yet tempering it to take account of special circumstances, and thus into something other than it is in reality ; a practical method be applied for the purpose of delimitation.

Nevertheless this concept as manifested in decided cases, has not thereby become a rule of general International law, a norm logically flowing from a legally binding principle of customary international law, neither has it been adopted into customary law simply as a method to be given priority or preference.

"The Chamber further observed :

What general international law prescribes in every maritime delimitation between neighbouring states could there be defined as follows :

(1) *No maritime delimitation between states with opposite or adjacent coasts may be effected unilaterally by one of those states. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.*

(2) *In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographical configuration of the area and other relevant circumstances, an equitable result.*

Applying the governing principles and rules of law and equitable criteria and appropriate methods, the Chamber indicated the course of single maritime boundary that divides the continental shelf and the exclusive fisheries zones of Canada and the United States of America.

Case concerning the continental shelf—Libyan Arab Jamahiriya/Malta.[90]—This is the latest case on the point. In this case the Court was requested to decide the question as to what principles and rules of international law are applicable in the delimitation of the areas of the continental shelf which appertains to Malta and the area of continental shelf which appertains to Libya and how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such areas by an agreement.

On behalf of Libya it was contended *inter alia* that the natural prolongation of the respective land territories into and under the sea is the basis of title to the areas of continental shelf which appertain to each of them. The delimitation should be accomplished in such a way as to leave as much as possible to each party all areas of continental shelf that constitute the natural prolongation of its land territory without encroachment on the natural prolongation of the other. Further, the delimitation in this case should reflect the element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the respective state and the lengths of the relevant parts of their coasts, account being taken of any other delimitation between states in the same region. Last but not the least, application of the equidistance method is not obligatory, and its application in the particular circumstances of this case would not lead to an equitable result.

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[90] I.C.J. Judgment of 3 June, 1985.

On the other hand it was contended on behalf of Malta that the principles and rules of international law applicable in the area are that the delimitation shall be effected on the basis of international law in order to achieve an equitable solution and in practice the above principles and rules are applied by means of a median line every point of which is equidistant from the nearest points on the baselines of Malta and the low water mark of the coasts of Libya.

Both the parties have signed the 1982 U.N. Convention on the Law of the Sea but it has yet not entered into force. The Parties agreed that the dispute is to be governed by customary international law. As regards the 1982 convention the International Court of Justice observed that even independently of the references made it is the duty of the Court to consider in what degree any of its provisions are binding upon the parties as a rule of customary international law. The court referred to Art. 76, paragraph 10 and Article 83, paragraph 1 and observed :

That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation."

The Court then quoted the following observation from its judgment in *the case concerning continental shelf (Tunisia/Libyan Arab Jamahiriya). :* [91]

"In the new text, any indication of a specific criterion which could give guidance to the interested states in their effort to achieve an equitable solution has to be achieved. The principles and rules, applicable to the delimitation of Continental shelf areas are those which are appropriate to bring about an equitable result........."

After quoting the above observation, the court aptly remarked, *"The Convention sets a goal to be achieved but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard and it is left to states themselves or to the courts, to endow this standard with specific content."* [92]

For Malta, the reference to Art. 76 of the 1982 Convention represents a consecration of the "distance principle", for Libya the reference to natural prolongation corresponds to customary international law. The Court did not agree with Libyan contention that distance from the coast is not a relevant element for the decision of the present case.

As regards Libya's case that natural prolongation, in the physical sense of land territory into and under the sea is still a primary basis of title to continental shelf, the World Court observed :

".........Since the development of the law enables a state to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast whatever the geological characteristic of the corresponding sea-bed and sub-soil there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of states concerned or in preceding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned. Since at least in so far as those areas are situated at a distance of under 200 miles from the coast in question, title depends solely on the distance from the coasts of the claimant states of any areas of seabed claimed by way of continental shelf, and geological or geomorphological characteristic of those areas are completely immaterial. It follows that since the distance between the coasts of the parties is less than 400 miles so

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[91] I.C.J. Reports 1982, p. 49, para 50.

[92] I.C.J. Reports (1985) para 28.

that no geophysical feature can lie more than 200 miles from each coast the feature referred to as the rift zone cannot constitute a fundamental discontinuity terminating the southwards extension of the Maltese shelf and northward extension of the Libyan as if it were some natural boundary." [93]

As regards Malta's contention regarding the principle of equidistance" the court observed :[94]

"The Court is unable to accept that, even as a preliminary and provisional step toward the drawing of a delimitation line, the equidistance method is one which must be used, or that the court is required, as a first step to examine the effects of a delimitation by application of the equidistance method.[95] Such a rule would come near to an espousal of the idea of 'absolute proximity', which was rejected by the court in 1969[96], and which has since moreover failed of acceptance at the third United Nations conference on the Law of the Sea.........The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation even from the outset."

But on the basis of the circumstances in the present case, the court agreed that"......*the tracing of a median line between those coasts by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.[97]* The court however, added that it "should not be understood as implying that an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite states." [98]

By a majority of 14 votes to 3 the Court concluded[99] that the principles and rules of international law applicable for the delimitation are :

(1) the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances, so as to arrive at an equitable result

(2) the area of continental shelf to be found to appertain to either party not exceeding more than 200 miles from the coast of the party concerned, no criterion for delimitation of shelf areas can be derived from the principles of natural prolongation in the physical sense. Further, an equitable result may be arrived at by drawing, as a first stage in the process a median line every point of which is equidistant from the low water mark of the relevant coast of Malta (excluding the islet of Filfla) and the low-water mark of the relevant coast of Libya.

A perusal of the above cases shows that in the first place the principle of equidistance cannot be applied in all cases of delimitation between opposite states. In the absence of an agreement on the basis of circumstances of the case it may be applied by way of provisional step in the process to be continued by other operations. Secondly, since each coastal state can claim continental shelf upto a distance of 200 miles, the principle of natural prolongation has lost its importance and has been replaced to a great extent by distance criterion. Thirdly Article 83 which lays emphasis on equitable solution, sets a goal to be achieved but is silent as to the method to be followed to achieve it. Thus the rules and principles of law to be applied for delimitation of continental shelves between two opposite states are vague and far from satisfactory. The provisions of the 1982 convention relating to delimitation deserve to be suitably amended to remove uncertainty and vagueness. The function of law is not only to set goal to be achieved but also to lay down clearly the methods and procedures to achieve it.

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[93] I.C.J. Reports (1985) para 39.

[94] Para 43.

[95] I.C.J. Reports 1982, p. 79, para 110.

[96] I.C.J. Reports 1969, p. 30, para 41.

[97] Note 93, para 62.

[98] Ibid, para 77.

[99] Ibid, para 79.

Indian position on Continental Shelf.—India is one of the signatories of the U. N. Convention on the Law of the Sea but she has yet not ratified it.

VII. Exclusive Economic Zone or Patrimonial Sea :*

The concept of economic zone or patrimonial sea was for the first time advocated by Kenya in the Asian African Legal Consultative Committee at its Colombo Session held in January, 1971. Subsequently, Kenya submitted a working paper in the Lagos of Sessions of the Committee held in January, 1972. Finally Kenya submitted the draft of exclusive economic zone concept in the 1972 Geneva Session of the United Nations Sea-bed Committee.[100]

Since the United Nation's efforts relating to the revision in law of the sea the concept of economic zone is probably the most dramatic development that has taken place.[101] After the concept was first advocated by Kenya, as noted above, it has attracted many adherents. The Third U. N. Conference on the Law of the Sea deserves credit for having settled the provisions relating to the concept of Exclusive Economic Zone. Article 55 of the U. N. Convention on the Law of the Sea, 1982, provides that the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part (*i.e.*, Part V), under which the rights and jurisdictions of the coastal State and freedoms of other States are governed by the relevant provisions of this convention. Article 56 which deals with rights, jurisdiction and duties of a coastal State, in the exclusive economic zone provides the following :

1. In the exclusive economic Zone, the coastal State has :
   (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and sub-soil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the Zone, such as the production of energy from the water currents and winds ;
   (b) jurisdiction as provided for in the relevant provisions of this convention with regard to :
      (i) the establishment and use of artificial islands, installation and structures ;
      (ii) marine scientific research;
      (iii) the protection and preservation of the marine environment ;
   (c) other rights and duties provided for in this convention.

2. In exercising its rights and performing its duties under this convention in the exclusive economic zone, the coastal States shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this convention.

3. The rights set out in this article with respect to the sea-bed and sub-soil shall be exercised in accordance with Part VI.[102]

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* See also I.A.S. (1978) Q. No. 5(c) and (9d) ; See also for P.C.S. (1990) Q. 7(b)—for this question see also problem discussed under the heading "Continental Shelf" ; UPPCS (2004) Q. 6; IAS (2001) Q. 8(c) ; IAS (2005) Q. 7(a) ; IAS (2007) Q. 7(a).

[100] See Ebera Osieke, "The Contribution of States from the Third World to the Development of the Law of the Continental Shelf and the Concept of the Economic Zone", I.J.I.L., Vol. 15 (1975) p. 313 at pp. 328-29; see also Jorge Castaneda, "The Concept of Patrimonial Sea in International Law", I.J.I.L., Vol. 12 (1972), p. 535.

[101] See M. K. Nawaz, "The Emergence of Exclusive Economic Zone : Implication for a New Law of the Sea", I.J.I.L., Vol. 16 (1976), p. 471 at p. 487.

[102] Part VI deals with Continental Shelf which has already been discussed earlier in this chapter.

As regards the breadth of the exclusive economic Zone, Article 57 provides that it shall not exceed beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

As regards the rights and duties of other states in the exclusive economic Zone, Article 58 provides the following :

1. In the exclusive economic Zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this convention, the freedoms referred to Article 87 of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful use of the sea related to these freedoms such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of this convention.

2. Articles 88 to 115[103] and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this convention and other rules of international law in so far as they are not incompatible with this part.

Article 73, which deals with the 'Enforcement of laws and regulations of the coastal state' provides the following :

1. The coastal state may in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the convention.
2. *Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.*
3. Coastal state penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the states concerned, or any other form of corporal punishment.
4. In cases of arrest or detention of foreign vessels the coastal state shall promptly notify the flag state, through appropriate channels, of the action taken and of any penalties subsequently imposed.

This Article 73 is part of a group of provisions of the Convention (Articles 61 to 73) which develop in detail the rule in Article 56 as far as sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone are concerned. This was pointed out by the International Tribunal for the Law of the Sea in the *M/V "Saiga" case (saint Vincent and the Grenadines* v. *Guinea)*[104] wherein Article 73, especially its paragraph 4, was applied. The facts and decision of this case have been discussed below in this chapter under the heading *"Settlement of Disputes"*.

The above provisions emerged after prolonged negotiations among the different groups of States and seek to maintain a just and equitable balance between the rights and duties of coastal States and those of other States in the exclusive economic zone. Besides the above provisions, land-locked States and states with special geographical characteristics have been given certain rights in the exclusive economic zone in Articles 69 and 70 respectively. As regards delimitation of the exclusive economic zone between States with opposite or adjacent coasts, Article 74 provides that it shall be effected by agreement in conformity with international law as referred to in Art. 38 of the Statute of International Court of Justice in order to achieve an equitable solution. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

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[103] These articles are relating to the High Seas.

[104] The case was decided on 4th December, 1997.

The provisions of Article 74 are exactly similar to the provisions of Article 83 relating to the delimitation of Continental Shelf which have been discussed in detail earlier.

Distinction between Exclusive Economic Zone and Contiguous Zone.—The Sea waters ahead of maritime belt is called Contiguous Zone. The Contiguous Zone extends upto 24 nautical miles to be measured from the base line from which maritime belt is measured. The coastal state possesses the right to make rules to (a) prevent infringement of its customs, fiscal, immigration or sanitary regulations committed within its territory or territorial sea; (b) punish infringement of the above regulations committed within its territory or territorial sea. The contiguous zone may not extend beyond 24 nautical miles baseline from which the breadth of the territorial sea is measure and thus impose certain restrictions on the freedom of the high seas.

On the other hand, coastal state exercises sovereignty over Maritime whereas the coastal state does not possess sovereignty over Contiguous Zone. In Exclusive Economic Zone the coastal state does not exercise complete sovereignty but it has sovereign rights for the purpose of exploring and exploiting, conserving the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters, and with regard to other activities for the economic exploration and exploitation of the zone, such as the production of energy from the water currents and winds. The coastal state also has jurisdiction as provided for in the relevant provisions of the convention with regard to—

(i) the establishment and use of artificial islands, installation and structures.
(ii) marine scientific research.
(iii) the protection and preservation of marine environment.

Further as regards the breadth of the Exclusive Economic Zone, Article 57 of the convention on the Law of the Sea provides that it shall not exceed beyond 200 nautical mile from the baselines from which the breadth of the territorial sea is measured.

Continental Shelf and Execlusive Economic Zone distinguished

The concept of economic zone is related both to exclusive Fisheries Zone and Continental Shelf. It resembles them in certain respects and differs from them in certain respects. It has been rightly pointed, "The concept of exclusive Economic Zone differs both from the Continental Shelf and the exclusive Fisheries Zone. It differs from the former in that it extends to the living and non-living resources in the area of the sea, the outer limits of which are measured by distances rather than by depth or exploitability. It differs from the latter in so far as it adopts an uniform approach to all resources—living and non-living thereby ignoring the functional differences between the two kinds of resources."[105]

It may be noted here that the concept of Exclusive Economic Zone as highlighted by the 1982 convention on the Law of the sea has already become "part of modern law."[106] In *Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya/Malta*)[107], the International Court of Justice, aptly observed :

"In the view of the Court even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 *convention demonstrates the two institutions, continental shelf and exclusive economic zone are linked together in modern law. Since the rights enjoyed by a state over its continental shelf would also be possessed by it over the sea-bed and sub-soil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of the state is the legally permissible extent of the exclusive economic zone appertaining to that state. This does*

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[105] M. K. Nawaz, "The Limits of the Coastal Jurisdiction : Continental Shelf, Fisheries and Economic Zone", I.J.I.L., Vo. 14 (1974), p. 261 at p. 272.

[106] Case Concerning the Continental Shelf (Tunisia/Libya), I.C.J. reports 1982, p. 74, para 100.

[107] I.C.J. Reports 1985 (Judgment dated 3, June 1985), Majority Judgment, para 33.

not mean that the concept of continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements such as distance from the coast which are common to both concepts.[108]

Although the institution of the Continental Shelf and the Exclusive Economic Zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed are defined by reference to the regime laid down for the continental shelf. Although there can be continental shelf where there is no exclusive economic zone there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that for juridical and practical reasons, the distance criterion must now apply to continental shelf as well as to the exclusive economic zone and that quite apart from the provisions as to distance in paragraph 1 of Article 76.

Indian Position : Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 provides that the exclusive Economic Zone of India is an area beyond and adjacent to the territorial waters, and the limit of such Zone is two hundred nautical miles from the baseline from where territorial waters are measured.[109] The Central Government, may whenever it considers necessary so to do having regard to International Law and State practice, alter by notification in the official Gazette, the limit of the exclusive Economic Zone.[110] Resolutions approving the issue of such notification must be passed by both Houses of Parliament.[111] In the exclusive Economic Zone, the Union has—(a) sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producting engery from tides, winds and currents; (b) exclusive rights and jurisdiction for the construction maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the zone or for any other purpose; (c) exclusive jurisdiction to authorise, regulate and control scientific research; (d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and (e) such other rights as are recognised by International Law.[112] Further, no person (including a foreign Government) shall, except under and in accordance with the terms of any agreement with the Central Government or a licence or a letter of authority granted by the Central Government explore, exploit any rescurces of the exclusive economic Zone or carry out any search or excavation or conduct any research within the exclusive Economic Zone or drill therein or construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device therein for any purpose whatsoever provided that nothing in this sub-section shall apply in relation to fishing by a citizen of India.[113]

But section 1 (2) of the Act provides that Sections 5 and 7 shall come into force on such date or on such different dates as the Central Government may, by notification in the official Gazette, appoint. On 15th January, 1977, Central Government issued the Notification bringing into force the provisions concerning the exclusive Economic Zone of India with effect from 15 January, 1977.[114]

VIII. The High Seas[*]

Definition.[**]—The concept of freedom of open sea or high seas is very old. In the modern times it has assumed and added significance. In 1958 a convention was adopted on the high seas which is known as the Geneva Convention on the High Seas, 1958. Article 1 of the said Convention provided : "The term 'high seas' means the parts of the sea that are not included in the territorial sea or in the internal waters of a State." [115] In view of the recent developments, particularly the emergence of the concept of exclusive economic zone, this definition has become obsolete and inadequate and there is an urgent need to revise it. Article 86 of the U. N. Convention on the Law of the Sea, 1982, provides that the provisions of this Part (*i.e.*, Part VII) apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This Article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58. This provision instead of defining high seas describes it and its area.

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[108] Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Report 1985 (Judgment dated 3 June, 1985) Majority Judgment, para 34.

[109] Section 7 (1).

[110] Section 7 (2).

[111] Section 7 (3).

[112] Section 7 (4).

[113] Section 7 (5).

[114] See I.J.I.L., Vol. 16 (1976), pp. 557-562.

[*] See also for I.A.S. (1968), Q. No. 8 ; I.A.S. (1964), Q. No. 4 ; I.A.S. (1969), Q. No. 5 ; P.C.S. (1975), Q. No. 5 P.C.S. (1971), Q. No. 6 ; P.C.S. (1970), Q. No. 8 ; P.C.S. (1971), Q. No. 8 ; I.A.S. (1973), Q. No. 3(c), P.C.S. (1970), Q. No. 2 ; P.C.S. (1980), Q. No. 8(a) ; P.C.S. (1982), Q. No. 10(e) ; P.C.S. (1983), Q. No. 3 ; P.C.S. (1984), Q. No. 10(e) ; C.S.E. (1985), Q. No. 7(a).

[**] See also for C.S.E. (1996) Q. 5(d).

Thus the emergence of the concepts of exclusive economic zone and archipelagic waters, have curtailed the limits of the high seas. Since the coastal state possesses some rights on contiguous zone also, this concept has also affected the traditional concept of high seas to some extent.

Development of the law relating to high seas : Conflict between maritime Sovereignty and the freedom of high seas.—In the ancient period, it was generally believed that high seas are a common heritage of mankind and are not within the property of any State. All the States were free to use it. During sixteenth and seventeenth centuries, States started occupying different parts of the high seas. In the modern period, the reply of Queen Elizabeth of England to the Spanish Ambassador in 1580 is an important event in regard to the freedom of the high seas. In her reply she had made it clear that seas and air are the property of all mankind and no State can claim occupation over them. In 1609, Grotius also expressed the same view in regard to the freedom of open sea. At present freedom of the high seas is a universally recognised principle and all the States subscribe to this view. The Convention on the high seas was adopted in 1958. As is clear from the preamble of the Convention, the provisions relating to high seas were declaratory of customary law. In the course of time, uses of oceans multiplied and the coastal States claimed wider parts of the sea. Many of the provisions of the Convention were criticized and even challenged. The U.N. Convention on the Law of the Sea, 1982, seeks to reconcile these claims and counter-claims of major maritime powers. Article 87 of the Convention provided that high seas are open for all the States, whether coastal or land-locked. Freedom of high seas is exercised under the conditions laid down by this convention and by other rules of International Law.

The 1982 Convention further provides that the high seas shall be reserved for peaceful purposes.[116] No state may validly purport to subject any part of the high seas to its sovereignty.[117] Every state, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.[118] Every State effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[119] The 1982 Convention also imposes certain duties upon every State to take measures for ships flying its flag as are necessary to ensure safety at sea.[120] Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.[121] Ships owned or operated by a State and used only on governmental non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.[122] The 1982 Convention prohibits transport of slaves[123] and imposes duty upon all States to cooperate the repression of piracy.[124] So is also the case of illicit traffic in narcotic drugs or psychotropic substances.[125] All States are entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf. The convention also makes provision for the conservation and management of the living resources of the high sea.[126]

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[115] See U.N. Doc. A/CONF, 13/L. 53.

[116] Article 88.

[117] Article 89.

[118] Article 90.

[119] Article 94 (1).

[120] Article 94 (3).

[121] Article 95.

[122] Article 96.

[123] Article 99.

Freedoms of the High Seas*.—Article 2 of the 1958, Geneva Convention on the high seas provides that the Freedom of the high seas comprises *inter alia*, both for coastal and non-coastal States : (1) Freedom of Navigation, (2) Freedom of fishing, (3) Freedom to lay submarine cables and pipelines, and (4) Freedom to fly over the high seas. These freedoms, and others which are recognised by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States. That is to say, the freedoms enumerated are not exhaustive. They are in addition to those recognised by the general principle of international law. There is, however, no express provision of the freedom of scientific research and the freedom to construct Islands and other installations permitted under international law. The 1982 U. N. Convention on the Law of the Sea has included these two freedoms. The freedoms of high seas expressly enumerated in Article 87 (1) of the Convention are following : (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines; (d) freedom to construct artificial islands and other installations permitted under international law; (e) freedom of fishing; and (f) freedom of scientific research. It is also provided that these freedoms shall be exercised by all States, with due consideration for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under the convention with respect to activities under the area.[127] It is further provided that the high seas shall be reserved for peaceful purposes.[128] Moreover, no State may validly purport to subject any part of the high seas to its sovereignty.[129]

A brief reference may also be made here to the Geneva Convention on Fishing and Conservation of the Living Resources on the High Seas, 1958. Article 1 of the Convention provides that all States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of Coastal States as provided for in this convention, (c) to the provisions contained in the other articles of the convention. Further, all States have the duty to adopt, or to co-operate with other States in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the High seas. Article 6 of the Convention provides that a Coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.[130] Articles 116 to 120 of the U. N. Convention on the Law of the sea now deal with the conservation and management of the living resources of the high seas.

It may also be noted that the freedom of the high seas "is not an absolute principle and has never been applied in absolute terms; because it contains an inherent danger of abuse of rights it has long since been qualified in various ways (the classic example being the provision for the Universal jurisdiction with regard to crimes of piracy). State practice, including the practice of major maritime powers, amply, demonstrate that coastal State may and do exercise jurisdiction and control over foreign vessels beyond territorial waters in order to prevent injury to their territory, to ensure their self-preservation, and to enforce their laws.........[131]. Further, "beyond the limits of national jurisdiction there will remain the greatest part of the seas and oceans of the world for which the traditional legal order must be reformed and revitalised to place less emphasis on *Laissez faire* and more on conservation and co-operation.[132] Finally, "what is required in the new legal order for the seas is a better balance of interests, a better balance as between exploitation and conservation, as between free seas and clean seas, as between peaceful uses strategic considerations, and as between coastal interests and flag interests." [133]

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[124] Article 100.

[125] Article 108.

[126] Articles 116 to 120

* *See* also for UPPCS (2001) Q. 5 ; UPPCS (2005) Q. 5 ; IAS (2008) Q. 8(c).

[127] Article 87.

[128] Article 88.

[129] Article 89.

[130] As pointed out by H. Lauterpacht in his article "Sovereignty over Submarine Areas", BYBIL., Vol. XXVII (1950), 376 at p. 407; "Its (i.e.) freedom of the Seas true purpose is to ensure freedom of navigation, unhampered by exclusive claims of individual States, and freedom of utilization of the resources of the sea to a degree to which they can be equitably utilized by all. The resources of the submarine areas adjacent to the coast of the State cannot be feasibly and reasonably utilized by all. They can be so utilized mainly by the adjacent mainly (coastal State). Similarly, the true purpose of the object of securing the individual interest of any particular State provided that interest is not imcompatible with the two essential purposes of the freedom of the seas............"

Criticism of the traditional doctrine of the freedom of the seas*.— The doctrine of the freedom of the high seas is a typical example of Eurocentric law. It was devised and developed at a particular period of history to serve the needs and interests of the rich and powerful Industrial States of Western Europe and United States of America. It has been aptly remarked by Senator Metcalfe of the U.S.A. that "under the freedom of the seas doctrine there is not much equity, between developed and under-developed coastal nations" and "a less developed nation is a second class citizen." In the U. N. Seabed Committee, the representative of Kenya pointed out that in 1970 the developed countries with less than one-third of the world's population, had taken 60 per cent of the world catch of the fish while only 40 per cent had gone to the developing countries.[134] In the name of the freedom of the high seas the developed maritime countries have been using high seas for activities such as naval military operations, dumping radio active water, testing nuclear weapons and sending submarines equipped with nuclear missiles near the coasts of other states. The freedom of the seas was always interpreted by the technologically advanced and powerful military States as giving them a right to move across the wide open seas to threaten smaller States or to subjugate and colonize other people. Even today, the smaller States are concerned about several activities that take place on the high seas in the name of the doctrine of the freedom of the seas.[135] Further, "the assumptions on which the freedom of the seas doctrine was based have proved to be incorrect; the interests which it protected and the force which supported it have all radically changed." [136] The developing States of Asia, Africa and Latin America were very critical of the traditional doctrine of the freedom of the seas. It had, therefore, become necessary to adapt the traditional doctrine to the present times and circumstances so as to accommodate the interests of the developing and developed countries.[137]

The once-proud doctrine of 'freedom of the seas' has now fallen in hard time. The lawyers reared in the classical traditions of the law of the sea may deplore the sacrifice of large parts of the seas, but this appears to be the only alternative to chaos in an area which has become of major importance for the future and, indeed, for the survival of mankind.[138] The U. N. Convention on the Law of the Sea, 1982 has endeavoured to achieve the synthesis between the exclusive claims of developing countries and inclusive claims of major maritime powers.

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[131] L.J.H. Legault. "The Freedom of the Seas : A Licence to Pollute ?", University of Toronto Law Journal, Vol. XXI (1971), p. 211 at p. 218.

[132] Ibid, at p. 220.

[133] Ibid, at p. 221.

* UPPCS (2001) Q. 9(b).

[134] U. N. Doc. A/A.C. 138/S.C. II S. R. 29 March, 1976, p. 6.

[135] R. P. Anand, "Tyranny" of the Freedom of the Seas Doctrine", International Studies, Vol. 12 (1973), p. 416 at p. 442.

[136] Ibid, at p. 429.

[137] As pointed out by William V. O'Brien and Armando C. Chapelli, the "freedom of the seas" policies informing the old constitutive process are obsolete and must be revised to protect other values, notably conservation and prevention of pollution" : McGill Law Journal, Vol. 19 (1973), p. 322 at p. 325.

[138] Lucius Caflisch, "The Future of the Law of the Sea", I.C.J. Review, No. 11. (December 1973), p. 35 at pp. 44-45.

Jurisdiction on the High Seas.—It is the duty of every State to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.[139] Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in the 1982 Convention on the Law of the Sea, shall be subject to its exclusive jurisdiction on the high seas. Except in case of a real transfer of ownership or change of registry, a ship cannot change its flag during a voyage or while in a port of call.[140] Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[141] Warships on high seas have complete immunity from the jurisdiction of any State other than flag State.[142] This immunity is only for State owned or operated by State and used only on government non-commercial service.[143]

In case of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the State.[144]

It is clear from the above provision that the legal order on the high seas is based on the rule of international law under which every ship on the high seas is required to have the nationality of and to fly the flag of one State. Thus international law leaves it upon municipal laws of various States to fix conditions to be fulfilled by ships authorised to sail under its flag, rules relating to discipline on board of the ships and regarding punishment of ships sailing without authorisation under their flags. The rules of international law are thus supplemented by municipal laws of the States.[145]

Right of Visit.—The general rule is that the State whose flag ship is flying (and of course is entitled to fly) has complete jurisdiction over the ship and its crew. But this exclusive jurisdiction is subject to some exception. One such exception is right of visit. The general rule is that a war ship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity, is not justified in boarding it. But the war ship may board such a ship if there is reasonable ground for suspecting that :

(a) the ship is engaged in piracy ;

(b) the ship is engaged in slave trade ;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the war ship has jurisdiction under Article 109 of 1982 Convention on the Law of the Sea ;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the war ship.

If any of the above grounds exist, the war ship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.[146]

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[139] Article 91 of the Law of the Sea Convention, 1982.

[140] Article 92.

[141] Article 94.

[142] Article 95.

[143] Article 96.

[144] Article 97.

[145] Oppenheim's International Law, Ninth Edition, Vol. 1, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U. K. Ltd. and Mrs. Tomoko Hudson, 1992, p. 731.

Right of hot pursuit.—Yet another exception to the exclusive jurisdiction of the flag State over a vessel in the high seas is the right of hot pursuit. Article 111 of the U. N. Convention on the Law of the Sea, 1982 provides that the hot pursuit of a foreign ship may be undertaken when the competent authorities of the State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. The right of the hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with the convention to the exclusive economic zone or continental shelf, including such safety zones.

The right of the hot pursuit ceases as soon as the ship pursued enters territorial sea of its own State, or of a third State. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of the boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of territorial sea, or, as the case may be, without the contiguous zone or the exclusive Economic Zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

The above provisions also apply to a hot pursuit effected by an aircraft. It is, however, necessary to note that the right of hot pursuit can be exercised only by war ships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.

Finally, there is a provision for payment of compensation for any loss or damage caused where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit.

Conservation and Management of the Living Resources of the High Seas.—As noted earlier, freedom of high seas is not an absolute principle. It does not mean freedom to pollute or over-exploit. With a view to maintain a better balance between exploitation and conservation, U. N. Convention on the Law of the Sea, 1982 contains a separate section (*i.e.* Section 2 of Part VII - dealing with High Seas) relating to the conservation and management of the Living Resources of the High Seas.

The Convention confers on the nationals of all States the right to engage in fishing on the high seas. But this right is subject to (a) their treaty obligations; and (b) the rights and duties as well as the interests of the coastal States.[147] Thus the rights of the States or their nationals are not absolute. Further, all States have the duty to take, or to co-operate with other States in taking such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.[148] States shall also co-operate with each other in the conservation and management of living resources in the areas of the high seas.[149]

IX. REGIME OF ISLANDS

As regards the Regime of Islands, Article 121 provides the following :

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[146] Article 110.

[147] Article 116.

[148] Article 117.

[149] Article 118; See also Article 119.

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

X. ENCLOSED OR SEMI-ENCLOSED SEAS

"Enclosed or semi-enclosed sea" means a gulf, basin, or sea surrounded by two or more states and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states.[150] States bordering an enclosed or semi-enclosed seas should co-operate with each other in the exercise of their rights and in the performance of their duties under the convention.[151]

XI. RIGHT OF ACCESS OF LAND-LOCKED STATES TO AND FROM THE SEA AND FREEDOM OF TRANSIT*

"Land-locked state" means a state which has no sea-coast.[152] "Transit state" means a state, with or without a sea-coast, situated between a land-locked state and the sea, through whose territory traffic in transit passes.[153] The U. N. convention on the Law of the Sea, 1982 provides that land-locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in the convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked states shall enjoy freedom of transit through the territory of transit states by all means of transport.[154] The terms and modalities for exercising freedom of transit shall be agreed between the land-locked states and transit states concerned through bilateral, sub-regional or regional agreements.[155] Transit states, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in Part X of the convention shall in no way infringe their legitimate interests.[156]

The provisions of the convention, as well as special agreements relating to the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked states, are excluded from the application of the most favoured nation clause.[157] Further, traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic.[158] For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit states by agreement between those states and the land-locked states.[159] Last but not the least, ships flying the flag of land-locked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.[160]

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[150] U. N. Convention on the Law of the Sea, 1982, Article 122.

[151] Ibid, Article 123.

* See also for P.C.C. (1995) Q. 8(b).

[152] Article 124 (1) (a).

[153] Article 124 (1) (b).

[154] Article 125 (1).

[155] Article 125 (2).

[156] Article 125 (3).

[157] Article 126.

[158] Article 127 (1).

[159] Article 128.

[160] Article 131.

XII. INTERNATIONAL SEA-BED AREA

Definition and Delimitation of the "Area"

The first essential requirement of a legal regime of the International Sea-bed Area (hereinafter called the "Area") is that the precise limits of the Area should be clearly defined and they should be delimited from other maritime zones. The Area has been defined as the sea-bed and ocean floor and sub-soil thereof beyond the limits of national jurisdiction. A pertinent question therefore arises as to what is the outer limit of a coastal State's jurisdiction in sea-bed. The first and second U. N. Conferences on the law of the sea failed to solve this question satisfactorily. The first U. N. Conference on the law of the sea which was held in Geneva in 1958 and which adopted four conventions including the convention on the continental shelf. It need not be overemphasized here that the outer limit of the continental shelf is the limit where the coastal state's national jurisdiction in sea-bed ends.

Beyond the continental shelf, the sea bottom falls away more steeply into deep water, until it levels out again in the floor of main ocean basins, which lie as much as ten or even fifteen thousand feet below the surface. The "Area" may therefore, be defined as the sea-bed and ocean floor of the sea and sub-soil thereof beyond the continental shelf of a coastal State and extending upto the continental shelf of other coastal States. But one million dollar question is as to where the continental shelf ends. We have seen earlier that the definition of the continental shelf contained in Article 1 of the Geneva Convention on Continental Shelf, 1958 is vague. The elastic clause of the definition providing the exploitability test created great confusion in this field.[161] An effective and workable definition of the "Area" is contingent upon a workable definition and agreement on the continental shelf. It is heartening to note that Article 76 of the U. N. Convention on the Law of the Sea, 1982 has removed the ambiguities of the earlier definition.[162]

As regards the outer limit of the continental shelf, Article 76, paragraph 5 now provides that it shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

It may be added that since the continental shelf comprises of the sea-bed and sub-soil of the submarine areas that extend beyond the territorial sea, its definition and delimitation is contingent upon a workable definition and agreement on the territorial sea. There is, however, a general consensus of States that the breadth of the territorial sea of a coastal State should be upto a limit not exceeding 12 nautical miles, measured from baselines. The limit has now been adopted in the Convention on the Law of the Sea, 1982.[163] The "Area" comprises of the sea-bed and ocean floor and sub-soil thereof beyond the limits of national jurisdiction. The sea-bed and ocean floor beyond the limits of national jurisdiction begins where the outerlimit of the continental shelf of a shelf ends. According to Art. 76 of the Convention, all coastal states have a continental shelf to a distance of 200 nautical miles from the baselines from which the territorial sea is measured where the outer edge of the continental margin does not extends up to that distance. In case of states whose continental margin extends beyond 200 nautical miles, the continental shelf shall not exceed 350 nautical miles or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

Development of the Law Relating to "Area"

The credit of taking the initiative to move the machinery of the U. N. for revision and progressive development of the law of the sea goes to Malta who in 1967 proposed the following in the General Assembly: "Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor underlying the seas beyond the limits of the present national jurisdiction and the use of their resources in the interest of mankind." [164] When the General Assembly met to consider the proposal, the representative of Malta moved for the deletion of the words "Declaration and Treaty" in view of the concern of certain delegations, who thought the emphasis on "legal objectives" was premature.[165] In pursuance of the proposal of Maltese Government the General Assembly established a 35-member *ad hoc* Committee on December 18, 1967, to study the peaceful uses of the sea-bed and ocean-floor beyond the limits of national jurisdiction. Subsequently, it was replaced by a permanent 42 members U. N. sea-bed committee to study the peaceful uses of the sea-bed and ocean floor. Its membership was increased to 86 and 91 in 1970 and 1971 respectively. Later on, for substantive work, the committee was organised into three sub-committees. These sub-committees were entrusted with the task of making substantive work for the preparations for the Third Conference on the Law of the Sea.

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[161] S. Oda, International Control of Sea Resources (Leyden, 1963), p. 167.

[162] For definition of Continental Shelf ; sea Part VI of this Chapter.

[163] See Article 3 of the Convention.

A great land mark in the development of law relating to the "Area" was the adoption of the Declaration of Principles of International Law, Governing the Deep Sea Floor (*i.e.*, International Sea-bed Area) by the General Assembly on December 17, 1970,[166] on the basis of the report of the U. N. Sea-bed Committee. It was adopted by a vote of 108 in favour to none against with 14 abstentions. The Declaration contained following principles : 1. Declaration of the "Area" as common heritage of mankind.[167] 2. Non-appropriation of the "Area" by States or Persons. 3. No claim, exercise or acquiring of rights by States or persons over the "Area" incompatible with future International Regime and the Declaration of Principles. 4. Availability of the Area to all States exclusively for peaceful purposes. 5. Regulation of activities of States on the Area in accordance with Principles of International Law including the Charter of the U. N. 6. Exploitation of Resources for the benefit of Mankind as a whole. 7. Reservation of the Area exclusively for peaceful purposes. 8. Establishment of an International Regime to be established by an international Treaty of a Universal character, generally agreed upon. 9. International co-operation in scientific research for peaceful purposes. 10. Prevention of pollution and contamination and protection and conservation of Natural Resources. 11. Due regard to the Rights and Legitimate Interest of coastal States. 12. The proposed International Regime not to affect superjacent waters, Air Space above waters and Rights of coastal States. 13. Responsibility of States to carry on the activities in the Area in conformity with the International Organisation to be established. 14. Adjudication of Disputes in the Area. 15. Moratorium on the Exploitation in the Area until the establishment of an International regime.

Declaration of the "Area" and its Resources as the common Heritage of Mankind.—As declared in the first paragraph of the operative part of resolution 2749 (xxv), dated 17 December 1970, "the sea-bed and ocean-floor and the sub-soil thereof, beyond the limits of national jurisdiction as well as the resources of the area, are the *common heritage of mankind.* As remarked by the late Ambassador, H. S. Amara Singhe, formerly President of the Third U. N. Conference on the Law of the Sea, in his banquet address to the Fifth Annual Conference of the Law of the Sea Institute, June 15 —19, 1970, "The concept of common heritage of mankind as we understand it, is in effect the concept of property held in trust for all mankind property which belongs to no single nation but to the entire world. The main objection to the common heritage concept seems to be based partly on the fear that some of the heirs to that heritage might carve out what they regard as their share. This is a misunderstanding of the common heritage concept. An essential feature of the concept of common heritage is the indivisibility of that heritage. It is the acceptance of the principle of indivisibility that a rational means of an equitable sharing in the benefits resulting from the exploitation of that heritage could be ensured."[168]

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[164] U. N. Doc A/6695.

[165] See Daniel S. Cheever, "The Role of the International Organisation in Ocean Development", Int. Orgn., Vol. XXII (Summer 1968), p. 630.

[166] General Assembly Resolution 2749 (XXV). For a detailed study; see S. K. Kapoor, "Principles of International Law Governing the Deep Sea Floor", Lawyer (July, 1973), pp. 133-143.

[167] This is the most important principle relating to the Area. There is general agreement about this principle. Even before the entry into force of 1982 Convention, this principle has attained the status of Jus Cogens.

The principle of common heritage of mankind has become an indispensable principle so far as the "Area" and its resources are concerned. Reference may be made here to preamble of the Antarctica Treaty which recognized that "it is in the interest of mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord........."[169] Thus the Antarctica Treaty, though very near to it, stopped short of declaring the Antarctica as the common heritage of mankind. However, the principle of common heritage of mankind has been extended or applied in other fields also. For example, Art. 11, paragraph 1 of the Agreement Governing Activities of States on the Moon and other Celestial Bodies (1979)[170] incorporates this principle in respect of Moon and its natural resources.[171]

Article 136 of the U. N. Convention on the Law of the Sea, 1982 incorporates the principle in the following words : *"The Area and its resources are the common heritage of mankind.* This principle also finds mention in the preamble of the convention. Paragraph 6 of Article 311 (which deals with "Relation to other conventions and international agreements") provides : *"States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation* thereof." This is indeed a very important provision and by its adoption in the Convention on the Law of the Sea, 1982, the principle of common heritage of mankind has risen to the status of *jus cogens* or a peremptory norm of general international law.[172] However, it had certainly been better and of course more in conformity with Articles 53 and 64 of the Vienna Convention on the Law of Treaties, if it had added that any agreement entered into by any state party in respect of the "Area" and its resources in derogation of the principle of common heritage of mankind would be void.[173]

However, as pointed out by Ambassador Arvid Pardo of Malta, "No doubt, the declaration of the Seabed and its resources as the common heritage of mankind was bound to change the structural relationship between rich and poor countries. And that change amounted to a revolution not merely in the law of the sea but also in international relations."[174]

Significance of the 1970 Declaration of Principles.—Although the above principles were contained in a Central Assembly resolution, which is generally said to be of recommendatory character only, many of these principles have assumed added significance as there emerged general consensus of the States on them in the Sessions of the Third U. N. Conference on the Law of the sea and most of them have incorporated in the Convention of the Law of the Sea. Resolution 2749 (XXV) of the General Assembly which incorporated the above principles was adopted by 108 votes to none, with 14 abstentions. Since no state voted against it, it may be said to have been adopted unanimously. Even those States who on 17 December 1970 did not vote in favour of the resolution, subsequently supported it. Besides this, the principles contained in the said resolution have been recited and reaffirmed in subsequent resolutions of the General Assembly. Thus the principles declared in the said resolution are such as cannot be violated by member States and they will govern the Area until all international legal regime over the Area is established.

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[168] See The Law of the Sea—The U. N. Ocean Management, Edited by Lewis M. Alexander (1971) p. 373.

[169] See A.J.I.L., Vol. 54 (1960) p. 477.

[170] See (A/34/664), Doc. A/Res/34/68.

[171] For other provisions of the 1979 Agreement see Chapter on "Outer Space",

[172] The author has expressed this view in his doctoral thesis on "The Legal Regime of the International Sea-bed Area" for which he has been awarded LL.D. by Lucknow University in 1986.

[173] Ibid.

[174] U. N. Chronicle, Vol. XXX, No. 1 (March, 1993), p. 87.

Resources of the International Seabed Area and U. N. Convention on the Law of the Sea, 1982.—On the basis of the report of the U.N. sea-bed committee, the Third U. N. Conference on the Law of the Sea held its first Session in Newyork in 1973. By the end of the ninth session consensus had emerged in respect of most of the issues relating to the legal regime of the area. After the end of the eleventh session on 30 April, 1982, the draft of the convention was adopted by an over-whelming majority of 130 States. Finally on 10 December, 1982, as many as 119 States signed the Convention. By 31st January, 1995, 159 States have signed the Convention and 72 States have ratified it. As of January 2015, 167 countries (166 countries plus European Union) have become parties to the U. N. Convention on the Law of the Sea.

It may be noted here that the wealth of the sea is estimated at 300 million dollars but it could be several times more than that amount. One of the most valuable resources on the bottom of the oceans are the black potato shaped mineral rich manganese nodules. Indeed the immediate commercial focus is on these nodules which are strewen across the sea-floor. The manganese nodules contain as many as 40 different metals but the principal component of these nodules is manganese, nickel, cobalt, copper, zirconium and iron. According to the experts, bottom of the ocean contains copper enough to last the entire world for 6,000 years, compared with 40 years reserves on land. So is the case with nickel and aluminium—there is enough nickel to last 150,000, years as compared to 100 years, reserves on land and aluminium enough for 20,000 years, compared with 100 years' reserves on land. Thus, manganese nodules are "the largest mineral deposit on this planet. But for exploiting and processing these metals, highly sophisticated technology is required. Deep sea-bed mining and processing technology is possessed by a few corporations belonging to the industrialized countries. The corporations which are engaged in development of deep sea-bed mining technology are : American, British, French, Belgian, German, Dutch, Australian and Japanese. As pointed out in the Report of the Secretary-General, fewer than 10 ventures are likely to become operational within the next decade. The consortia, or corporations belonging to America have already invested $ 200 million for developing deep sea-bed technology and command a considerable lead over others".

Thus the exploitation of the resources of the Area will result in direct and immediate benefits to these corporations and ultimately to the few industrialized countries to which these corporations belong. These few industrialized countries also happen to be the major importers of the minerals to be exploited from the Area. On the other hand, there are about 20 developing countries who are the traditional exporters of the minerals to be exploited from the area. The commercial exploitation of manganese nodules will cause a decline of the prices of these minerals thereby adversely, affecting the export earnings of the land-leased developing producers of these minerals. There was therefore an urgent need to prevent or at least minimize adverse effects of the exploitation of the resources of the Area on these land-leased producer developing countries of these minerals. Consequently, before establishing a legal regime of the area, it was necessary to settle two major issues—(i) system of Exploration and Exploitation of the Area; and (ii) Production policies. Both these issues generated a lot of controversy during the third U. N. Conference on the Law of the Sea (hereinafter referred as *U. N. CLOS*).

System of Exploration and Exploitation (or who may exploit the resources of the area ?) :

The developed and developing states took diametrically opposite positions in this respect when the Third U. N. CLOS started negotiations in this respect. The developed states wanted free and non-discriminatory access to the resources of the Area on the condition that, a part of the revenues earned would be given to the International Sea-bed Authority (hereinafter referred as *"the Authority"*). On the other hand, the developing states took the position that since the area and its resources have been declared as the common heritage of mankind the exploitation of the resources of the area will be carried out by 'the Enterprise' sea-bed mining arm of the proposed Authority. After prolonged negotiations, a package, or compromise was evolved reconciling the above opposite positions. This compromise is known as *'the parallel system'* which may be summarised in the following words :

The activities in the Area may be carried out by the Enterprise and States Parties or States Entities in association with the Authority. Activities in the Area shall be carried out and controlled on behalf of mankind as a whole. States Parties or States Entities will be allowed to exploit the minerals of the Area on the condition that for mining a site, they will have to submit an application covering a total area, sufficiently large and of sufficient commercial value to allow two mining operations, within 45 days of the receipt of such application along with data concerning polymetallic modules, the Authority shall designate the part which is to be reserved solely for the conduct of activities by that Authority through the Enterprise or in association with the developing States. Each operator (other than Enterprise) will be allowed to exploit minerals only if he undertakes to transfer technology to the Enterprise. If the operator himself is not the owner of the technology, he shall obtain a written assurance from the owner of the technology that he shall transfer the same technology to the Enterprise if and when requested by the Authority. This will also apply to a developing State or group of developing States which has applied for a contract to mine sites. The obligation to transfer technology shall be included in each contract for the conduct of activities in the Area until 10 years after the Enterprise has begun commercial production of minerals from the resources of the Area and may be invoked during that period. This system shall continue for an interim period of 15 years. After fifteen years a review conference shall be held to see whether the 'parallel system' has worked properly, *i.e.*, to see whether the reserved areas have been exploited in an effective and balanced manner in comparison with non-reserved areas and whether the system has resulted in the equitable sharing of benefits to be derived from exploitation of the area taking into particular consideration the interests and needs of the developing countries.

The above 'package' can neither be said to be perfect or viable. It suffers from a number of defects but only this much was possible under the circumstances.

Production Policies

Yet another issue that generated a lot of controversy was production policies. A compromise or package that has been evolved in respect of production policies comprises of three main points : (i) Commodity Agreements, (ii) Production control Formula, and (iii) A system of compensation or other measures of economic adjustment assistance. As indicated above, exploitation of the resources of the Area will adversely affect the export earnings of land-based producer developing countries. With a view to meet this situation, consensus has emerged that the Authority, acting through existing forums or such new agreements as may be appropriate in which all interested parties, including both producers and consumers participate, shall take measures necessary to promote the growth, efficiency and stability of markets for those commodities produced from the resources of the Area, at prices remunerative to producers and fair to consumers.

As regards production control or ceiling formula, consensus emerged that during an interim period (which shall begin five years prior to 1st January of the year in which the earliest commercial production is planned to commence under an approved plan of work and shall last 25 years or until the end of the Review conference) commercial production shall not be undertaken pursuant to an approved plan of work until an operator has applied for and has been issued a production authorization from the Authority during a period beginning not more than five years prior to the planned commencement of commercial production under that plan of work unless the Authority prescribes another period in its rules and regulations having regard to the nature and timing of project development. There is also consensus in respect of the production ceiling which shall be fixed for any year of the interim period beginning with the year of the earliest commercial production.

As regards a system of compensation or other measures of economic adjustment assistance, there is general consensus that following the recommendations from the council on the basis of advice from Economic Planning Commission, the Assembly shall establish a system of compensation or other measures of economic adjustment assistance including co-operation with specialized agencies and other international organizations to assist developing countries which suffer adverse effects or their export earnings or economics resulting from a reduction in the price of an affected mineral or the volume of the mineral exported, to the extent that such reduction is caused by activities in the Area. The Authority on request shall initiate studies on the problems of those states which are likely to be most seriously affected with a view to minimizing their difficulties and assisting them in their economic adjustment.

International Sea-bed Authority

Article 156 of the U.N. Convention on the Law of the Sea, 1982 provides for the establishment of the International Sea-bed Authority. All state parties to the Convention are *ipso facto* members of the Authority. The seat of the Authority is in Jamaica. The Authority may establish such regional centres or offices as it deems necessary for the exercise of its functions.

Nature and Fundamental Principles of the Authority

The Authority is the organization through which state parties shall, in accordance with Part XI of the Convention organize and control activities in the International Sea-bed Area (hereinafter to be referred as the Area), particularly with a view to administering the resources of the Area. The powers and functions of the Authority shall be those expressly conferred upon it by the Convention. The Authority shall also have such incidental powers, consistent with the Conventions, as are implicit and necessary for the exercise of those powers and functions with respect to activities in the Area. The Authority is based on the principle of the sovereign equality of all its members.

Principal Organs of the Authority

The principal organs of the Authority are following :—

(1) The Assembly.—The Assembly consists of all the members of the Authority each member shall have one representative in the Assembly, who may be accompanied by alternates and advisors. The Assembly shall meet in regular annual sessions and in such special sessions as may be decided by the Assembly, or convened by the Secretary-General at the request of the Council or of majority of the members of the Authority. The Assembly shall adopt its rules of procedure. A majority of the members of the Assembly shall constitute a quorum. Each member shall have one vote. Decisions on questions of procedure, including decisions to convene special sessions of the Assembly, shall be taken by a majority of the members present and voting. Decision on questions of substance shall be taken by a two-thirds majority of the members present and voting, provided such majority includes a majority of the members participating in the session. When the issue arises as to whether a question is one of substance or not that question shall be treated as one of substance unless otherwise decided by the Assembly by the majority required for decisions on the question of substance.[175]

The Assembly is the sole organ of the Authority which consists of all the members and is considered the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided in the Convention. The Assembly has the power to establish general policies in conformity with the relevant provisions of the Convention on any question or matter within the competence of the Authority. The Assembly has the power to elect the members of the Council, the Secretary-General from among the members proposed by the Council, the members of the Governing Board of the Enterprise and the Director-General of the Enterprise. The Assembly can establish subsidiary organs if it finds necessary for the exercise of its functions. The Assembly has the power to assess the contributions of members to the administrative budget of the Authority in accordance with an agreed scale of assessment based upon the scale used for the regular budget of the United Nations until the Authority shall have sufficient income from other sources to meet its administrative expenses.[176]

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[175] Article 159 of the U.N. Convention on the Law of the Sea, 1982.

The first session of the Assembly was held at Kingston (Jamaica) in two parts. The second part of the first session was held from February 27 to March 17, 1995 but it failed to elect 36 member Council. Subsequently in March, 1996 the members of the Council were elected. India was elected as member of the Council for two years i.e. upto March, 1998 and then from 2000 to 2004. Other states elected in this category were China, France and Germany.

(2) The Council.—The Council consists of 36 members of the Authority elected by the Assembly in the following order :

(a) four members from among those State Parties, which during the last five years have either consumed more than 2 per cent of total world consumption or have had net imports of more than 2 per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one state from the Eastern European (Socialist) region, as well as the largest consumer ;

(b) four members from among the eight State Parties who have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one state from the Eastern European (Socialist) region ;

(c) four members from among State Parties which, on the basis of production in Areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the Area, including at least two developing states whose exports of such minerals have a substantial bearing upon their economics ;

(d) six member from among developing State Parties representing special interests ;

(e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this sub-paragraph. For this purpose the geographical regions shall be Africa, Asia, Eastern European (Socialist), Latin America and Western European and others.

A majority of the members of the Council shall constitute a quorum. Each member of the Council shall have one vote. Decisions on questions of procedure shall be taken by a majority of the members present and voting. Decision on questions of substance have been divided into several categories, some will be decided by a two-thirds majority, some by a three-fourth majority, while some others will be decided by consensus (i.e., the absence of any formal objection).[177]

The Council is the executive organ of the Authority.

It shall have the power to establish in conformity with the Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.[178]

Subsidiary organs of the Council.—Following are the two subsidiary organs of the Council.

(A) Economic Planning Commission.

(B) Legal and Technical Commission.

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[176] Article 160.

[177] Article 161.

[178] Article 162.

Each of the above commissions shall be composed of 15 members, elected by the Council from among the candidates nominated by the State Parties. However, if necessary, the Council may decide to increase the size of either commissions having due regard to economy and efficiency.[179]

(3) The Secretariat.—The Secretariat of the Authority comprises a Secretary-General and such staff as the Authority may require. The Secretary-General shall be elected for four years by the Assembly from among the candidates proposed by the Council and may be re-elected. The Secretary-General shall be the chief administrative officer of the Authority, and shall act in that capacity in all the meetings of the Assembly, of the Council and of any subsidiary organ, and shall perform such other administrative functions as are entrusted to the Secretary-General by these organs.[180]

Other organs of the Authority

(1) Enterprise.—The Enterprise is the organ of the Authority which will carry out activities in the Area directly as well as the transporting, processing and marketing of minerals recovered from the Area. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as is provided for in the statute set forth in Annex IV. The Enterpise shall act in accordance with this Convention and the rules, regulations and procedures of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council. Its principal place of business shall be the seat of the Authority.[181]

(2) Sea-bed Disputes Chamber of the International Tribunal for the Law.—The establishment of the Sea-bed Disputes Chamber and the manner in which it shall exercise its jurisdiction shall be governed by the provisions of Section 5 of Part XI, Part XV and of Annex VI.[182]

International Tribunal for the Law of the Sea.—After the United Nations Convention on the Law of the Sea, 1982 came into force on November 16, 1994, vigorous efforts were made for the establishment of the International Tribunal for the Law of the Sea. It was established on October 21, 1996.

N.B.:—In view of its importance a separate chapter has been devoted in Part IV of the book. Please, therefore, see Chapter on International Tribunal for the Law of the Sea and Sea Disputes Chamber for a detailed discussion.

As per agreement that has been reached under the Convention Authority will comprise of the following organs : 1. Assembly; 2. Council; 3. Secretariat; and 4. Enterprise. The Assembly, Council and Secretariat shall be the principal organs of the Authority. The Enterprise will be established as an organ through which the Authority shall directly carry out activities in the Area. The Assembly, a policy-making organ, shall consist of all the members of the Authority. The Council shall consist of 36 members of the Authority elected by the Assembly. The Council shall establish its two organs—(i) An Economic Planning Commission; and (ii) A Technical Commission. The Secretariat shall comprise of a Secretary-General and such staff as the Authority may require. The Secretary General shall be appointed by the Assembly upon the recommendation of the Council. He shall be the Chief Administrative Officer of the Authority. In addition to the above-mentioned organs, it is also proposed to establish *the Sea-bed Disputes Chamber of the Law of the Sea Tribunal* for settlement of disputes.

The Convention on the Law of the Sea, 1982 having come into force on 16th November, 1994, the first meeting (three-day Kingston meeting which was mainly commemorative) was held on the same date *i.e.* 16th November, 1994. The Assembly decided to reconvene its first session from 27th February to 17th March, 1995. During this meeting it dealt with such substantive matters as election of members of the council of the Authority, its Secretary-General and members of other major organs.

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[179] Article 163.

[180] Article 166.

[181] Article 170.

[182] Article 186.

As regards the first election of the judges of the International Tribunal, the State Parties to the convention decided on 21st November, 1994 to defer this until August, 1996.

It may be noted here that on 27th March, 1996, India has been elected as a member of the Council of International Sea-bed Authority for six years under investor category. It will remain a member for two years till March, 1998 and then for four years from 2000 to 2004. Under investor category China, France and Germany were also elected as members.

Financial Arrangements

As regards the funds of the Authority, there is general consensus that they shall include : (a) assessed contributions made by State Parties; (b) funds transferred from the Enterprise; (c) receipts of the Authority arising from activities in the Area ; (d) loans received; and voluntary contributions made by State Parties or other entities. Further, the funds of the Enterprise shall include : (a) amounts received from the Authority; (b) voluntary contributions made by State Parties for the purpose of financing activities of the Enterprise; (c) amounts borrowed by Enterprise; (d) income of the Enterprise through its operations; and (e) other funds made available to the Enterprise to enable it to carry out its functions and to commence operations as soon as possible. Moreover, the Enterprise shall be provided with the funds necessary to explore and exploit one mine site, and to transport, process and market the metals recovered therefrom, namely, nickel, copper, cobalt and manganese and to meet its initial administrative expenses. The amount of the said funds, and the criteria and factors for its adjustment, shall be included by the Preparatory Commission in the draft rules, regulations and procedures of the Authority.

It may be noted here that according to the latest report of the Secretary-General, the annual administrative costs of all the organs to be established taken together might range from $41 million to $53 million. The totals for building and equipping their headquarters were given as a range of from $ 104 million to $ 229 million. As to the cost of an initial sea-bed mining venture, the report assumed three alternative amounts $ 700, $ 1,000 million and $ 1,400 million of those amounts, states would be called on to invest half.

The decision of U. S. and certain other Western Countries not to sign the Law of the Sea Convention and its implications.—As pointed out above, 22 States including U. S., U. K., West-Germany, Italy, Belgium and Japan—the States which really matter so far as capital and technology required for the purpose—did not sign the convention. Envisaging the situation that the U. S. might not join the convention and might prefer to persuade its industrial partners, Japan, U. K., Belgium and France to enact national legislation with reciprocating provisions—a "mini-treaty", Mr. T. B. Koh, President of the Third U. N. CLOS said in a Press Conference held in April 17, 1981, if that option become a reality, the developing and the socialist countries might proceed to adopt the draft convention, become partners to it, with the result that under international law there would be a mini-treaty signed by some five industrialized states and a "Maxi-treaty" signed by over 100 States. If the developing States decided to take the matter to the International Court of Justice, the court might rule in favour of the Maxi-treaty side holding that the national law in question was contrary to international law. In that event those who had developed the expensive sea-bed mining technology involving major economic investments would not obtain the kind of legal security which was necessary from risking venture capital.[183]

At the signing ceremony of the convention at Montego Bay (Jamaica) 10 December, 1982, the U. S. stated that under the circumstances, "alternative ways of preserving national access to deep sea-bed resources are necessary, just and permitted by international law." But many speakers challenged the notion that a nation could legally stake a claim to deep-sea minerals which the General Assembly before it had proclaimed as "the common heritage of mankind."[184] Obviously the U. S. was referring to the doctrine of the freedom of the high seas under which it preferred to stake the claim. The U. S. took this position in the Deep Sea-bed Hard Mineral Resources Act enacted by the U. S. Congress in June, 1980. Summing up the views on that point in the debate President Koh said in his final address on 10 December, 1982 that "speakers from every regional and interest group, expressed the view that the doctrine of the freedom of the high seas can provide no legal basis for the grant by any state of exclusive title to a specific mine site in the international area of the sea-bed." He added, "Any attempt by any State to mine the resources of the deep sea-bed outside the convention will earn the universal condemnation of the international community and will incur grave political and legal consequences.[185] Thus the decision of America and some other countries not to join the convention deserves condemnation by all alike, more so because America had taken very active and keen interest at all stages and made a significant contribution in evolving the 'package' on which the convention is based. This is good as far as it goes but the fact remains that without America and some other industrialized countries who possessed capital and technology required the convention could be expected to achieve objectives.

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[183] U. N. Monthly Chronicle, Vol. XVIII, No. 5 (May, 1981), p. 22.

Some of the main reasons for the refusal of the U. S. to sign the convention were the provisions relating to (i) transfer of technology, (ii) production policies, (iii) decision making through majority rule, (iv) possibility that national liberation movements, such as P.L.O., may get share in the benefits, (v) creation of Enterprise a supra-national company, and (vi) pioneer investors to assume heavy financial obligations. Under the provisions, a pioneer investor has to pay a fixed annual fee of one million dollar to the Seabed Authority. The U. S. wants this provision to be scrapped. Thus countries like the U. S. have not signed because they feel Chapter XI of the Convention should be modified so that they have the least obligations.

It may be noted that India was also one of the countries who have not ratified the Convention. Being inspired by U. S. attitude India was adopting a wait and watch attitude. If U. S. did to renegotiate the Convention is successful, especially if the provision regarding payment of one million dollar by a pioneer investor is scrapped, India may gain a million dollar a year. Besides this, as pointed out by an Indian diplomat at the U. N. at the end of five day last round of closed-door negotiations in first week of September, 1993, "Things have changed since 80's" and now more or less India is "sitting on the fence". In sharp contrast to India's strong stand in favour of developing nations in the 1970's and 80's, the current negotiations indicate that the Indian position, though unclear at present may shift in favour of the affluent. But even India is concerned about some other moves initiated by the U. S. These moves include a bid seeking to abolish the pioneer investor's voting rights in the Council and to establish a powerful finance committee with overall control.

Obstacles to Universal Participation Removed

Objection to the convention's provisions relating to deep-seabed mining dealt mainly with the detailed procedures for production authorization from the deep seabed. Complex financial rules of contracts, decision making in the Council of the Seabed Authority, and mandatory transfer of technology.

With a view to overcome these objections, the U.N.-Secretary-General undertook informal consultations with all parties, lasting nearly four years. As a result, the General-Assembly adopted on 28 July, 1994 the Agreement Relating to the Implementation of Part XI.

The Agreement, in essence, removes the obstacles that had stood in the way of Universal acceptance by substituting general provisions for the detailed provisions contained in the convention and by leaving it to the Authority to determine at a future date the exact nature of the rules it would adopt with respect to the authorization of deep-seabed mining operations.

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[184] U. N. Chronicle, Vol. XX, No. 2 (1983), p. 5.

[185] Ibid.

The Agreement also removed the obligation for mandatory transfer of technology and ensured the representation of certain countries, in the Council, while giving those countries powers over decision-making.[186]

Above all, it was agreed that the Agreement and Part XI would be applied together. In case of conflict between the two, the provisions of the Agreement would prevail.

Pioneer Investors.—In 1979, the U. S. made a proposal regarding the ways to protect investments made by states and private consortia but withdraw it early in 1981. Therefore, before the 1982 session, the conference had not discussed any proposal on the subject. During the first week of the 1982 session the issue was again raised on a proposal made by the U. S. and other western countries whose firms were already involved in deep sea exploration. Consequently, a scheme was devised by the conference and was set out in Resolution II (Resolution I is on the establishment of Preparatory Commission). It was adopted alongwith the convention although it was not part of it for it was intended to take effect before the convention entered into force. The convention had to be adjusted to the scheme, since many of the guarantees it afforded would extend into the first generation of sea-bed mining operations under the control of the Authority. The scheme will entitle states and private investors to qualify for registration by the Preparatory Commission as pioneer investors. This will entitle them to explore but not commercially exploit—a selected area of the seabed until the convention comes into effect. Further, it would guarantee them priority over all others except the Authority's own Enterprise—once the Authority permits commercial production from the deep sea-bed.

To qualify as pioneer investors, States and private consortia would have to spend at least $ 30 million on sea-bed activities by 1st January 1983, not less than 10 per cent of which must have been on a specific portion of the sea-bed. But for developing countries (other than India which was provided for separately) the said date was extended to 1st January 1985. As regards the number of pioneer investors, the revised draft limited it to eight plus an unspecified number from developing countries, the number of those who could qualify for pioneer status. These eight are divided into two groups of four each. The first, consists of France, Japan, India and the Soviet Union, including their State enterprises and corporations. The second group of four consists of entities made up of firms (namely, Kennecott Consortium, Ocean Mining Associates, Ocean Management Incorporated and Ocean Minerals Company) having the nationality of or controlled by any one or more of the following : Belgium, Canada, Federal Republic of Germany, Italy, Japan, Netherlands, United Kingdom and United States.

Under this scheme, each investor other than a State would have to be registered with the Preparatory Commission by a "certifying State" which had signed the convention. The pioneers would be confined during the prevention period to exploration and prospecting for polymetallic nodules in an allocated area, commercial exploitation would be excluded before the convention entered into force. Each applicant would receive only one site. Each pioneer would be required to pay $ 2,50,000 fee to the Commission for registration, plus $ 2,50,000 to the Authority when it applied for a plan of work (mining contract). There would be an additional fee of $ 1 million per year from the time the pioneer area was allocated, payable to the Authority when the investor's plan of work was approved. Before applications are submitted, certifying States would have to ensure that claims for particular areas do not overlap. Pioneer investors would be guaranteed entry into the sea-bed mining area under the convention once it enters into force. Only those pioneers certified by States which had ratified the convention would be entitled to have plans of work approved.[187]

The total reserves of nodules have been estimated at 3,000 billion tonnes. Unlike fossil, nodules are renewable and are widely distributed throughout the three major oceans of the world. Multinational Companies have already spent about Rs. 2,400 crores in developing capacity to mine the nodules. The economic potential of the metals found in the nodules is so great that even if ten per cent of estimated deposits turn out to be economic, sufficient supplies of many metals will be available from the sea for thousands of years at our present rate of consumption. India is short of many metals that nodules can provide.

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[186] U.N. Chronicle, Vol. XXXII No. 1 (March, 1995) p. 12.

[187] U. N. Chronicle, Vol. XIX No. 6 (June 1982) pp. 9-12.

A large part of the demand of copper is met by imports as also more than half of zinc and lead, the entire requirement of nickle, cobalt and vanadium are imported. Nearly 15 laboratories all over the country are participating in the analysis of the nodules. The first haul of nodules from the sea-bed was lifted by Indian research vessel *"R. v. Ganeshani"*, a vessel owned by C.S.I.R. and run by the National Institute of Oceangraphy. Later on three more ships joined the fleet. According to Dr. T. K. S. Murthy, head of the Uranium extraction division, Bhabha Atomic Research Centre, the richest site discovered has a density of 21 kg. of nodules per square metre. Nodules are found at a depth of 3000 to 6000 metres in all oceans of the world. Nodules mining involves massive investment. The estimated cost of processing, transporting and exploring for one million tonnes of nodules per year will be between Rs. 200 and Rs. 800 crores.[188]

As noted above, India has been accorded pioneer status in sea-bed mining. On 26 August, 1987, the then Prime Minister of India informed the Lok Sabha that the Preparatory Commission had allocated to India a site (of 1,50,000 square kilometres) in the sea-bed of Central Indian Ocean and that Indian claim has been registered. The General Committee of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea took this decision on August 17, 1987.[189]

It may be noted that France, Japan and the Soviet Union became pioneer investors in the International Sea-bed Area on 16 May, 1988, joining India. It is indeed a significant step towards putting into practice the 1982 United Nations Convention on the Law of the Sea, by which the Area has been established. The above decision was taken by the Commission in its sixth session held at Kingston during 14 March—8 April, 1988. In the resumed sixth session of the Commission held in Newyork from 15 August to 2 September, 1988, the Commission held informal consultations on fulfilment of obligations of "pioneer investors" registered under Resolution II of the Third U. N. Conference on the Law of the Sea.

Apart from India, the Pioneer Investors Group now comprises of Japan, France, China and former Soviet Union (now Russia) plus a Consortium of Belgium, Canada, Germany, Italy, the Netherlands, Britain and the U. S.

Preparatory Commission.—Resolution I adopted by the U. N. Conference on the Law of the Sea in its 1982 session deals with the establishment of the Preparatory Commission. It defines powers and functions of the Commission which is to prepare for the establishment of the International Sea-Bed Authority and the International Tribunal for the Law of the Sea. The Commission would begin meeting between 60 and 90 days after 50 States signed or acceded to the convention. It would be financed from United Nations regular budget and serviced by the United Nations Secretariat. It would remain in existence until the end of the first session of the Assembly of the Authority. The Commission would prepare draft rules, regulations and procedures necessary to enable the Authroity to commense its functions, as well as perform the traditional preparatory functions of drafting agendas and a budget. It would also exercise the powers and functions assigned to it in the resolution on the treatment of preparatory sea-bed investments. The first session of the Preparatory Commission was held in Jamaica from 15 March to 8 April, 1983. During its first session the Commission established four special Commissios of equal status with the Plenary. It also established a General Committee consisting of the Chairman and other officers of the Preparatory Commission and of the Sepcial Commissions.

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[188] See the Pioneer, dated 12 April, 1986, p. 10.

[189] See I.J.I.L., Vol. 28 (1988), pp. 126-151.

The first part of the second session of the Preparatory Commission was held in Kingston, Jamaica from 9 March to 13 April, 1984. The third session of the Preparatory Commission was held in Jamaica in March-April, 1985. The fourth session was held in Jamaica from 17 March to 11 April, 1986. The sixth session was held in two parts—the first part in Kingston from 14 March to 8 April, 1988 and the second part from 15 August to 2 September, 1988. The seventh session of the Commission was held in two parts. The first part of the session was held at Kingston from 27th February to 23rd March, 1989. The Commission discussed the matter relating to liabilities of pioneer investors in respect of exploration of Sea-bed. It also considered the matters relating to Land-based producer States, Enterprise, Mining Code and Sea Law Tribunal. The second part or resumed seventh session was held from 14 August, 1989 to 1st September, 1989 at Newyork. In this resumed session the Commission considered duties, training etc., of new pioneer investors. In the eighth session, which was held from 13 to 31st August, 1990, the Commission approved the understanding on the fulfilment of obligation by the Registered Pioneer Investors and their certifying States. The ninth session of the Preparatory Commission was also held in two parts—(i) from 25 February to 22nd March, 1991 at Kingston, and (ii) 12 to 30th August, 1991 at Newyork. In the first part of the session China was welcomed as the fifth new pioneer investor. The tenth session was also held in two parts—(i) 24th February to 13th March, 1992 at Kingston; and (ii) 10th August to 21st August, 1992 at Newyork. In this session, an agreement was reached in respect of the Registration of exploitation of minerals from Sea-bed.

The eleventh session of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea was held at Kingstom from 22 March to 2nd April, 1993. In this session the Commission stressed the need for a framework agreement to deal with "hard core" issues that have so far eluded resolution. The "hard core" issues mainly involve provisions of Part XI of the United Nations Convention on the Law of the Sea which deal with mining of the Sea-bed in area outside the jurisdiction or sovereignty of States. The Commission also decided not to hold any more meetings in 1993. Instead, it decided to make provisions every year for a two-week annual session, until the entry into force of the Convention.[190]

The Preparatory Commission concluded its last session on 12th August, 1994 ending 12 years of work. In its final report, the Commission recommended approval of a $2.5 million expenditure to establish and operate the International Seabed Authority, starting on 16th November, 1994. The Authority is to be headed by a Secretary-General who started work on 1st June, 1995. The Commission also approved the registration of the Republic of Korea as a pioneer investor and waived the $1million annual fee provided for in the convention for the pioneer investors.[191]

Provisional Understanding Regarding Sea-Bed Matters.—As referred in the beginning, on 3rd August, 1984, eight developed countries, namely, Belgium, France, Federal Republic of Germany, Italy, Japan, Netherlands, the U. K. and the U.S.A. entered into a Provisional Understanding Regarding Sea-bed Matters. It aims to resolve conflicts arising out of possible overlapping in the areas claimed by pioneer investors. It provides that no party shall issue an autorization in respect of such areas. Further without such authorization or registration, no party shall itself engage in deep sea-bed operations. It also provides that no party shall authorize, or itself engage in, exploitation of the hard mineral resources of the deep sea-bed before 1 January, 1988. Thus eight developed countries established some form of a 'Mini Treaty' to facilitate the exploitation of deep sea-bed resources in terms of unilateral legislation.[192] As indicated earlier, such a Treaty will be void in view of Article 137 (3) and the Declaration adopted by the Preparatory Commission on 30 August, 1985.

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[190] U. N. Chronicle, Vol. XXX, No. 2 (June 1993), p. 71.

[191] U.N. Chronicle, Vol. XXXI, No. 4 (December 1994), p. 42.

[192] See Bhimsen Rao, "Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea", I.J.I.L., Vol. 25 (1985) p. 226 at p. 234.

It is significant to note that Article 15 of the Provisional Understanding provides that the agreement is without prejudice to, nor does it affect, the position of the parties, or any obligations assumed by any of the Parties, in repect of the U. N. Convention on the Law of the Sea. It may be noted here that France, Japan, Belgium and Italy have signed the 1982 Convention on the Law of the Sea. Thus half of the States Parties to the Provisional Understanding have signed the Convention. Federal Republic of Germany has given an indication that it may also join the Convention if the Preparatory Commission could accommodate its deep sea-bed mining interests under the pioneer investors.[193] The position of U. K. is, though not as good, nearly same. It has been pointed out :

> "What has been called 'the convoluted compromise' over prospective community participation will certainly be widely interpreted as an attempt of the Federal Republic of Germany and the U. K. to secure eventually a form of limited accession with major accession.[194] If such a trend continues, the U. S. may be left alone in the field. It may therefore, be hoped that it will not be long before the U. S. also joins the U. N. Convention on the Law of the Sea, 1982." [195]

The world consesus will ultimately triumph and the 1982 Convention will provide an effective legal regime over nearly 70 per cent of the surface of our globe. Thus the Provisional Understanding between eight Developed Countries, rather I will prefer to call it 'Provisional Misunderstanding' will be null and void because of the 1982 Convention which is backed by world Consensus.

Thus, one major difficulty which has stood in the way of the treaty's universal acceptance was that the majority of the industrialized States are opposed to provisions governing the International regime for deep Sea-bed mining. As remarked by U. N. Secretary-General, Boutros-Boutros Ghali, a comprehensive solution would have to safeguard the principle of the common heritage of mankind. He added that it was the U. N.'s duty to ensure that the Convention "enters fully into force at last and really becomes the corner stone of tomorrow's international maritime law." [196]

Agreement Relating to the Implementation of Part XI of the convention (28 July, 1994).

With a view to overcome the objections of the industrial states, the U.N. Secretary-General undertook informal consultations with all interested parties, lasting nearly four years. As a result, the General Assembly adopted on 28 July 1994 the Agreement Relating to the Implementation of Part XI, thus removing the obstacle that stood in the way of universal participation of states to the U.N. Convention on the Law of the Sea, 1982. The General Assembly adopted this resolution (48/263) by a vote of 121 to none, with 7 abstentions.

XIII. PROTECTION AND PRESERVATION OF MARINE ENVIRONMENT*

One of the main achievements of the Third U. N. Conference on the Law of the Sea is to adopt generally agreed provisions relating to protection and preservation of the marine environment. These provisions which will govern nearly three-fourth of the surface of the earth are contained in Part XII of the 1982 Convention on the Law of the Sea. In view of the increasing realization of the environment in general and that of marine environment in particular, these provisions are very important, nay, must for the survival of mankind.

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[193] Ibid,at p. 244.

[194] K. R. Simmonds. "The Status of the United Nations Convention on the Law of the Sea" I.C.L.Q., Vol. 34, p. 359 at p. 368.

[195] See also R. P. Anand, "U. N. Convention on the Law of the Sea and the United Sates", I.J.I.L., Vol. 24 (1984) p. 153 at pp. 198-199.

[196] U. N. Chronicle, Vol. XXX No. 2 (June, 1993) p. 71.

* IAS (2005) Q. 7(a).

The Convention provides that States have the obligation to protect and preserve the marine environment.[197] States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.[198] The Convention imposes duty on States, individually or jointly as appropriate, to take measures to prevent, reduce, and control pollution of the marine environment.[199] States shall co-operate on a global basis and, as appropriate on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional centres.

The Convention provides for detailed International rules and national legislation to prevent, reduce and control pollution from land based sources.[200] sea-bed activities subject to national jurisdiction,[201] activities in the area[202] by dumping,[203] vessels[204] from or through the atmosphere.[205] States are responsible for the fulfilment of their international obligations, concerning the protection and preservation of the marine environment. They shall be liable in accordance with International law.[206]

XIV. MARINE SCIENTIFIC RESEARCH

Part XIV of the Convention deals with marine scientific research.[207] According to the Convention, all States and competent International organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided under the Convention.[208] States and competent international organizations have been enjoined to promote and facilitate the development and conduct of marine sientific research in accordance with the Convention.[209] The Convention lays down general principles for the conduct of marine scientific research.[210] Detailed provisions relating to conduct and promotion of marine scientific research.[211] Scientific research installations or equipment in the marine environment,[212] responsibility and liability[213] and settlement of Disputes and Interim Measures[214]have been made.

XV. SETTLEMENT OF DISPUTES

Since the Convention on the Law of the Sea would have been incomplete without provisions relating to Settlement of Disputes, Part XV of the Convention is devoted to such provisions. These provisions may broadly be divided into two parts—(i) General Provisions, and (ii) Compulsory Procedures Entailing Binding Decisions.

As regards the General Provisions, Art. 279 imposes obligation upon State Parties to settle disputes by peaceful means. According to Article 280, State Parties may agree to settle a dispute concerning the interpretation or application of the Convention by any peaceful means of their own choice. The Convention also provides for procedure where no settlement has been reached by the Parties.[215] Provisions relating to obligation to exchange views[216] and conciliation[217] have also been made.

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[197] Article 192.

[198] Article 193.

[199] Article 194. See also Articles 195 and 196.

[200] Article 207.

[201] Article 208.

[202] Article 209.

[203] Article 210.

[204] Article 211.

[205] Article 212.

[206] Article 235.

[207] See Articles 238-278.

[208] Article 238.

[209] Article 239

[210] Article 240.

[211] See Articles 245 to 257

[212] See Articles 258 to 262.

[213] Article 263.

[214] Article 264 and 265.

As regards Compulsory Procedures Entailing Binding Decisions, the Convention has made "a significant departure from the traditional principle of International law under which a State has the sovereign right to refuse to submit a dispute to an independent body." [218] Article 286 of the Convention provides that any dispute concerning the interpretation or application of the Convention *shall,* where no settlement has been reached by recourse to Section 1 (*i.e.,* provisions referred above), be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction. This is however, subject to certain limitations contained in Section 3 comprising of Articles 297, 298 and 299. As regards choice of procedure, Article 287 (1) provides that when signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention :

(a) The International Tribunal for the Law of the Sea established in accordance with Annex. VI;

N.B.—The International Tribunal for the Law of Sea referred to in Article 287 was finally established on 21 October, 1996. This has been discussed in detail in the next chapter, *i.e.* Chapter 20.

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex. VII;

(d) a special arbitral tribunal constituted in accordance with Annex. VIII for one or more of the categories of disputes specified therein.

Further, a declaration made under the above provision shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, Section 5.[219]

Article 288 which deals with the jurisdiction of a court or tribunal referred to in Article 287 also provides that in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.[220] As regards applicable law, Article 293 provides the following :

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono,* if the parties so agree.

Lastly, Article 296, provides that any decision rendered by a court or tribunal having jurisdiction under Section 2 shall be *final and shall be complied with by all the parties to the dispute.* But any such decision shall have no binding force except between the parties and in respect of that particular dispute. Article 297 is on the lines of Articles 59 and 60 of tne Statute of the International Court of Justice and combines both these articles. Article 296 is however, conspicuous by its silence in respect of the power of the court or tribunal to construe its judgment at the request of any party in the event of dispute as to the meaning or scope of the judgment.

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[215] Article 281.

[216] Article 283

[217] Article 284.

[218] Jorge R. Coquia, "Settlement of Disputes in the U. N. Convention on the Law of the Sea",I.J.I.L.. Vol. 25 (1985) p. 171 at p. 190.

[219] Article 287 (2).

[220] Article 288 (4).

Nevertheless, "the New Convention contains a number of innovative and very significant provisions involving the settlement of international disputes. While the provisions are limited only to disputes arising from the Convention on the Law of the Sea, they can be considered as a significant break through for the peaceful settlement of international disputes with more effective and binding effect." [221] To achieve the desired effect, these provisions should be fully implemented.

Prompt Release of vessels and crews

Article 292 of the U.N. Convention on the Law of Sea, 1982 deals with the prompt release of vessels and crews. It provide the following :

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and if it is alleged that the detaining state has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties, or failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under Article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag state of the vessel.

3. The court or tribunal shall deal without delay the application for release and *shall deal only with the question of release,* without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining state remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining state shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

The above provisions were invoked by Saint Vincent and the grenadines against Guinea in *The M/v. Saiga case* which was decided by the International Tribunal for the Law of the Sea on 4th December, 1997. The facts this case are as follows :

On 13 November, 1997, the Agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal an application under Article 292 of the United Nations Convention on the Law of the Sea instituting proceedings against Guinea in respect of a dispute concerning the prompt release of M/v. "Saiga" and its crew. According to Saint Vincent and the Grenadines M/v. "Saiga" did not enter the territorial waters of Guinea. While the ship was drifting in the exclusive economic zone of Sierra Leone it was attacked by two customs patrol boats of Guinea. It was alleged that the Guinean authorities had no jurisdiction to take such action. At the time of the incident, the M/v. "Saiga" served as a bunkering vessel supplying fuel oil to the fishing vessel and other vessels operating off the coast of Guinea. In the early morning of 27 October, 1997, the M/v. "Saiga" having crossed the maritime boundary between Guinea and Guinea Bissau, entered the exclusive zone of Gunea approximately 32 nautical miles from the Guinean island of Alcatraz. On 28th October, 1997, the M/v. "Saiga" was arrested by Guinean customs patrol boats. The arrest took place at a point south of the maritime boundary of the exclusive economic zone of guinea. In the course of action, at least two crew members were injured on the same day the vessel was brought into Conakry where the vessel and its crew were detained. Subsequently, the two injured crew members were allowed to leave and the cargo was discharged in Conakry upon the orders of local authorities. No bond or other financial security was requested by Guinean authorities for the release of the vessel and its crew or offered by Saint Vincent and the Grenadines.

Guinea contended that the Application had not been submitted in conformity with Article 110 of the Rules of the Tribunal and Article 292 of the Convention on the Law of the Sea was not applicable to the case. Guinea further stated that M/v. "Saiga" was involved in smuggling, an offence under the customs Code of Guinea and that the detention had taken place after the exercise by Guinea of the right of hot pursuit in accordance with Article 111 of the convention.

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[221] *Jorge R. Coquia, note 218 p. 171.*

Before proceeding with the facts, the Tribunal held that it has jurisdiction.

While relying upon Article 292 of the Convention Saint Vincent and the Grenadines also refered to Articles 73, 220 and 226. Guinea, on the other hand, urged that reference made by Saint Vincent and Grenadines to Article 73[222] of the Convention is unfounded because a bond has been posted and Article 292 is not applicable to the case which, in its opinion concerns smuggling. Guinea further stated that the arrest of the M/v Saiga was in conformity with International Law and its release cannot be claimed on the basis of Article 292 of the Convention. According to Guinea : (a) the bunkering must be qualified its an infringement of its customs legislation; (b) the bunkering took place in its contiguous zone (less than 24 nautical miles from the island of Alcatraz); and (c) the arrest was justified because it was effected following the exercise of the right of hot pursuit according to Article 111 of the Convention.

Before proceeding to decide substantive issues, the Tribunal observed that it is not called upon to determine whether true detention of the M/v "Saiga" was legitimate. It was called upon to determine whether the detention consequent to the arrest is in violation of a provision of the Convention "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

From the pleadings and documents submitted by Guinea there also emerged inductions that the violation of which the M/v Saiga was accused was seen as the violation concerning its rights in the exclusive economic zone while discussing the applicability of Article 73 to the present dispute, the Tribunal observed that in the light of the independent character of the proceedings for the prompt release of vessels and crews, when adopting its classification of the laws of the detaining state, the Tribunal is not bound by the classification given by such state. The Tribunal can, on the basis of the arguments made, conclude that, for the purposes of the present proceedings, the action of Guinea can be seen within the framework of Article 73. The Tribunal then proceeded to consider the submission of Guinea that Article 73 of the Convention cannot form a basis for the application because a bond or other security has not been offered, or posted.

The Tribunal pointed out that in the case under consideration Guinea has not notified the detention as provided for in Article 73, paragraph 4, of the convention. Guinea has refused to discuss the question of bond and the ten day time-limit relevant for the application for prompt release has elapsed without the indication of willingness to consider the question. The Tribunal, therefore, observed that in the circumstances, it does not seem possible to the Tribunal to hold that Saint Vincent and the Grenadines responsible for the fact that a bond has not been posted. The Tribunal further held that taking into consideration the commercial value of the gasoil discharged and the difficulties that be incurred in restoring the gasoil to the holds of the *M/v "Saiga"*, it is reasonable that the discharged oil shall be considered as a security to be held and as case may be, returned by Guinea, in kind or in its equivalent in United States dollars at the time of judgement.

After having unanimously decided that the Tribunal has jurisdiction under Article 292 of the United Nations Convention on the Law of the Sea to entertain the Application filed by Saint Vincent and the Grenadines on 13th November, 1997, the Tribunal decided the following by 12 votes to 9 :

(i) that the Application is admissible.

(ii) that Guinea shall promptly release the *M/v. Saiga* and its crew from detention.

(iii) that the release shall be upon the posting of a reasonable bond or security; and

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[222] For the provisions of Article 73, see matter earlier discussed under Exclusive Economic Zone.

(iv) that the security shall consist of : (1) the amount of gasoil discharged from the *M/v. Saiga;* (2) the amount of 400,000 United States dollars, to be posted in the form of a letter of credit or bank guarantee, or, if agreed by the parties, in any other form.

Subsequently on 22nd December, 1997 Saint Vincent and Grenadines instituted proceedings for provisional measures in accordance with Annex. VII of the Convention in respect of the dispute concerning the *M/v. Saiga*. In this case *i.e.* the *M/v "Saiga" No. 2* (*Saint Vincent and the Grenadines* v. *Guinea*), the Tribunal gave its orders on 11th March, 1998 on 13th January, 1998, Saint Vincent and the Grenadines filed with the Registry of the Tribunal a request for the prescription of provisional measures in Convention with the arrest by Guinean authorities of a vessel, the *M/v Saiga,* flying the flag of Saint Vincent and the Grenadines on 20th February, 1998 the Tribunal was informed that the Government of Guinea and the Government of Saint Vincent and the Grenadiners had agreed to transfer to the Tribunal the arbitration proceedings instituted by Saint Vincent and the Grenadines. The Tribunal was also informed by the parties that the *M/v Saiga,* its Master and crew had been released in execution of the Tribunal's judgement of 4th December, 1997. The Tribunal unanimously prescribed the following provisional measure under Article 290, paragraph 1, of the Convention :

"Guinea shall refrain from taking or enforcing any judicial or administrative measure against the *M/v Saiga,* its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28th October, 1997 and to the subsequent prosecution and conviction of the Master."

Further, the Tribunal unanimously recommended "that Saint Vincent and the Grenadines and Guinea endeavour to find an arrangement to be applied pending the final decision and to this end the two states should ensure that no action is taken by their respective authorities or vessel flying flag which might aggravate or extend the dispute submitted to the Tribunal".

The U.N. Convention on the Law of the Sea, 1982 has already entered into force. As pointed out by U.N. Secretary-General Boutros Boutros Ghali, addressing the first meeting of the Assembly of the International Seabed Authority on 16th November, 1994, the entry into force of the U.N. Convention on the Law of the Sea has turned the dream of a comprehensive law for the oceans into a reality and is one of the greatest achievements of this century.[223]

So far 168 countries (166 countries plus European Union) have become parties to the Convention on the Law of the Sea. U.N. Convention on the Law of the Sea is now regarded as codification on the customary Law of the Sea.

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[223] U.N. Chronicle, Vol. XXXII, No. 1, (March, 1995), p. 8.

CHAPTER 17

THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND SEA-BED DISPUTES CHAMBER

Introduction.—Article 287 of the U.N. Convention on the Law of the Sea provides that when signing, ratifying or acceding to the convention or at any time thereafter a state shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention :

(a) The International Tribunal for the Law of the Sea established in accordance with Annex VI.
(b) The International Court of Justice ;
(c) an arbitral tribunal constituted in accordance with Annex VIII;
(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[1]

It is further provided that a declaration made under paragraph 1 of Article 287 shall not affect or be affected by the obligation of a state party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI of the Convention, section 5.[2] Further, a State Party, which is a party to the dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.[3]

The United Convention on the Law of the Sea, 1982 having come into force on November 16, 1994 vigorous efforts were made to establish the International Tribunal for the Law of the Sea. The seat of the Tribunal is in the Free and Hanseatic city of Hamburg in the Federal Republic of Germany. The Tribunal may, however, sit and exercise its functions elsewhere whenever it considers this desirable. In August, 1996, 21 Judges of the Tribunal were elected. In accordance with the Law of the Sea convention, they were elected on the basis of 'equitable geographical distribution'. Dr. P.C. Rao of India was also elected as one of the Judges of the Tribunal. After all formality were completed, the Tribunal was finally established on 21 October 1996.[4]

Composition.—The International Tribunal for the Law of the Sea comprises of a body of 21 members, elected from among persons enjoying the highest reputation of fairness and integrity and of recognized competence in the field of the law of the sea. In the Tribunal as a whole the representation of the principal legal system of the world and 'equitable geographical distribution' shall be assured.[5]

No two members of the Tribunals may be the nationals of the same State. There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations.[6] On August 1996, twenty one members of the Tribunal were elected on the basis of 'equitable geographical distribution' out of these

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[1] Article 287, paragraph 1.

[2] Article 287, para 2.

[3] Ibid., para 3.

[4] Article 1 of the Statute of the International Tribunal for the Law of the Sea, Annexe VI of the U.N. Convention on the Law of the Sea, 1982.

[5] Article 2 of the Statute.

[6] Article 3.

21 members, 5 are from Asia, 5 from Africa, 4 from Western Europe 4 from Latin America and, Caribbean States and 3 from Eastern Europe.

The members of the Tribunal are elected for nine years and may be re-elected; provided however, that the members elected at the first election, the terms of seven members shall expire at the end of three years and the terms of seven more shall expire at the end of six years. The members of the Tribunal whose terms are to expire at the above-mentioned initial period of three and six years shall be chosen by lot to be drawn by the Secretary-General of the United Nations immediately after the first election.[7]

Access to the Tribunal.—All the State Parties to the U.N. Convention on the Law of the Sea have access to the Tribunal. The Tribunal shall be open to entities other than State Parties in any case expressly provided in Part XI of the Convention or in any submitted persuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.[8]

Applicable Law.—The Tribunal shall decide all disputes and applications in accordance with Article 293 of the Convention on the Law of the Sea. According to Article 293, the Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention. However, this will not prejudice the power of the Tribunal to decide a case *ex acquo et bono,* if the parties so agree.

Any decision rendered by the Tribunal shall be final and binding and shall be complied with by all parties to the dispute. But any such decision shall have no binding force except between the parties and in respect of that particular dispute.[9]

Jurisprudence.—According to Article 288 of the Convention on the Law of the Sea, 1982, the Tribunal shall have jurisdiction over any dispute concerning the interpretation or application of the Convention which is submitted to it in accordance with Part XV of the Convention. The Tribunal shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes to the Convention, which is submitted to it in accordance with the agreement.

In the event of a dispute as to whether the tribunal has jurisdiction, the matter shall be settled by decision of the Tribunal.

Thus the Tribunal exercises jurisdiction over all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.[10] As regards reference of disputes subject to other Agreements, Article 22 of the Statute of the Convention provides that of all the parties to a treaty or convention already in force and concerning the subject matter covered by the Law of the Sea Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.

Thus the jurisdiction of the Tribunal is not compulsory. It is optional and voluntary and based on the consent of parties to the dispute.

Sea-Bed Disputes Chamber

Composition.—Article 186 of the Convention on the Law of the Sea provides that the establishment of the Sea-Bed Disputes Chamber and the manner in which it shall exercise its jurisdiction shall be governed by the provisions of section 5 of Part XI, Part XV and Annex VI of the Convention. Article 14 of the Statute (Annex VI) provides that a Sea-Bed Disputes Chamber shall be established in accordance with the provisions of section 4 of Annex VI containing Articles 35 to 40. Article 35, of the Statute, which deals with the composition of Sea-Bed Disputes Chamber, provides that the Sea-Bed Disputes Chamber shall be composed of 11 members, selected by a majority of the elected members of the Tribunal from among them. In the selection of the members of the Chamber, the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.

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[7] Article 5.

[8] Article 20. See also Article 291 of the Convention.

[9] Article 296 of the Convention.

[10] Article 21 of the Statute.

The members of the Chamber shall be selected every three years and may be selected for a second terms. The Chamber shall elect its President from among its members, who shall serve for the terms for which the Chamber has been selected.

The Sea-Bed Disputes Chamber may form *ad hoc* chamber, composed of three of its members, for dealing with a particular dispute submitted to it in accordance with Article 188, paragraph 1(b).

Special Chambers.—The Tribunal may form such chambers, composed of three or more of its elected members, as it consider necessary for dealing with particular categories of disputes. This is provided in Article 15, paragraph 1 of the Statute of the Tribunal. Acting pursuant to this provision the Tribunal at a meeting on 14 February 1997 formed Special Chamber for Fisheries Disputes. The Tribunal at its meeting on 20 February 1997 selected seven members of the Tribunal to serve in the **chamber for Fisheries Disputes.** The seven members selected are : Hugo caminos, Soji Yamamoto, Paul Bamela Engo, P. Chandrasekhara (India), David H. Anderson, Edward A. Laing and Gudmundur Eiriksson. The term of office of these members will end on 30th September 1999. The Tribunal also decided that the Chamber for Fisheries Disputes will be available to deal with disputes which the parties agree to submit to it concerning the interpretation or application of any provision of :

(a) U.N. Convention on the Law of the Sea concerning the conservation and management of marine living resources ; and

(b) any other agreement relating to the conservation and management of marine living resources which confers jurisdiction on the Tribunal.[11]

On the same date *i.e.* on 14 February 1997, the Tribunal formed a **standing special chamber for Marine Environment Disputes** on 20 February 1997, the Tribunal selected seven members to svine on this special chamber. The members selected are : Rudiger Wolfruom (President of the Chamber), Alexander Yankov, Soji Yamamoto, Antoly L. Kolodkim, Choon-Ho Park, Joseph S. Warioba and Mohamed Mouldi Marsit. The term of the office of the members will end on 30 September 1999. The Tribunal also decided that the Chamber will be available to deal with disputes which the parties agree to submit to it concerning the interpretation or application of any provision of :

(a) the United Nations Convention on the Law of the Sea concerning the protection and preservation of marine environment.

(b) special convention and agreements relating to the protection and preservation of the marine environment referred to in Article 237 of the convention; and

(c) any agreement relating to the protection and preservation of the marine environment which confers jurisdiction in the Tribunal.[12]

Advisory opinions.—According to Article 191 of the U.N. Convention on the Sea, the Sea-Bed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council of the International Sea-Bed Authority on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

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[11] See Doc. ITLOS/1997/Res/of 30 April 1997.

[12] See ; Doc. ITLOS/1997/Res. 2 of 30 April 1977.

Finality and Binding Force of Decisions.—The decision of the Tribunal is final and shall be complied with by all the parties to the dispute. But the decision of the Tribunal shall have no binding force except between the parties and in respect of that particular dispute. In the event of dispute as to the meaning or scope of the decision, the Tribunal shall construe it upon the request of any party.[13]

Cases Decided by the International Tribunal for the Law of the Sea.—Following are the cases which have been decided by the Tribunal :—

(1) *The M/v. "Saiga" case (Saint Vincent and the Grenadines* v. *Guinea)*[14]

(2) *The M/v. "Saiga" case (Saint Vincent and the Grenadines* v. *Gunia)*[15].—Request for Provisional measures.

So far twenty one cases have been decided by the Tribunal. Following are the last three cases decided by the Tribunal :

(19) *M.V. 'Virginia' G* case (Panama-Guinea Bissau, 2011).

(20) ARA Liberated (Q2) (Argentina-Ghana, 2012).

(21) *Green peace Arctic Sunrise Ship* case (Netherland-Russia, 2013).

The current President of the Tribunal is Shunj Ivanai and the Vice President is Albert J. Hoffman. 161 countries (member States) have conferred jurisdiction upon the Tribunal to decide their disputes.

N.B.—These cases have been discussed in the preceding chapter on "the Law of the Sea".

Agreement on Cooperation and Relationship between the U.N. and the International Tribunal for the Law of the Sea

On 18th December, 1997 the U.N. and the International Tribunal for the Law of the Sea (ITLOS) entered into an Agreement on Cooperation and Relationship for the Law of the Sea.[16] Under the agreement the U.N. recognizes ITLOS as an autonomous international judicial body with jurisdiction as provided for in the relevant provisions of the Convention and the statute of International Tribunal annexed thereto.[17] As regards cooperation and coordination, Article 2 of the agreement provides that the U.N. and the International Tribunal with a view to facilitating the effective attainment of their objections and the coordination of their activities, will : (a) consult and cooperate, whenever appropriate, on matters of mutual concern; and (b) pursue whenever appropriate, initiatives to coordinate their activities.

The agreement also provides for reciprocal representation,[18] exchange of information and documents,[19] Personnel arrangement,[20] Administration cooperation,[21] Budgetary and Financial matters,[22] Financing of Services[23] etc. As regards reports to the U.N., Article 5 provides that the International Tribunal shall keep the U.N. informed of its activities that may require the attention of the U.N. For this purpose, the International Tribunal may, when it deems it appropriate : (a) Submit reports to the U.N. through the Secretary General of the U.N. (b) Notify the Secretary General of the U. N. whenever in its opinion, a question within the competence of the security, in particular relating to the application of Article 298, paragraph 1(c) of the Convention arises in connection with the work of the International Tribunal. As regards Conference services, the Agreement provides that upon the request of the International Tribunal on a reimbursable basis, such facilities and services as may be required for the sessions of the International Tribunal including translation and interpretation services, documentation and conference services.[24]

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[13] Article 33 of the Statute.

[14] Decided on 4th December, 1997.

[15] Decided on 11th March, 1998.

[16] See ITLOS/INF 29 dated 12th March, 1998.

[17] Article 1 of the agreement.

[18] Article 3.

[19] Article 4.

[20] Article 6.

[21] Article 8.

[22] Article 10.

[23] Article 11.

The agreement has already entered into force because as required under Article 14, both the General Assembly of the U.N. and the International Tribunal have approved it.

Conclusion.—The establishment of the International Tribunal for the Law of the Sea is a great landmark in the development of the Law of the Sea. In some circles its establishment has been criticised on the ground that it was not necessary in the presence of the International Court of Justice. This criticism does not seem to be justified. The codification of the entire law of the sea which covers nearly 71.4% of the earth's space, would have been incomplete if it did not provide dispute settlement mechanism. A right without a remedy is meaningless and contradiction in terms. Law of the sea has its own special problems and may involve special disputes and can be better dealt with by a Law of the Sea Tribunal, rather than by a general tribunal such as the International Court of Justice. Though it is true that the International Tribunal of the Law of the Sea is only one of the means of for the settlement of disputes relating to the Law of the Sea including the interpretation or application of the U.N. Convention on the Law of the Sea and the Jurisdiction of the International Court of Justice has been left intact, yet the importance of the International Tribunal for the Law of the Sea cannot be undermined because it is best suited to deal with the disputes relating to the Law of the Sea. The dispute relating to the Law of the Sea requires special dealing by men who are well versed and are of recognized competence in the field of Law of the Sea. This is manifest from the fact that alongwith the establishment of the International Tribunal for the Law of the Sea, provision has been made for the establishment of Sea-Bed Disputes Chamber, Special Chambers and ad hoc chamber for dealing with special problem and disputes relating to the Law of the Sea, yet another reason which justifies the establishment of the International Law of the Sea and adds to its significance is that the International Sea-Bed Authority is an unique International organization. It will not only grant licences and contracts for sea-bed mining but will itself undertake the exploration and exploitation of the sea-bed of the International Sea-Bed Area. For such an undertaking of commercial nature it is necessary that the disputes arising in the process must be settled promptly. The International Tribunal for the Law of Sea is best suited to perform these tasks.

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[24] Article 7(1).

CHAPTER 18

PIRACY*

Definition.—There has been a great controversy in respect of the definition of the term 'piracy'.[1] According to traditional international law, navigation in the high seas with the object of committing violent acts against other persons and property for private (or their own) interests and without being authorised or permitted by any State, is called 'piracy'. Different jurists have given different definitions of the term 'piracy'. But as remarked by Story, J., in *United States* v. *Smith*,[2] "Whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea *animo furandi*, is piracy." In an American case,[3] the Federal Court expressed the view that the armed ship in the sea should be under the authority of some State and if such a ship is not under the authority of any State, it would be treated in the category of pirate ships, irrespective of the fact whether it has committed piracy or not. The law relating to piracy was codified in the Geneva Convention on High Seas, 1958. Article 15 of the Convention defines 'piracy' in the following words : Piracy consists of any of the following acts :

(1) Any illegal act of violence, detention or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft ; (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.

(3) Any act of inciting or of internationally facilitating an act described in sub-paragraph (1) or sub-paragraph (2) of this article.[4]

"The only clear innovation in the provision .... is the reference to aircraft, a sensible application of analogy. The essential feature of the definition is that the acts must be committed for private ends. It follows that piracy cannot be committed by warships of other government ships, or government aircraft, except where the crew has mutinied and taken control of the ship or aircraft (Article 16). Acts committed on board a ship by the crew and directed against the ship itself, or against persons or property on the ship, are not within the definition."[5]

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty to that act.[6]

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* See also for I.A.S. (1973), Q. No. 3(d) ; I.A.S. (1961), Q. No. 2 ; I.A.S. (1958), Q. No. 3 ; P.C.S. (1969), Q. No. 3(e) ; C.S.E. (1994) Q. 5(c) ; IAS (2009) Q. 8(b).

[1] See Ian Brownlie, Principles of Public International Law, Second Edition (1968), p. 238 ; see also Serhassan Pirates (1845), 2 Wm. Rob. 354 ; The Magellam Pirates (1853), 1 Sp Fcc. Ad. 81 ; In re Piracy Jure Gentium, (1934) A.C. 586.

[2] (1820) 5 Wheat 153, 161.

[3] The Ambrose Light, (25 Fed. Rep. 408).

[4] The definition noted above has been retained without any change in Article 101 of U.N. Convention on the Law of the Sea, 1982.

[5] Brownlie, see supra note 1, at p. 239.

[6] Article 17 of the 1958 Geneva Convention on the High Seas. This provision has been retained in 1982 Convention on the Law of the Sea.

Essential elements of 'piracy'.—Following are the essential elements of piracy :

(1) Violence or robbery at high seas must be for private ends. Such acts committed by warships, Government ships or aircraft cannot be called 'piracy'. For example, in the Second World War German U-Boats sank enemy ships in the area of long-distance blockade in the high seas without any prior intimation. This act cannot be called 'piracy' because it was committed under the authority of the State of Germany. In fact, this act is violation of the laws and custom of war and is a war crime.

(2) Illegal acts of violence, detention or any act of depredation committed for private ends must be against the crew or passengers of a private ship or private aircraft. The only exception of this is recognised in Article 16 which provides that the acts of piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

(3) Illegal acts of violence, detention or any act of depredation may be either on the high seas or in a place outside the jurisdiction of any State.

(4) Such acts must be directed against a ship, aircraft, persons or property.

(5) Violence, detention or any act of depredation may constitute piracy provided that above elements are satisfied.

(6) Committing of actual robbery is not essential for piracy. Even an unsuccessful attempt to commit robbery at high seas will constitute piracy. This was held in *Re Piracy Jure Gentium.*[7] The facts of this case are as follows :

In 1931, some Chinese citizens were arrested on the charge of piracy. They were tried in Hong Kong and held guilty. In this case accused had made an unsuccessful or abortive attempt to commit robbery at high seas. The Court was confronted with the question as to whether actual robbery was essential for piracy. The Hong Kong Court referred this question to the Privy Council for its opinion. The Privy Council held that for an act to constitute piracy, actual robbery is not essential. Even if an accused is guilty of making an unsuccessful attempt to commit robbery, he will be guilty of having committed piracy and will be punished.

(7) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or aircraft will also constitute piracy.[8]

(8) Any act of inciting or of intentionally facilitating any illegal act described above will also constitute piracy.

Piracy by a war ship, government ship or government aircraft whose crew has mutinied.—According to Article 102 of the U.N. Convention on the Law of the Sea, the acts of piracy committed by a war ship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Piracy committed by unrecognised insurgents.*—One of the important legal effects of the recognition of insurgency is that insurgents are not treated as pirates. But so long as they remain unrecognised, they can be apprehended and punished as they commit piracy. This can be understood with the help of following illustration : *P* and *A* are vessels owned by unrecognised insurgents against the established Government of Chile. Their purpose is to blockade and besiege the port. They carry arms and soldiers. For example *A*, in the course of her voyage, stops *X*, a French merchantman. By force *A* takes from *X* an official in the employment of the Government of Chile, as also a large quantity of coal without payment. *Y*, a British man-of-war appears on the scene. *Y* captures *P* and *A* both the vessels and their crew. *Y* condemns them as pirates.[9] Here *Y* is justified in capturing *P* and *A* and condemning them as pirates because acts of *P* and *A* constitute piracy in view of the definition and essentials of piracy discussed above. According to Article 21 of the Geneva Convention on the High Seas a Seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect. Thus, *Y*, a British warship is justified in capturing *P* and *A*. As regards the jurisdiction to capture such vessels, Article 19 of the Convention on the High Seas propounds the theory of Universal jurisdiction whereby every State may seize a pirate ship or aircraft. The principle of Universal jurisdiction in respect of piracy is being discussed below in a little greater detail. *Y* was, therefore, justified in capturing *P* and *A* and condemning them as pirates.

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[7] (1934) A.C. 586.

[8] Article 15(2) of Geneva Convention on the High Seas.

* Asked in I.A.S. (1958) Q. No. 3.

Concept of universal jurisdiction in respect of the crime of piracy.—By universal jurisdiction in respect of a crime, it is generally meant that all States exercise jurisdiction in respect of that crime. When a crime is against the interests of international Community (*i.e., Delict Jure Gentium*) then all the States are entitled to apprehend and punish persons accused of such crimes.[9] The principle of universal jurisdiction applies in respect of the crime of piracy, war crimes,[10] and to some extent the crime of aircraft hijacking.[11] Persons accused of committing crime of piracy may be apprehended and punished because they are regarded as enemies of the whole mankind. In the words of Judge Moore : "A pirate is treated as an outlaw, as the enemy of mankind —*hostes humane generis*—whom any nation may in the interest of all capture and punish".[12] The concept of Universal jurisdiction has been accepted and adopted in the 1958 Geneva Convention on the High Seas. Article 19 of the Convention provides that on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The Courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third pirates acting in good faith. This provision has been retained without any change in Article 105 of the 1982 U.N. Convention on the Law of the Sea.

There is a great controversy in respect of the property of the ship thus seized. According to the practice of States in the seventeenth century, the property of such a ship became the property of the State which seized the ship. But in the eighteenth century, it was generally accepted that the seized ship and its property should be returned to the real owners. This rule is called *pirata non mutat dominium.* It is still a prevalent rule. But if it is not clear as to who is the owner of the ship and its property, they become the property of the State which seized them.[13]

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.[14] As noted above, a seizure may be carried out by warships or military aircraft or other ships or aircraft on government service authorised to that effect.[15] A warship which encounters a foreign merchant ship on the high seas may board her on the ground

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9. See J.G. Starke, Introduction to International Law, Eighth Edition (1977), p. 307.
10. See the Eichman Case, (1926) 136 I.L.R. 277 where the Supreme Court of Israel upheld the exercise of Universal jurisdiction in respect of War Crimes.
11. See also Chapter on "State Jurisdiction".
12. The Lotus Case, P.C.I.J., Series A, No. 10 (1927), p. 70.
13. L. Oppenheim, International Law, Vol. I, Eighth Edition, pp. 616-617.
14. Article 20 of the Geneva Convention on the High Seas. See also Article 106 of the 1982 Convention on the Law of the Sea.
15. Article 21 ; See also Art. 107 of 1982 Convention.

suspecting that the ship is engaged in piracy.[16] This may be done on other grounds also if permitted by treaty.[17] In case, however, the suspicions prove to be unfounded, and provide that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.[18]

Piracy under Municipal law.—There is difference in the concept of piracy under International Law and Municipal Law. Some States may declare crimes those acts of violence, detention or depredations, which are not crimes under international law. On the other hand, States may also declare crimes lesser acts of violence than those declared by international law. For example, in England every British citizen who assists the enemy of the King or Queen or transports slaves in the high seas, is treated as a pirate. But foreigners can be treated as pirates only in accordance with the rules of International law.[19] Thus the concept of piracy in municipal law is different from that of international law.

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16. Article 22 (1) (a).
17. Article 22 (1).
18. Article 22 (3).
19. To put it in the words of Oppenheim : "........... Since a State cannot enforce its Municipal laws on the open sea against others than its own subjects it cannot treat foreigners on the open sea as pirates unless they are pirates according to the Law of Nations. Thus, when in 1958, before the abolition of slavery in America, British men-of-war molested American vessels suspected of carrying slaves, the United States rightly complained", see supra Note 13 at p. 617.

CHAPTER 19

AIR LAW (INCLUDING AIRCRAFT-HIJACKING)

Air space : Various theories regarding air space*

As pointed out earlier each State exercises complete sovereignty over its territory which comprises of lands, waters, maritime belts, air space, etc. According to the old view each State exercises sovereignty over its complete air space. In the modern times, this view is subjected to criticism and has been criticized by the jurists. There are several views or theories prevalent in this connection. According to the first view, air space is available for each State and the aircrafts of each State may pass through it without any obstruction. This view has been vehemently criticised because it is contrary to many international treaties. Each State exercises control over its air space and the aircrafts of another State can enter in its air space only after seeking its prior permission. In accordance with the second view, each State exercises control over its air space up to unlimited height. It is entitled to exercise complete control over it and may not permit the entry of the aircrafts of other States in this area. This view also does not seem to be correct because in view of the rapid scientific and technological developments aircrafts can go to a very high attitude. It is not possible for each State to exercise control over unlimited height. Since it is not possible to exercise control over unlimited air space, this view has lost much of its relevance. According to third view, a State exercises control over the lower strata of the air space and its sovereignty is limited only to that extent. This view seems to be better than the other two views mentioned earlier because sovereignty can be effective only when the State can exercise control over it. However, the greatest difficulty in the general acceptance of this theory is that no State is prepared to accept it affirmatively. According to the fourth view, the State concerned can make rules in regard to the outer space so as to ensure its security. But only a few States of the world have capability to enforce such rules. Lastly, each State has sovereignty over air space extending to the unlimited height subject only to the providing of innocent passage to the aircrafts of other States. Only a few States of the world can effectively exercise such sovereignty.

Thus there is a great controversy in respect of law relating to airspace. But there is general agreement regarding certain matters. There is general agreement that each State exercises over the airspace over its territory. This sovereignty is essential for the defence and security of the State. But at the same time there is need for the freedom of aerial navigation for commercial, scientific and humanitarian purposes. With a view to reconcile these conflicting needs, the concept of functional sovereignty has been suggested. There is also the urgent need of evolving the legal regime of air space as new branch of international law. In view of the great significance of the subject, a separate chapter has been devoted to "Air Law". However, due to paucity of space, it is proposed to discuss in this chapter only the following two aspects of Air Law—

I. Aerial Navigation.
II. Aircraft Hijacking.

I. Aerial Navigation**

A number of international conventions have been concluded to regulate aerial navigation. The more important of them are given below—

(*1*) *Paris Convention of Aerial Navigation 1919.*—This convention framed certain rules regarding aerial navigation during peace time. According to the convention, each State exercises complete sovereignty over its air space. Further, during peace, parties to the convention will give innocent passage to the other State parties to the convention. The convention did not frame rules for the period of war.

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* See also for C.S.E. (1991) Q. 6(b).

** See also for I.A.S. (1957), Q. 7.

(2) *Havana Convention.*—This convention was adopted mainly by the States of American continent. Several rules regarding aerial navigation were adopted under the convention.

(3) *Convention for the Unification of Certain Rules Relating to International Carriage by Air or Warsaw Convention, 1929.*—This convention was signed at Warsaw on 12 October, 1929. According to Article 1 of the convention, the convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircrafts performed by an air transport undertaking.

(4) *Chicago Convention on International Civil Aviation, 1944.*—Chicago convention is the most important of all treaties and conventions relating to aerial navigation. It was signed by 53 States. This convention was concluded on 7th December, 1944 and entered into force on 14th April, 1947. The International Civil Aviation Organisation (ICAO) created a framework for International Civil aviation including the principle that every State has complete and exclusive sovereignty over the airspace above its territory and that no scheduled flight may operate over the territory of a contracting State without its consent. It is also important to note here that the convention confers on the ICAO Council the power to settle disputes between contracting parties and its decision is binding on the parties. From 20 to 22 March, 2006. Civil aviation leaders from around the world have adopted a global strategy which will usher in a new era of openness and transparency concerning safety information. Five Freedoms of air were for the first time declared under this convention. Some of the important provisions of the Chicago Convention on International Civil Aviation, 1944 are as follows :

(i) The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.[1]

(ii) For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.[2]

(iii) The Convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft used in military, customs, and police services. No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement otherwise and in accordance with the terms thereof.[3]

(iv) Each contracting State agrees that all aircrafts of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observances of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights. Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions, of Article 7, have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations or limitation as it may consider desirable.[4]

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[1] Article 1 of the Chicago Convention on International Civil Aviation, 1944.

[2] Article 2.

[3] Article 3.

[4] Article 5.

(v) Last but not the least important provision runs as follows : No scheduled International Air Service may be operated over or into the territory of a contracting State, except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorization.[5]

(vi) Aircrafts have the nationality of the State in which they are registered.[6]

(vii) An aircraft may be validly registered in more than one State, but its registration may be changed from one State to another.[7]

Thus aerial navigation is generally controlled by several international treaties. Besides these multilateral treaties and conventions, many States have concluded bilateral treaties which govern their relations to aerial navigation.[8]

*Five Freedoms of Air**.—Before and after the First World War many problems relating to international air transport arose. Because of the increase in the transport through airways, the need for definite rules of international law was felt. In order to evolve definite rules of international law regarding this a Conference was held at Chicago in 1944. This Conference is known as International Civil Aviation Conference, Chicago, November, 1944. This Conference declared the following five freedoms of air :—

(1) freedom to fly across foreign territory without landing ;

(2) freedom to land for non-traffic purposes ;

(3) freedom to disembark in foreign territory traffic originating in the State of the origin of the craft ;

(4) freedom to pick up in any foreign country traffic destined for the State of origin of aircraft ; and

(5) freedom to carry traffic between two foreign countries.

In order to give concrete shape to the above five freedoms two agreements were concluded. They are as follows :

(*1*) *Chicago International Air Services Transit Agreement, 1944.*—This agreement incorporated the first two freedoms.[9]

(*2*) *Chicago International Air Transport Agreement, 1944.*—This agreement incorporated the last three freedoms. But this agreement was signed by a very few countries.

Thus most of the States of the world agreed to provide the first two freedoms to each other. "The International Air Services Transit Agreement" or 'the two freedoms Agreement' has been widely accepted .... The International Transport Agreement or the "five freedoms" Agreement on the other hand has had a few adherents and that its effect is minimal at best." [10] It may be noted here that in the absence of multilateral treaties most of the States regulate their relations through bilateral treaties. A brief reference may also be made here to the International Civil Aviation Organisation which was established in 1947. A large number of the States are its members. This Organisation has made many rules relating to International Air Transport and International Air Traffic. The ICAO has been discussed in a little greater detail under the chapter "Specialized Agencies". Following are the treaties which have been adopted under this Organisation :

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[5] Article 6.

[6] Article 17.

[7] Article 18.

[8] For detailed study see also Bin Cheng and R.H.F. Austin, "Air Law" in The Present State of International Law and other Essays, Edited by Prof. Dr. Maarten Bos. (1973), pp. 183-200 ; S. Bhat, "Safety in Air—Recent Developments", I.J.I.L., Vol. 14 (1974), pp. 386-399.

* See also for I.A.S. (1973), Q. No. 11 (e) ; I.A.S. (1954), Q. No. 12 ; P.C.S. (1976), Q. No. 10(f) : P.C.S. (1969), Q. No. 4 ; P.C.S. (1984), Q. 6 ; see also matter discussed above under the heading "Chicago Convention on International Civil Aviation, 1944".

[9] Article 1 of the Agreement provides that each party to the Agreement grants to the other contracting States the following freedoms of the air in respect of scheduled international air services : The privilege to fly across its territory without landing ; (ii) The privilege to land for non-traffic purposes.

[10] Edward Collins, International Law in a Changing World (1969), p. 173.

(1) Convention of 1948 on the International Recognition of Rights in Aircraft.

(2) Rome Convention of 1952 on damage caused by foreign aircraft to their party on the service.

(3) Protocol of amendments of the Warsaw Convention, 1959 concerning the liability of the Air Carrier to passengers and Cargo concluded at Hague in 1955.

II. Aircraft-Hijacking*

Meaning and definition of 'Hijacking':—"Aircraft hijacking is a contemporary addition to the roster of international and national crimes and the necessity for its control at international and national level is only beginning to be recognised by States." [11] In its wide sense hijacking is an act against the safety of civil aviation and resembles piracy.[12] According to Article 11 of Tokyo Convention, 1963, when a person on board has unlawfully committed by force or threat thereof, an act of interference, seizure or wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve its control of the aircraft. Further, the contracting State, when the aircraft lands, shall permit its passengers and crew to continue their journey as soon as practicable and shall return the aircraft and its cargo to the persons lawfully entitled to the possession. Article 13 further provides that any contracting State shall take the delivery of any person whom the aircraft commander delivers and that it shall immediately make a preliminary enquiry into the facts. It is clear from the above provisions that an attempt to define the term 'hijacking' has not been made, but it simply imposes certain obligations upon a contracting State and lays more emphasis on the return of the hijacked aircraft and its passengers to those persons who are entitled to its possession and to permit its passengers and crew to continue their journey as soon as practicable.

Article 1 of the Hague Convention of 1970, provides that "Any person who on board an aircraft in flight : (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act, commits an offence ...." This provision also does not define the term 'hijacking', but simply mentions its essential elements which are following :

(i) Unlawful use of force or threat thereof or any other form of intimidation ;

(ii) To do above-mentioned acts with a view to seize that aircraft or to exercise control over it ;

(iii) The said acts should have been committed on board an aircraft in flight ;

(iv) Accomplice of person who performs or attempts to perform the above-mentioned act is also guilty of the offence of hijacking.

The above-mentioned essential elements are similar to those mentioned in Article 11 of the Tokyo Convention, 1963. The only innovation in 'Hague Convention, 1970' is that it includes an accomplice of a person who performs or attempts to perform any such act.[13] The wider concept of the offence of hijacking has been incorporated in the Montreal Convention, 1971.[14] Article I of the Montreal Convention, 1971, provides that any person commits an offence if he unlawfully and intentionally—(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft ; (b) destroys an aircraft in service or causes damages to such an aircraft which renders it incapable of flight or it is likely to endanger its safety in flight ; or (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it, which is likely to endanger its safety in flight; or (d) destroys or damages air navigation facilities or interferes with that operation if any such information which he knows to be false, thereby endangering the safety of an aircraft in flight. Besides this, it is further provided that any person also commits an offence if he attempts to commit any of the offence mentioned earlier or if he is an accomplice of a person who commits or attempts to commit any such offence.

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* See also I.A.S (1972), Q. No. 10(i) ; P.C.S. (1984), Q. No. 10(d)

[11] Alone E. Evans, "Aircraft Hijacking : Its Causes and Cure", A.J.I.L., Vol. 63 (1969), p. 695.

[12] See Dr. Sami Shubber, "Is Hijacking of Aircraft Piracy in International Law,"? BYBIL, Vol. XLIII (1968-69), p. 193 ; see also S.C. Chaturvedi, "Hijacking and the Law", I.J.I.L., Vol. 11 (1971), p. 89.

[13] See Sami Shubber, "Aircraft Hijacking under the Hague Convention, 1970—A New Regime", I.C.L.Q., Vol. 22, Part 4 (1973), p. 687 at p. 690.

[14] For the text of the Montreal Convention : see A.J.I.L., (1971), pp. 742-48.

Development of law relating to hijacking.—The increase in number of incidents of hijacking and increase in the dangers against the safety of the flights of aircraft presented grave problems before the international community and particularly before the International Civil Aviation Organisation. (I.C.A.O.). In order to solve this problem and to punish the hijackers a Convention was adopted in 1963, known as the Tokyo Convention, 1963. Despite the adoption of this Convention the number of incidents continued to increase and this Convention failed to solve the problem.[15] India also acceded to the Tokyo Convention and with a view to give effect to the provisions of the Convention Parliament of India, enacted the Tokyo Convention Act, 1975.[16] Increase in the number of Incidents relating to hijacking and the shortcomings of the Tokyo Convention compelled the States to think and take some effective measures to solve the problem and to give deterrent punishment to the hijackers. This process started in September, 1968, when the International Civil Aviation Organisation Council was asked to study the problem of hijacking. In December, 1968, the Council entrusted this matter to a Legal Sub-committee. This Legal Sub-committee prepared a draft for Convention. In order to consider this draft and to adopt a Convention, a Conference was called in December, 1970. The Convention was finally adopted and was known as the Hague Convention, 1970. After having been ratified by the prescribed number of States, Hague Convention came into force on October, 1971.

Main provisions of the Hague Convention, 1970.—Hague Convention is a significant milestone for suppressing the crime of hijacking.[17] As pointed out earlier, the Hague Convention further developed the concept of hijacking. As compared to the Tokyo Convention, it further widened the net to apprehend the hijackers and to ensure the safety of flights of civil aircraft's. The State parties may have jurisdiction over the hijackers in some or other way and it will become difficult for hijackers to escape the process of law. As pointed out by Sami Shubber; "These features of jurisdiction have brought the offence of hijacking very near to piracy under International Customary Law. Thus it is not without justification that the 'Aerial Piracy' has been applied to this new regime in the field of International Civil Aviation." [18] Yet another special feature of the Hague Convention is that the offences shall be deemed to be included as extraditable offences in any Extradition Treaty existing between contracting States. The contracting States undertake to include the offences as extraditable offences in every Extradition Treaty to be concluded between them. It is further provided that each of the offences shall be treated, for the purpose of extradition between the contracting States, as if it had been committed not only in the place in which it occurred, but also in the territories of the States required to establish their jurisdiction in accordance with the provisions contained in Article 5 of the Convention. Thus, "the Hague Convention, 1970, may be considered as a big step forward in the endeavour of the international community to suppress hijacking of aircraft and remove the threat caused by it to international civil aviation." [19] Further, "The Hague Convention borrows heavily from the Tokyo Convention, which may lead one to wonder whether or not its adoption, as a protocol to the Tokyo Convention would have been more desirable, as there would have been some advantage to be gained from the link between the two instruments, for example, rights of aircraft commander and crew members to take measures, protection of such persons, arrest and delivery of hijackers, simplicity of arrangements and so forth." [20] With a view to give effect to the provisions of the Hague Convention, 1970, the Indian Parliament enacted the Anti-Hijacking Act, 1982.[21]

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[15] For shortcomings of Tokyo Convention see Sushma Malik, "Legal Aspects of the Problems of Unlawful Seizure of Aircraft", I.J.I.L., (1969), p. 61 at pp. 65-71 ; see also A. Samuel, "Crimes Committed on Board Aircraft", BYBIL, Vol. XLII (1967), p. 1.

[16] For Text of the Act see I.J.I.L., Vol. 15 (1975), pp. 274-279.

[17] Sami Shubber, "Aircraft Hijacking under the Hague Convention, 1970—A New Regime". I.C.L.Q., Vol. 22 (1973) p. 687 at p. 725.

[18] Ibid.

Montreal Convention, 1971.—Undoubtedly, Hague Convention is a great milestone in the field of suppressing the offence of hijacking yet it is subject to some criticism so far as certain provisions relating to jurisdiction of States and extradition of offenders or hijackers are concerned. Moreover, it may also be noted that despite the provisions of Hague Convention, the incidence to hijacking continued to increase. Consequently, a Conference was called at Montreal from 8th to 23rd September, 1971. As a result of this conference, a Convention (known as Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971) was adopted. Under Article 1 of the Convention, the concept of the offence of hijacking was further widened. Under this Convention, the State parties have undertaken that they will provide deterrent punishment to the hijackers. Other provisions are similar to that of the Hague Convention. It would not be wrong to say it is simply an improvement of the Hague Convention. As a matter of fact, it would have been better if the provisions of Montreal Convention had been adopted as protocol to the Hague Convention.[22] With a view to give effect to the Montreal Convention, 1971, the Parliament of India passed, "The Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982.[23]

Montreal Convention, 1991 or the Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991

As noted above, there are several international conventions against unlawful interference with civil aviation. Among such conventions following are more important :

(i) Tokyo Convention (1963);
(ii) Hague Convention (1970);
(iii) Montreal Convention (1971);
(v) Protocol for the Suppression of Unlawful Act of Violence at Airports Serving International Civil Aviation, 1988.

Despite the above conventions the incidents of unlawful acts against the safety of International Civil Aviation could not be reduced. In such incidents the plastic bombs or explosives have been prominently used. For example, on 21 December, 1988, Pan Am Flight 103 while flying over Lockerbie (Scotland) was blowen by a plastic bomb. This resulted in the death of 270 passengers. From 12, February to March 1, 1991 a conference was held at Montreal. In this conference the representatives of 79 countries adopted a convention known as Montreal Convention, 1971 or the convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991. The parties to this convention undertook to prevent the manufacture and going outside their territories plastic explosives without commercial markings. It was also agreed that plastic explosives or bombs which are not necessary for army or police be destroyed within a period of three years. As regards plastic bombs and explosives the Convention provides that they are to be destroyed within a period of 15 years. The Convention provides for the establishment of International Explosives Technical Commission. Both the Security Council and the General Assembly have supported and approved this Convention. As remarked by the then Secretary General of the U.N., Perez de Cuellar, "nothing perhaps activates corporation like a universally shared sense of danger of the threat of terrorism that spares few countries or individuals is indeed practically a universal one." .

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[19] Sami Shubber, "Aircraft Hijacking under the Hague Convention, 1970—A New Regime". I.C.L.Q., Vol. 22 (1973) p. 687 at p. 725.

[20] Ibid, at p. 726.

[21] Act No. 65 of 1982. The Gazette of India, Extraordinary, Part II, Section 1, November 8, 1982. See also I.J.I.L., Vol. 22 (1982), pp. 484-486.

[22] As remarked by Cheng and R.H.F. Austin, "As anticipated, the Hague Convention and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation which was signed on 23 September, the following years are couched in a most identical terms, except for the definition of the offence. The Hague Convention is directed against the Hijackers who on board an aircraft in flight, by force or intimidation, unlawfully takes over control of the aircraft. The Montreal Convention is aimed at the person who unlawfully, and intentionally (i) commits any act which is likely to endanger the safety of an aircraft in flight, (ii) destroys an aircraft in service or places a device or substance on board an aircraft in service which is likely to destroy such an aircraft, or (iii) causes damage to aircraft in service renders it incapable of flight, or places a device substance on board an aircraft in service which is likely to cause such damage." "Air Law", in The Present State of International Law and other Essays (Kluwar—The Netherlands—(1973), p. 183 at p. 197.

[23] Act No. 66 of 1982. The Gazette of India, Extraordinary, Part II, Section 1, Nov. 8, 1982. See also I.J.I.L., Vol. 22 (1982), pp. 486-490.

This convention entered into force on 21 June 1998 after have been ratified by 35 signatory States. As of February 2015, the convention has been ratified by 152 countries (151 United Nations Members and Nive).

Hijacking of Indian Aircraft and I.C.A.O.—Jurisdiction case (India v. Pakistan).[24]— An Indian Aircraft was hijacked and taken to Lahore (Pakistan). Instead of apprehending the hijackers and to ensure that they get proper punishment, the Government of Pakistan did not do so. As a result of which the hijackers burnt the aircraft. This act on the part of Pakistan was a clear violation of Tokyo Convention.[25] It was also against the resolution of Security Council (Resolution 286, 1970) in which the States were asked to take all possible steps to prevent the interference of hijackers in the international civil aviation. As a reprisal the very next day India suspended with immediate effect the overflight of all Pakistan aircrafts—civil and military over Indian territory till the issue was satisfactorily resolved. India demanded extradition of hijackers, but Pakistan rejected this demand. Pakistan on the other hand, complained to the International Civil Aviation Organisation that the suspension of overflights by India was a violation of international and bilateral commitments and requested the I.C.A.O. Council on March 3, 1973, to declare that India's decision to suspend the overflights was illegal. India raised certain preliminary objections and contended that the Council has no jurisdiction to hear and decide Pakistan's complaint. The contention of India was, however, overruled by the President of the Council. India's preliminary objections were rejected by the Council on July 29, 1971. India appealed to the International Court of Justice on August 30, 1971, against the said decision. Pakistan objected to the jurisdiction of the International Court of Justice to hear and decide India's appeal. The International Court of Justice by a majority of 13 votes to 3 rejected the Government of Pakistan's objection on the question of its competence and held that it had jurisdiction to entertain India's appeal. The Court, however, held by a majority of 14 to 2, that the Council of International Civil Aviation Organisation was competent to entertain the application and complaint laid before it by the Government of Pakistan on March 3, 1971, and in consequence rejected the appeal made to the Court by the Government of India against the decision of the Council assuming jurisdiction in those respects. Thus the case again went to the International Civil Aviation Organisation, who could decide it on merits.

It may be noted here, that India and Pakistan entered into Simla Agreement and agreed to settle all their disputes through bilateral negotiations and through peaceful means. Subsequently, Delhi Agreement, 1973 and Delhi Tripartite Agreement, 1974 were entered into to resolve matters relating to the repatriation of Pakistani Prisoners of War. The representatives of India and Pakistan also held several round of talks relating to the resumption of flights of aircraft by both countries over the territory of each other but with no success, so far. The main stumbling block in the solution of this problem was Pakistan's persistent refusal to withdraw her case pending in the Council of the I.C.A.O. India, on her part made it clear that she would not entertain any proposal for resumption of Pakistani overflight through her territory unless and until Pakistan first withdrew her case from the Council of the I.C.A.O. This stand was in conformity with the letter and spirit of the Simla Agreement between the two countries. In view of India's insistence, Pakistan withdrew its case from the Council of the I.C.A.O. and subsequently Pakistani overflights over Indian territory were resumed.

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[24] I.C.J. Rep. (1972), pp. 46 ff.

[25] For details of the incident see also, "Hijacking—An International Crime", 1971 (1) S.C.C., p. 36.

In 1976, one more Indian aircraft was hijacked and taken to Lahore. This time Pakistan arrested the hijackers and returned the aircraft and passengers to go back to India. Pakistan assured India that deterrent action would be taken against the hijackers but subsequently released them on the ground that there was no sufficient evidence to prosecute them.

Two cases of hijacking took place in September 1981 and July 1984, yet another case of hijacking took place on 5th Sept. 1986 when four armed terrorists seized a Pan American Jumbo jet with 399 passengers and cabin crew on board at Karachi airport. Later on, in the terrible shoot out that ensued, 18 persons were killed and several other were injured.

Hijacking of an Indian Airlines' Plane (IC 814) [Dec. 1999].—An incident of hijacking of an Indian Airlines, air bus IC 814 took place in mid-air over Lucknow on 24th December, 1999. The ill-fated plane was on flight from Kathmandu to New Delhi with 187 passengers. Before landing at Kandhar at 8.33 P.M. the next day, the air craft flew from Kathmandu to Amritstar, Lahore and Dubai. At Dubai the hijackers earlier released 27 hostages and off loaded the body of a victim, Ripon Katyal, who was killed on board the hijacked Indian Airlines' Airbus. The greatest problem faced by Indian Government in respect of the hijacking of Indian Airlines' airbus IC 814 was that the hijacked plane landed at Kandhar (Afghanistan) because India has not recognised the Taliban Government of Afghanistan and as such India has no diplomatic relations with Taliban Government. India had to seek the help of Taliban Government to rescue the passengers and secure the release of the aircraft. India had no option left except to request Taliban Government for help. In the beginning the Taliban officials expressed resentment with Indian Government for not initiating negotiations with the hijackers rather they compelled Indian Government to start negotiations otherwise they would force the hijackers to leave Kandhar.

India's longest hijack crisis ended on the night of 31st December, 1999 as the 155 passengers and crew reached New Delhi after being freed by the five hijackers in exchange of three dreaded militants. The circumstances were such that the Indian Government had no option left but to release the said three militants to save the lives of 155 passengers.

Under International Law, it was the obligation of the Taliban Government, to rescue the passengers, and crews and return the aircraft to India. Even if it is admitted that they could not take any action against the hijackers keeping in view the safety of the passenger their conduct was certainly questionable after the passengers had been freed and the hijackers had come down the aircraft. Contrary to the norms of International law the hijackers were allowed to go scot-free and declared that they gave the hijackers a few hours time to leave Afghanistan.

Hijacking has been described as aerial piracy and any state, whether bound by any international convention or not, can apprehend, assume jurisdiction over them, and can try and punish them. The Taliban Government did not, therefore, act according to the rules of International Law.

While the Taliban Government forced the Indian Government to negotiate with the hijackers, in case of hijacking of Ariana Airline Boeing 727 of Afganistan with 160 passengers which landed at Stansted Airport of U.K. on 7th February, 2000, the Taliban Administration took the stand that they would neither negotiate nor cede to the demands of the hijackers as terrorism is strongly condemned by them. Contrary to their conduct, the British officials not only negotiated with the hijackers but ultimately got freed all the passengers without the loss of a single life and also apprehended the hijackers.

Last but not the least on 8th February, 2000 at the inaugural meeting of the joint working group on counter terrorism by India and America, the two sides have agreed to intensify their joint cooperation to ensure that the perpetrators of the hijacking of Indian Airlines flight IC-814 are brought to justice. India has also agreed to take U.S. assistance in tackling the menace of terrorism in general and hijacking in particular.

Principle of universal jurisdiction in respect of the crime of the hijacking.*—The principle of universal jurisdiction is recognised in respect of the crime of piracy and war crimes. Since hijacking is generally described as aerial piracy, the principle of universal jurisdiction should apply in respect of the crime of hijacking. By universal jurisdiction in respect of a crime, it is meant that the crime is against the interests of international community and in order to suppress such a crime, all States can exercise jurisdiction in respect of the crime. The Hague Convention, 1970, and the Montreal Convention 1971 on hijacking have gone a long way to confer universal jurisdiction, to a great extent, on all States. "If an offender or alleged offender is within the territory of a State, both conventions contain provisions for him to be taken into custody and if he is not extradited, for his case to be placed before the prosecution authorities. Although neither Convention creates a duty to extradite or an inescapable duty to prosecute authorities are nevertheless under a duty "to take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. If the decision is in the affirmative, the above mentioned universal jurisdictional clause ensures that the courts will be competent to hear the case." [26]

Evaluation.—The greatest difficulty in the field of suppression of the offence of hijacking is the extradition of hijackers. Under International Law extradition is based on bilateral treaties. Thus, "By its very nature extradition is not a matter regulated by International Law............ The duty to surrender cannot arise except under a treaty." [27] An attempt was made under Hague Convention to solve this problem. Article 8 of the Hague Convention provided that offence shall be deemed to be included an extraditable offence in the common extradition treaty existing between contracting States. The contracting States further undertook to include the offence as extraditable in every extradition treaty to be concluded between them. The obvious effect of this provision is that the offence of hijacking may not be treated as a political crime. It is undoubtedly a great achievement of the Hague Convention.

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* See also for C.S.E. (1991) Q. 5(c).

[26] Bin Cheng R.H.F. Austin, "Air Law, in The Present State of International Law and other Essays" (1973), 183 at p. 197 ; See also Chapters on "State Jurisdiction" and "Piracy".

[27] Oppenheim, International Law, Vol. II, 2nd Edition, p. 720.

The Montreal Convention, 1971 has tried to improve upon the provision of Tokyo Convention. Thus it may be said that at present there is no lack of adequate law for the suppression of the offence of hijacking. The need is to properly implement the existing provisions. The Hague Convention and Montreal Convention have enhanced the jurisdiction of State parties in respect of hijackers. It may, however, be admitted that despite those Conventions the number of incidents has not decreased ; one of the reasons is that these Conventions have not been ratified by a number of countries. Tokyo Convention which entered into force on 4 December, 1969, has upto now been ratified by 88 State parties. Hague Convention which entered into force on 14 October, 1971 has upto now been ratified by 79 States. Lastly, the Montreal Convention which entered into force on 26 January, 1973 has upto now been ratified by 75 States.[28] Yet another reason is that these Conventions have not ended the criminal jurisdiction of the States. For example Article 5(iii) of the Montreal Convention provides : "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law." Moreover, these Conventions have not fixed the punishment for this crime. For example, Montreal Convention under Article 3 simply, provides that each contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties. As a matter of fact, the need is to establish an International Criminal Court which may try and punish international offences such as hijacking. "The greatest hurdle in the establishment of an International juridical Organ to try persons guilty of hijacking and other crimes is the concept of national sovereignty." [29] As pointed out by Prof. Agrawala : "............ mere municipal legislation by certain interested States providing for compulsory prosecution and punishment of hijackers landing in its territory or escaping to it, could not be a complete answer to the problem, since the States most willing to punish hijackers are not the ones wherein the hijackers generally land or escape to.

Therefore, only the imposition of an international obligation on all States and to extradite or to punish, and consequent national legislation and action by all giving effect to such an obligation, could prove really fruitful." Further, "It is not as easy to put into effect a fool-proof legal framework and create an international regime for preventing and deterring acts of unlawful interference with civil aviation, as it is to commit such acts. Many factors, political and economical, play their part, and the efforts of nations with divergent interests have to be co-ordinated. If the concern with the problem continues with an unceasing interest and enthusiam of the aviation community, and efforts are not given up in despair, better results might come forth in not to distant a future."

Yet another shortcoming in the existing law is in respect of extradition of the hijackers. "Extradition of alleged offenders is obligatory only when there is a treaty to that effect and hijacking is not included as an extradition offence, in some extradition treaties. Moreover, extradition treaties often provide that State is under no obligation to extradite its own nationals, or persons who have committed crimes of political nature.[30] Further, "The reluctance of States to extradite hijackers who have acted for political motives is understandable, hijacking an aircraft is often the only way in which an individual can escape from a country where he is liable to political, social or religious persecution and it would be undesirable to require other State to send him back to a country where he faces such persecution. But unless such an individual is punished, there is danger that other people with less excusable motives will be tempted to imitate him. It is therefore a matter of regret that the Hague and Montreal Conventions stopped short of requiring States to prosecute hijackers, who are not extradited." [31] As regards actions against States which refuse to extradite or prosecute, it may be suggested. "An amendment to the Chicago Convention which empowered the Council of I.C.A.O. to order the suspension of all services to or from member States of I.C.A.O. which refused to extradite or prosecute hijackers would override air service treaties previously concluded between member States. If member States were forced to choose between accepting such an amendment and ceasing to be members of I.C.A.O., they would probably accept the amendment, because they would not want to lose the advantage of membership of I.C.A.O." [32] It was unfortunate that such an amendment when presented to the I.C.A.O. Assembly in 1973, could not be adopted as it failed to secure the requisite 67 votes. It could secure only 65 votes, *i.e.*, only two votes less than the requisite number.

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[28] U.N. Monthly Chronicle, Vol. XIV, No. 10 (November, 1977), pp. 13-14.

[29] S.C. Chaturvedi, "Hijacking and the Law", I.J.I.L. (1971), p. 89 at p. 101.

[30] Michael Akehurst, "Hijacking", I.J.I.L., Vol. 14 (1974), p. 81 at p. 85.

N. B.—For this please see Chapter on "International Criminal Law and the Establishment of an International Criminal Court."

Conclusion.—Despite the steps that have been taken so far to suppress the crime of hijacking, there has been no reduction in the number of incidents of hijacking. Rather the incidents of hijacking have increased recently. ".........while much has been achieved much more remains to be done to effectively deal with hijacking. The process is continuing but still the fact comes out clear : nation States are not prepared to fetter their sovereignty, therefore the aircraft users seem to be condemned to rely on co-operation between States which seems to be more an outcome of convenience and more diplomacy than the result of any sense of obligation." [33]

Efforts to induce States to prosecute or extradite hijackers presuppose that criminal sanctions against hijackers are an effective means of preventing hijacking. This assumption is not necessarily true. Indeed, there is a danger of that imprisoning hijackers who are the members of an organised gang may increase rather than reduce the number of future hijackings; the other membrs of the gang will seize other airliners and threaten to destroy them and kill the passengers and crew unless their comrades are released from prison." [34] There is need to tackle the problem of suppressing the crime of hijacking afresh. With this in view, a special Session of the U.N. General Assembly should be convened and united effort should be made to plug the loopholes in the existing law. In the meantime preventive measures such as search of all passengers and their luggages, etc. before they board aircrafts should be tightened.[35]

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[31] Michael Akehurst, "Hijacking", I.J.I.L., Vol. 14 (1974), p. 81 at p. 85 ; Jessup has rightly remarked : "One may still recognise the reason for the usual rule in the ex-traditional treaties that an accused will not be surrendered if the crime with which he is charged is a 'political' one ; given the difference in political systems and ideologies, this rule is not likely to be forsaken. But it has spawned the unfortunate thesis that aerial hijacking cannot be subject to uniform standards of punishment because "territoristic" activities may be inspired by political motives with which the State of refuge may be sympathetic even though it does not advocate the methods used to advance such interests. One may note that in the history of the law of piracy, the defence of political motivation did not loom large and piracy was (and is) an offence against the law of nations. Aerial piracy which even more seriously and directly endangers the lives of innocent persons, should be similarly characterised. The philosophy of transnational law leads to that conclusion." "The present State of Transnational Law", in The Present State of International Law and other Essays (Kluwer—The Netherlands—1973), p. 339 at pp. 341-342.

[32] Michael Akehurst, see supra note 30 at p. 87.

[33] Damodar Wadegaonkar, "Hijacking and International Law", I.J.I.L., Vol. 22 (1982) p. 360 at p. 374.

[34] Michael Akehurst, "Hijacking", I.J.I.L., Vol. 14 (1974), p. 81 at pp. 87-88.

Since many States do not still seem to be prepared to take stringent measures against hijackers and in view of the present state of international relations and affairs, preventive measures comprising of thorough searches of all passengers, and their luggage constitute the best means to prevent or at least minimise the incidents of hijacking.

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35. To quote Michael Akehurst again : "The best solution would be to search all passengers and their handluggage before they board an aircraft, in order to make sure that they are carrying no weapons. Such searches are carried out at many airports and are usually very effective, but they need to be applied rigorously to all passengers at all airports. It would be undesirable to lay down detailed rules of international law on the subject ; much depends on local conditions, and the form and intensity of the search are best left to the discretion of national authorities. But there is much to be said in favour of the adoption by I.C.A.O. of the principle of such searches as an international standard under Article 37 of the Chicago Convention, because such searches provide the most effective means of preventing hijacking". Ibid, at pp. 88-89.

CHAPTER 20

OUTER SPACE

It has been aptly pointed out : "We live on the shores of this tiny world, the third planet of nine, circling an average star, the Sun. This star is just among billions in a great city of stars, the Milky way, itself just one among a billion other stellar cities stretching on perhaps forever. This Universe is more vast than all imagining, and filled with wonders more than we can dream, is a heritage for all mankind." [1]

So far as the question of air space is concerned it has been made clear earlier that the State concerned exercise complete control over it. The other States can get some rights over it only through some agreements or treaties.* There is no customary rule of International law in regard to giving innocent passage through the territorial air space. As aptly pointed out by Edward Collins, "States have complete legal control over the airspace over their territory, other States have only rights in it as are acquired of treaty. There is no customary right of innocent passage through territorial airspace...."[2]

As remarked by Greek Philosopher Socrates in the 5th Century B.C., "Man must rise above the earth—to the top of the atmosphere and beyond—for only thus will he fully understand the world in which he lives." [3] Views are divided about the definition and delimitation of air space and outer space. It need not be overemphasized that there is practical and legal necessity to define the legal boundaries between the two.

At one time it was believed that the States exercised sovereignty over its outer space to the unlimited extent. The rapid progress of science and technology has made this view meaningless. Many efforts have been made to conclude international agreement in regard to the outer space. The first phase of the space developments started on 1st October 1957, when the Soviet Union launched its first sputnik. Since then efforts have been made to achieve international co-operation in this field. The early perspectives were provided by jurists and intellectuals. Subsequently the United Nations through various resolutions crystallized these speculations into legal principles.[4] As early as on 13 December, 1958, the General Assembly of the United Nations passed a resolution,[5] wherein it recognized "the common interest of mankind in outer space" and "that it is the common aim that outer space should be used for peaceful purposes only." The General Assembly established an *ad hoc* Committee on the Peaceful Uses of Outer Space to report to it, *inter alia.* "The nature of legal problems which may arise in the carrying out of programmes to explore Outer Space, "On 12 December, 1959, another resolution[6] entitled 'International Co-operation in the Peaceful Uses of Outer Space", was passed by the General Assembly. It established a Committee on the Peaceful Uses of outer space. On December 1977, the Assembly decided to enlarge the membership of the Committee on the Peaceful Uses of Outer Space from 37 to 47 (Resolution 32, 196B). On the same subject, the Assembly passed other resolutions on 20 December, 1961,[7] 14 December, 1962,[8] and on 13 December, 1963.[9] The last resolution *i.e.*, dated 13 December, 1963, entitled "Declaration of Legal Principles Governing The Activities of States in the

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[1] See U. N. Chronicle, Vol. XXIX, No. 4 (December, 1992), p. 49.

* See also for I.A.S. (1960), Q. No. 6; P.C.S. (1974) Q. No. 3 ; P.C.S. (1964) Q. No. 7 ; I.A.S. (1964), Q. No. 12(d) ; P.C.S. (1978) Q. 9(a).

[2] Edward Collins, International Law in a Changing World, p. 173.

[3] See note 1, at p. 57.

[4] S. Bhatt, Legal Controls of Outer Space, (1973), p. 273.

[5] Resolution 1348 (XIII).

[6] Resolution 1471 (XIV) 11.

[7] Resolution 1721 (XVI).

[8] Resolution 1902 (XVII).

[9] Resolution 1962 (XVIII).

Exploration and Use of Outer Space" which was unanimously adopted by the General Assembly is very important, particularly because most of its principles were incorporated in the *Treaty of Principles Governing the Activities of States in the Exploration and Use of outer space including the Moon and other celestial bodies,* 1966[10] (hereafter referred as "the Outer Space Treaty"). Thus during the decade from 1957 to 1967 the legal regime of Outer Space was in a continuous state of Development.

The first U.N. Conference on Outer Space (*i.e.* UNISPACE-I) was held in August, 1968 and was attended by 78 States.

The Committee on the Peaceful Uses of Outer Space is concerned with questions such as remote sensing, nuclear power sources, geostationary orbit, definition and delimitation of outerspace, arms race in outerspace. These matters were discussed in its sub-committees—(i) the Scientific and Technical Committee from 13 to 24 February, 1984 in Newyork and (ii) the Legal Sub-committee from 19 March to 6 April 1984 in Geneva. The term, "remote sensing" refers to the detection and analysis of the earth's resources and phenomena by sensors carried in aircraft and spacecraft. Four main types of remote sensing are—meteorological ocean observation ; military surveillance and reconnaissance, and land observation. The Scientific and Technical Sub-Committee reaffirmed that remote sensing from outer space should be carried out with the greatest possible international corporation and participation and that developing countries should receive aid to meet their needs in the area." [11] As regards Nuclear Power sources, both the Committees expressed concern for the safe use of space vehicles and objects powered by nuclear sources. The "nuclear-safe orbit of space vehicles carrying nuclear reactors was also discussed in the working group. It was suggested that the orbit lifetime of such vehicles should be 300 to 600 years after reactor shut down. Others felt a specific minimum life-time was not desirable.[12]

Both the Sub-committees continued consideration of aspects of geostationary orbit, the orbit 22,300 miles directly above the equator, where Satellites circle at the same speed as the earth rotates. It is the only orbit capable of providing continuous contract with ground stations via a single satellite. Satellites in this orbit appear to be stationary in the sky because they circle the earth at the same speed as the earth rotates. Because of problems of interference among radio frequencies, the orbit can be occupied by a limited number of satellites at any one time. So far, with less than 150 satellites occupying the orbit, there have been few problems in finding space. There may, however, be conjestion in the future if its use continues to grow at the present rate of 18 per cent annually.

As regards definition and delimitation of outer space, the Legal Sub-committee established a working group to deal with this problem. The subject of arms race was discussed in both the sub-committees.

The U. N. Committee on the Peaceful Uses of outer space met in the Vienna International centre from 12 to 21 June 1984 to consider questions relating to the militarization of outer space. But there was an impasse and the committee failed to reach any agreement on the question of future treatment of the item on the militarization of outer space.[13]

In 1989, the General Assembly asked the U. N. Committee on the Peaceful Uses of Outer Space to continue to give priority to considering ways and means of maintaining outer space for peaceful purposes.[14] The Outer Space Committee considered in 1989 the advisability of the Assembly declaring 1992 as International Space Year. In 1989 session theme was "Space technology as an instrument for combating environmental problems, particularly those of developing countries." On 8th December, 1989, the General Assembly endorsed the initiative to designate 1992 as International Space Year.

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[10] See U. N. Doc. A/6621, 17 December, 1966, pp. 11-18.

[11] U. N. Chronicle, Vol. XXI, No. 4 of 1984, p. 32.

[12] Ibid, at p. 34.

[13] U. N. Chronicle, Vol. XXI, No. 6 of 1984, p. 98.

[14] See Resolution 43/56.

In 1990 NASA launched Hubble Space telescope to study distant galaxies as well as ESA-built ulysses space craft on a five-year journey to explore the Sun. In 1991 Japan launched the Yohkoh Solar-observing spacecraft. Further, the ESA launched a new microwave remote sensing satellite—the Earth Resources Satellite (ERSI)—which can create accurate radar images of the Earth, regardless of cloud, fog or darkness. Moreover, NASA launched a remote sensing satellite—the Upper Research Satellite (UARS)—to spearhead a long term, space-based investigation.

1992 having been declared as the International Space Year (ISY), yearlong and worldwide celebration of humanity's future in the new space age were organised under the aegis of 29 national space agencies and 10 international organisations including the U. N. It may be noted that 1992 is the thirty-fifth anniversary of the birth of the space age for in 1957, the first man-made satellite (Sputnik) was launched by the former Soviet Union during the International Geophysical year, which highlighted Scientific inquiry and international cooperation. Addressing the World Space Congress on 28th August, 1992 at Washington D.C. Secretary-General Boutros Boutros Ghali said, "one of the central goals of International Space Year is to highlight the importance of understanding the Earth as a single complex, interdependent system and to stress the unique role that space science and technology can play in promoting that understanding."[15] While commemorating International Space Year (ISY) during thirty-fifth session in June, 1992, Peter Hohenfeller of Australia, Chairman of the U. N. Committee on the Peaceful Uses of Outer Space, the primary international policy making forum on space affair, said, "I can see no better use to be made of the rapid advances in space science and technology can play in promoting that understanding."[16]

In its 37th Session held at Vienna from 6 to 16 June, 1994 the Committee on the peaceful uses of outer space, proposed for a Third U. N. conference on the exploration and peaceful uses of outer space. In its 38th Session held from 12 June to 22 June, 1995, the Committee approved two texts on the debris of outer space and crafts in space (which include transportation crafts). The Committee also asked the Scientific and Technological Committee to consider in 1996 all the proposals for convening the Third U. N. conference on outer space by the end of the 20th century.

Legal Status of Outer Space.—Following are some of the international treaties and conventions which point out the legal status of outer space :

(1) The Outer Space Treaty*

Outer Space Treaty, 1967 is a landmark event in this connection. Some of the important provisions of the Outer Space Treaty of 1967 are as follows~~,~~—

(1) Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, there shall be free access to all areas of celestial bodies. There shall be freedom of scientific investigation in outer space.[17]

(2) Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[18]

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15. U. N. Chronicle, Vol. XXIX, No. 4 (December 1992) p. 50.

16. Ibid.

* See also for C.S.E. (1996) Q. 8(a) ; UPPCS (2008) Q. 8.

17. Article I of Outer Space Treaty of 1966.

18. Article II; Therefore if a State X lands craft on the moon and claims to have acquired an inchoate title to territory, the claim will be invalid. If the State concerned is a party to the outer space Treaty, the claim will be invalid by virtue of Article II noted above. The answer will be the same even if the State concerned is not a party to the Treaty because of General Assembly Resolution, 1962 (XVIII), entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space which was adopted unanimously by the United Nations General Assembly on December, 1963.

(3) State parties to the treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kind of weapons of mass destruction, install such weapons on celestial bodies or station such weapons in outer space in any other manner.[19]

(4) The moon and other celestial bodies shall be used by all States parties in the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden.[20]

(5) States parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing they shall be safely and promptly returned to the State of registry of their space vehicle.[21]

(6) States Parties to the Treaty shall bear international responsibility for national activities in outer space.[22]

(7) Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the earth, in air space or in outer space, including the moon and other celestial bodies.[23]

(8) A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object and over any personnel thereof, while in outer space or on a celestial body.[24]

Several of the above provisions, particularly Nos. 5 to 8 impose limitation on the national sovereignty of States Parties to the Treaty. It has been rightly remarked, "There are, however, in space developments two factors, namely, the extraordinary interdependence in space activities and the growing convergence of interests, which have radically changed the dimensions and objectives of the purely national interest. The immense potentialities of practical space applications were bound to lead to ever-increasing international co-operation without which the full benefits of these applications cannot be obtained.[25] Further, "The United Nations, recognising the revolutionary developments to be expected in this new dimension, has started to plant trees. As the space era is an era of space speed, there is very reason to expect that notwithstanding the obstacles to be overcome, these trees will grow at a faster rate than the human mind can at this juncture visualise."[26] Thus the Outer Space Treaty is a significant landmark in the evolution of international law relating to outer space.[27]

As regard national sovereignty in regard to outer space, it may be noted that some States have recently declared the extension of their sovereignty to include segments of the geostationary orbit. But such an extension is inconsistent with Outer Space Treaty which had been signed by 69 States by 1977 and which prohibits national appropriation of outer space by claims of sovereignty. Article 1 of the Outer Space Treaty no doubt proclaims freedom of the exploration and use of outer space but this freedom in fact suggests equal access by all States to outer space and non-appropriation of any part of outer space and this freedom can be exercised only with certain conditions and restrictions mentioned in the Treaty. As rightly pointed out by a Soviet author[28] "the extension of State sovereignty to outer space and its component parts is prohibited by international space law with freedom of space being its major principle." However, non-extension of State sovereignty to outer space and its component parts does not mean that the principle of respect for State sovereignty is alien to international space law. To be sure, relations between States with regard to their space activities are governed by international space law with strict compliance with the principle." Further, freedom of space should not be interpreted as an unrestricted right to any type of space activities. Numerous conditions and restrictions are embodied in the 1967 Treaty and other sources of international space law. Freedom of space should not be used as a pretext for violating sovereign rights of other States on earth."[29]

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[19] Article IV; see also General Assembly Resolution, 1884 (XVIII) dated 17 October, 1963.

[20] Article IV.

[21] Article V.

[22] Article VI.

[23] Article VII.

[24] Article VIII.

[25] D. Goedhuis, "The Present State of Space Law" in the Present State of International Law and other Essays (1973), p. 201 at p. 243.

[26] Ibid, at p. 244.

[27] For the detailed study of the Treaty and its Provisions see M. Chandrasekharan "The Space Treaty", I.J.I.L., Vol. 7 (1967), p. 61; Piradev and Rybakov, "First Space Treaty", International Affairs, (Moscow, March, 1967), p. 21; Damodar Wade, Goankar, "Legal Problems of Outer Space", I.J.I.L., Vol. 9 (1969), p. 47.

As remarked by an eminent author,[30] "The Space Treaty is a landmark in the process of development of space law. It represents the common interests of mankind. It has ended the mere speculative phase. It enshrines certain principles of space law which took a decade to form and crystallize. It represents in more specific and more binding terms the rules of customary law such as contained in various U. N. resolutions.

A major failure of Space Treaty is that it does not provide any international control machinery to look after the larger interests of the international community...............The treaty does not provide for compulsory jurisdiction of the International Court of Justice (I. C. J.) for the settlement of disputes." Moreover, "the treaty has not resolved the boundary between air space and outer space."[31]

As of January, 2019, 102 countries have ratified the Treaty other 27 countries have signed but not completed ratification.

(2) The agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 1967

Yet another landmark in the development of space law is the *Agreement on the Rescue of Astronauts, The Return of Astronauts and the Return of Objects Launched into outer space* which was commended upon by the General Assembly on December 10, 1967. The agreement entered into force in December, 1968. As of January 2019, 98 countries have ratified the Agreement and 24 others have signed. The Agreement provides that each contracting party which receives information or discovers that the personnel of a space craft have suffered accident or are experiencing conditions of distress or have made an emergency, or unintended landing in territory under its jurisdiction or on the high seas or in any other place not under the jurisdiction of any State shall immediately, (a) notify the launching authority or, if it cannot identify and immediately communicate with the launching authority, immediately make a public announcement by all appropriate means of communication at its disposal; (b) notify the Secretary-General of the United Nations, who should disseminate the information without delay by all appropriate means of communication at his disposal.[32] If owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a contracting party, it shall immediately take all possible steps to rescue them and render them all necessary assistance. It shall inform the launching authority and also the Secretary-General of the U. N. of the steps it is taking and of their progress.[33] If owing to accident, distress, emergency or unintended landing, the personnel of a space craft land in territory under the jurisdiction of a contracting party or have been found on the high seas or in any other place not under the jurisdiction of any State, they shall be safely and promptly returned to representatives of the launching authority.[34] Expenses incurred in fulfilling obligations to recover and return a space object or its component parts shall be borne by the launching authority.[35]

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[28] V. Vereshchetin, "On the Importance of the Principle of State Sovereignty in International Space Law", I.J.I.L., Vol. 17 (1977) p. 203 at p. 208.

[29] Ibid.

[30] S. Bhatt, note 4, at pp. 276-277.

[31] Ibid, at p. 278.

[32] Article 1 of the Agreement.

[33] Article 2.

(3) The Convention on International Liability for Damage caused by Space Objects, 1971.

The third great landmark in the development of international space law is the *Convention on International Liability for Damage caused by Space Objects,* which was agreed on and commended by the General Assembly on November 29, 1971.[36] The Convention entered into force in September, 1972. The convention provides that a launching State shall be absolutely liable to pay compensation for damage caused by the space object on the surface of the earth or to aircraft or to aircraft in flight.[37] In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.[38] Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused.[39] The convention provides for the establishment of a Claims Commission in case there is no settlement between the State which suffers damage and the launching State.[40]

The falling of "Skylab" in July 1979, raised the question of applicability of Liability Convention of 1971. Put in orbit in 1973 by NASA of America, it was expected to re-enter earth's atmosphere in 1980. It fell well in advance in July 1979. Though causing panic in India and abroad, it in fact fell in the sea causing no damage to any country. Moreover, irrespective of the fact whether a state was a party to the convention or not, American President had offered well in advance to pay compensation for any damage caused by the falling of 'Skylab'. Even the absence of such an offer America would have been internationally liable under the customary international law for any damage caused.

As of January 2019, 96 countries have become parties to the convention on International Liability for Damage caused by space Objects. Besides three inter-governmental organisations (European Space Agency, European Organisation for the Exploitation of Meteorological Satellites and the European Telecommunication Satellite Organisation) have declared their acceptance of the rights and obligations provided in the Agreement.

(4) The Convention on Registration of Objects Launched into Outer Space, 1974.

The fourth landmark is Convention on Registration of Objects Launched into Outer Space which was adopted by the U. N. General Assembly on 12 November, 1974 as an annex to Resolution 3235 (XXIX).[41] Article II of the Convention provides that when a space object is launched into earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching State shall inform the Secretary-General of the U. N. of the establishment of such a registry. Under Article IV each State or registry is under an obligation to furnish certain information concerning each space object carried on its registry to the Secretary-General of the U. N. The Convention on Registration of Objects Launched into Outer Space entered into force on 15th September, 1976, after its ratification by the U. S., Bulgaria, Canada, France and Sweden were the four countries who had ratified it earlier.[42]

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[34] Article 4.

[35] Article 5 (5).

[36] See General Assembly Resolution 2777 (XXVI).

[37] Article II of the Convention.

[38] Article III.

[39] Article V.

[40] See Articles XIV-XX.

[41] For the text of the Convention, see I.J.I.L., Vol. 14 (1974), pp. 446-449.

India acceded to the convention on 18 January, 1982. As of January 2019, 69 countries have ratified the convention. Besides this, two inter-governmental organisations (European Space Agency and European Organisation for the Exploitation of Meteorological Satellites) have declared their acceptance of the rights and obligations provided in the Registration Convention.

(5) The Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 1979.

The fifth landmark is the Agreement Governing the Activities of States on the Moon and other Celestial Bodies which was adopted by the General Assembly on 5th December, 1979 as an annex of Resolution 34/68. The Agreement entered into force on 11 July, 1994. The main provisions of this agreement are following :

(1) All activities on the moon, including its exploration and use, shall be carried out in accordance with international law, in particular the charter of the U. N. and taking into account the Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations adopted by the General Assembly on 24 October, 1970, in the interest of maintaining international peace and security and promoting international cooperation, and mutual understanding and with due regard to the corresponding interests of all other States Parties.[43]

(2) The moon shall be used by all States Parties exclusively for peaceful purposes.[44]

(3) The exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development.[45]

(4) There shall be freedom of scientific investigation on the moon by all States Parties without discrimination of any kind on the basis of equality and in accordance with international law.[46]

(5) The moon and its resources are the common heritage of mankind.[47]

(6) The moon is not subject to national appropriation by any claim of Sovereignty by means of use or occupation, or by any other means.[48]

(7) States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.[49]

(8) The main purposes of the international regime to be established shall include :

   (a) The orderly and safe development of the natural resources of the moon;

   (b) The rational management of those resources;

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[42] U. N. Monthly Chronicle, Vol. XIII, No. 9 (October 1976), p. 35.

[43] Article 2.

[44] Article 3, paragraph 1.

[45] Article 4, paragraph 1.

[46] Article 6, paragraph 1.

[47] Article 11, Paragraph 1. See also K. Narayana Rao, "Common Heritage of Mankind and the Moon Treaty", I.J.I.L., Vol. 21 (1981), p. 275.

[48] Ibid, paragraph 2.

[49] Ibid, paragraph 5.

(c) The expansion of opportunities in the use of those resources;

(d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.[50]

(9) States Parties shall retain jurisdiction and control over their personnel, space vehicles, equipment, facilities, stations and installations on the moon. The ownership of space vehicles, equipment facilities, stations and installations shall not be affected by their presence on the moon.[51]

(10) States Parties to this Agreement shall bear international responsibility for national activities on the moon, whether such activities are carried out by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions of this Agreement. States Parties shall ensure that non-governmental entities under their jurisdiction shall engage in activities on the moon only under the authority and continuing supervision of the appropriate State Party.[52]

As of January 2018, 18 countries have become parties to this Agreement.

Australia, Austria, Belgium, Chile, Kazakistan, Lebanon, Mexico, Morocco, Netherlands, Pakistan, Peru, Phillipines and Uruguay, Kuwait, Saudi Arabia and Turkey.

France, Guatemala, India, Romania have signed but not ratified.

In practice, it is a failed treaty since it has not been ratified by any nation which engages in manned and space exploitation or has plans to do so, for example, the U.S., European Union, Russian Federation, People's Republic of China, Japan and India. Thus since its creation in 1979, there has been negligible effect on actual space flight.

It may be noted that in September 2009, India's Chandrayan-I discovered the presence of water molecules on the moon. As pointed out by ISRO Scientist Mylaswami "It is one of the mile stones (of the mission). We have to quantify it. It was a combined team effort. Finding presence of water or ice has been one of the mission's scientific feat was a landmark event in international space cooperation between India and other countries. Busting the myth Mr. Annadurai, "The current thinking was that only other planetary bodies were the source of water molecules on Moon. Chandrayan-I mission has changed the thinking. The new theory is that water molecules are generated then and there. This is now being analysed".

Later on, the presence of water on Moon was confirmed by NASA's mission to Moon. But all these developments are taking place irrespective of the Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 1979.

(6) Vienna Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE-82 or UNISPACE II).

The UNISPACE-82 was held at Vienna from August 9 to August 22, 1982, with 94 States participants and 45 observers. The Conference reviews the developments in the field of outer space taking place since 1968. The conference appealed the States not to increase arm race beyond earth. This appeal was specially directed to States having nuclear capability. A report adopted by consensus asked the States to follow outer space Treaty, 1967 which has prohibited the use of weapons of mass-destruction in outer space. It is unfortunate that the two great powers—U.S.A. and the U.S.S.R.—are lying each other in production of most advanced weapons of destruction instead of establishing peace in the outer space. To quote only one example, U. S. President Reagan's recent "Star War" Missile defence project is most likely to endanger peace in outer space. Besides being violative of 1972-Anti-Ballistic Missile Treaty (ABM), this would accelerate the arms race and jeopardise efforts being made to ensure peaceful uses of outer space. The UNISPACE-82 also considered the question of monopoly of some industrialized countries in the field of science and technology and recommended increased cooperation between the developed and developing countries in this respect.

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[50] Article 11, paragraph 7.

[51] Article 12, paragraph 1.

[52] Article 14, paragraph 1.

(7) UNISPACE-III

As noted above, the Committee on the Peaceful Uses of Outer Space in its 37th Session held from 6 to 16 June, 1994 proposed the convening of the Third U. N. Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE-III) by the end of this century. The third U.N. Conference on exploration and Peaceful Uses of Outer Space (*i.e.* UNISPACE-III) was held in Vienna (Austria) from 19 to 30 July, 1999. The key objective of the conference was to create a blueprint for the peaceful uses of outer space in the 21st century. It considered the following subjects :

(i) Future of Exploration of Planets;

(ii) Use of Micro-wave systems or micro-satellites in the exploration of outer space;

(iii) Security of future outer space programmes in respect of debris of outer space;

(iv) Maintenance and supervision of outer space based environment; and

(v) Use of Mobile Satellite Communication.

The above-mentioned five major treaties and UNISPACE - I to III constitute the highlight of the development of space law.[53] To safeguard the common interests of mankind and to ensure the establishment and the maintenance of a viable, co-operative public order of the outer space, the moon and other celestial bodies, it is most important that full recognition be given to inclusive interests of States in outer space.[54] "The policy of inclusive access to and use of outer space resources means that each State must take full advantage of opportunities in space, subject to the limitation that activities must be peaceful and unharmful to common interest. This highlights the significance of freedom and equality of access to the outer space resources. The protection of exclusive interest is called for only in one single case, when it is reasonably, necessary for the protection of the security of the State............However, the inclusive exploitation of space resources takes place in a sort of unorganized arena. Proposals concerning the establishment of a special enterprisory organization of space has not found much favour among States. Therefore, the future of public order of space is heavily dependent upon cooperation among States, both at the multilateral and bilateral level. The United Nations plays a very important role in coordinating the activities of different States in outer space, ensuring a uniform and progressive economic and technological development of the entire world."[55]

To conclude in the words of an author,[56] there is need for a global policy for the Space Age. This need has arisen, especially in recent years, on account of the common destiny and common survival of mankind. For carrying out of the programme of a united policy there is need of an international organization. Such a policy, in the context of the contemporary period, shall guide States in the discharge of their responsibilities, provide a workable means for future progress, and establish a stable system of law and order."

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[53] See also Surya P. Sharma, "International Law of the Outer Space : A Policy Oriented Study", I.J.I.L., Vol. 17 (1977) p. 185 at p. 190.

[54] Ibid. at p. 201.

[55] Ibid. at p. 201.

[56] S. Bhatt, note 4 at p. 289.

(8) International Space Year (ISY), 1992

N.B.—This has already been discussed earlier in this Chapter.

India's Mission to the Moon.—*N.B.* : This has already been discussed earlier under the caption, "The Agreement Governing the Activities of the States on the Moon and other Celestial Bodies, 1979".

(9) Indian Space Research Organisation's (ISRO) grand Performance :

N.B.—For this please see Appendix II.

CHAPTER 21

NATIONALITY

Definition and meaning.—Nationality may be defined "...... as the legal status of membership of the collectively of individuals whose acts, decisions and policy are vouchsafed through the legal concept of the State representing those individuals".[1] Fenwick defines the term 'Nationality' in the following words : "'Nationality' may be defined as the bond which unites a person to a given State which constitutes his membership in the particular State, which gives him a claim to the protection of that State and which subjects him to the obligation created by the laws of that State".[2] In the famous case of *Re Lynch* the British Mexican Claims Commission defined the term 'Nationality' in the following words : "A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is membership of an independent political community. This legal relationship involves rights and corresponding duties upon both on the part of the citizens no less than on the part of the State".[3] A similar definition was given by the International Court of Justice in *Nottebohm* case (second phase).[4] According to the World Court under International Law, nationality is "a legal bond having as its basis a social fact of attachment, genuine connection of existence and sentiments together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of State conferring nationality than with that of any other State." Thus the basis of nationality is the membership of an independent community. In *U.S.* v. *Wong Kum Ark,*[5] Justice Gray held that the State may determine as to what type or class of people shall be entitled of citizenship. !t is for the internal law of each State to determine as to who is, and who is not its national. This is, however, subject to particular international obligations. Although, nationality is determined by the internal law of a State, it cannot claim that its determination must be acceptable to other States unless and until its determination is in conformity with the rules of international law. In *Nottebohm* case[6] the World Court observed :

> "A State cannot claim that the rules (relating to acquisition of nationality) which it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's *genuine connection* with the State which assumes the defence of its citizens by means of protection as against other States."

Development of the Law of Nationality and its importance*.—The rules of nationality are determined by State law. But due to the lack of uniformity in State laws in regard to the nationality, many difficulties were experienced. Consequently, difficult problems of Statelessness, double nationality, etc. arose. In Hague Conference of 1930, endeavour was made to end the conflicts arising out of divergent State laws in respect of nationality. Consequently a convention on the conflict of Nationality Law was signed and adopted. In this connection, an attempt was made to resolve the problems relating to nationality and Statelessness. Besides this, Convention of the Nationality of

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1. J.G. Starke, Introduction to International Law, Tenth Edition (Butterworths, Singapore, 1989) p. 340.
2. Charles G. Fenwick, International Law (Third Indian Reprint, 1971), pp. 301-302.
3. Annual Digest of Public International Law Cases, 1929-1930, p. 221 at p. 228.
4. I.C.J. Rep. (1955), at p. 23.
5. (1898) 169 U.S. 649 at p. 668 ; see also *Stoeck* v. *Public Trustee,* (1921) 2 Ch. 69.
6. I.C.J. Rep. (1955) p. 4 at p. 23.

* See also for P.C.S. (1986), Q. 7.

Married Women was adopted in 1957. Last but not the least, Convention on the Reduction of Statelessness was adopted in 1961.

International Importance of Nationality.*—Nationality is often determined by State laws. "Nationality is the principal link between an individual and International Law." [7] Under International Law, nationality has often been used as a justification for the intervention of a Government to protect another country.[8] It may, however, be noted that international law does not create a correlative right in favour of the individuals. It creates rights only in favour of the States whose nationals they are. In *Paneyezys Saldutiskis* case[9] the Permanent Court of International Justice observed : "......... in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals, respect for the rules of international law.[10] The right is necessarily limited to intervention on behalf of its own nationals because, in the absence of special agreement, it is the bond of nationality between the State and individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and ensures respect for the rules of International law must be envisaged."

As pointed out by Starke,[11] the laws relating to nationality have following importance under International law :

(1) The protection of rights of diplomatic agents are the consequence of nationality.
(2) If a State does not prevent offences of its nationals or allows them to commit such harmful acts as might affect other States, then that State shall be responsible for the acts committed by such a person.
(3) Ordinarily, States do not refuse to take the persons of their nationality. By nationality we may mean loyalty towards particular State.
(4) Nationality may also mean that the national of a State may be compelled to do military service for the State.
(5) Yet another effect of nationality is that the State can refuse to extradit its own nationals.
(6) According to the practice of large number of States during war, enemy character is determined on the basis of nationality.
(7) States frequently exercise jurisdiction over criminal and other matters over the persons of their nationality.

In a number of cases, the Permanent Court of International Justice has held that State may by agreement take matters, such as nationality, out of domestic jurisdiction and make them of international concern and subject to international jurisdiction.[12]

Distinction between Nationality and Domicile.**—It has been pointed out earlier that the basis of nationality is the membership of a man with an independent community. On the other hand, domicile denotes the residence of the person. Thus there is a great difference between 'nationality' and 'domicile'. While nationality denotes the relation of man with his nation which protects him and the person is bound to follow the rules enacted by that State, on the other hand, domicile denotes the residence of the person. Consequently, a person may acquire nationality through domicile. In different countries there are different rules and processes in regard to the acquisition of nationality through domicile. In *D.P. Joshi* v. *State of Madhya Bharat,*[13] the Supreme Court of India explained the meaning of domicile in the following words : "Domicile has reference to the system of law by which a person is governed, and when we speak of domicile of country, we assume that the same system of law prevails all over that country. But it might well happen that laws relating to succession and marriage might not be the same all over the country and that different areas in the State might have different laws in respect of those matters. In that case each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile. Domicile of a person means his permanent home. Domicile of origin of a person means 'the domicile received by him at his birth." [14] Further, "the domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by the race or allegiance or the country of the infant's nationality." [15]

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* See also for I.A.S (1973), Q. No. 4 ; I.A.S. (1938), Q. No. 2 ; P.C.S. (1985), Q. 4.

[7] Oppenheim's International Law, Ninth Edition, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, (1992) p. 857.

[8] Ralston, International Arbitral Law and Procedure, (1926), pp. 137, 160 ; see also Hyde, International Law (1945) Vol. II, p. 479 ; Brown's Claim case, Annual Digest, 1923-24, Case No. 35.

[9] (1939) P.C.I.J. Reports, A/B No. 75 at p. 76.

[10] See Mavrommatis Palestine Concessions (Jurisdiction) case, (1926) P.C.I.J., Series A. No. 2, p. 12 ; Brazillian and Serbian Loans case, (1929) P.C.I.J., Series A, Nos. 20-21, p. 17.

[11] Starke, see supra note 1 at pp. 342-343.

[12] See Tunis Morocco Nationality Decrees, P.C.I.J., Series B, No. 4 (1923) ; see also German Settlers in Poland, P.C.I.J., Series No. 7, 16 (1923) ; case Concerning certain German Interests in Upper Silesia, P.C.I.J., Series A, No. 6, 14, 16 (1925) ; Treatment of Polish Nationals in Danzing Territory, P.C.I.J., Series B, No. 44, 121.

** See also for I.A.S (1958), Q. No. 2.

Distinction between Nationality and Citizenship*.—Often nationality and citizenship are considered to be synonymous of each other. But the fact is otherwise. There is a great difference between nationality and citizenship. By nationality under international law, we mean the legal relationship which exists between the nation and the individual. Citizenship, on the other hand, denotes the relations between the person and the State law. In other words we may say through nationality the civil and natural rights of a person may come under international law whereas the rights of citizenship are the sole concern of the State law. It is possible that all the citizens may possess the nationality of a particular State, but it is not necessary that all the nationals may be the citizens of that particular State. Citizens are those persons, who possess full political rights in that State. But a person who possesses only nationality in a particular State may not possess all political rights.

Modes of Acquisition of Nationality.**—Following are the modes of acquisition of nationality :—

(1) *By Birth.*—A person acquires nationality of the State where he is born. He also acquires the nationality of his parents at the time of his birth.

(2) *Naturalisation****.—Nationality may also be acquired by naturalisation.

When a person living in a foreign State for a long time acquires the citizenship of that State then it is said to be state of nationality acquired through naturalisation. In *Nottebohm case,*[16] International Court of Justice held that in respect of grant of nationality there is no obligation of the States if that man has no relationship with the State of Naturalisation. In this case, the court applied the principle of effective nationality. A brief reference of this case may be made here.

Nottebohm's case**.**—Born in 1881 in Germany Friedrich Nottebohm went to Guatemala in 1905. He had German nationality by birth and remained a German national until 1939. Since 1905 he resided in Guatemala where he carried on the business of banking, commerce and plantation. But he continued his business relations with Germany and went to Germany several times. After 1931 he visited his brother who resided in Leichtenstein. In 1938 he left Guatemala. After reaching Leichtenstein, he through his attorney, submitted an application for naturalisation as a citizen of Leichtenstein, and the same was granted on 13 October 1939. Thereafter he conducted himself exclusively as a national of Leichtenstein, particularly with regard to Guatemala. He returned to Guatemala at the beginning of 1940 on Leichtenstein passport and in Guatemala his change of nationality was enrolled on the register of Aliens. As a result of war measures his property was seized in 1943 and he was arrested by Guatemalan authorities and handed over to the armed forces of the U.S. in Guatemala. Later on, he was deported to the U.S. and interned there for more than two years. In 1944, as many as 57 legal proceedings were started against him in Guatemala obviously to confiscate all his properties. After his release from internment in the U.S. he wanted to go to Guatemala to oppose cases filed against him but he was refused readmission to Guatemala. In 1946 he went to Leichtenstein and lived there thereafter. In 1949 his properties in Guatemala were confiscated under the law of Guatemala.

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[13] A.I.R. 1955 S.C. 334 at p. 338 ; see also *Somerville* v. *Somerville,* (1801) 5 Ves. 750 at p. 786 ; *Winans* v. *Attorney-General,* (1904) A.C 287 at p. 290 ; *Whicker* v. *Hume,* 28 L.J. Ch. 396 at p. 400.

[14] Dicey on Conflict of Laws, 6th Edition, p. 87.

[15] Ibid, at p. 88.

* See also for P.C.S. (1974), Q. No. 2(c) ; P.C.S. (1973), Q. No. 2(a).

** See also for P.C.S. (1971), Q. No. 7(a) ; P.C.S. (1968), Q. No. 8 ; P.C.S. (1981), Q. No. 8(a) ; P.C.S. (1988), Q. 7.

*** See also for P.C.S. (1975), Q. No. 2(c) ; C.S.E. (1985), Q. No. 5 (a).

[16] I.C.J. Rep. (1955), p. 4.

**** See also for I.A.S. (1964), Q. No. 5 ; C.S.E. (1983), Q. No. 5(c).

After having been domiciled in Leichtenstein for five years, Leichtenstein espousing his case, filed a case in the International Court of Justice on 11 December 1951. By its judgment dated 18 November 1953, the court rejected the preliminary objection of Guatemala against the jurisdiction of the Court. In the second phase the court considered only the admissibility of claims (of reparation summing into ten millions Swiss Frances) and held by a majority of eleven to three that Leichtenstein was not entitled to extend its protection *vis-a-vis* Guatemala. Thus the International Court of Justice rejected the claims made by Leichtenstein espousing the case of Nottebohm to be inadmissible. Further, the World Court had to decide whether by the fact of grant of nationality by the naturalisation to Nottebohm by Leichtenstein would directly entail an obligation on the part of Guatemala to recognise Leichtenstein's right to exercise its protection over Nottebohm. Propounding the principle of effective nationality, the World Court observed :

> "It must ascertain whether the factual connection between Nottebohm and Leichtenstein in the period preceding, contemporaneous with and following his naturalisation appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective as the exact juridical expression of a social fact, of a connection which existed previously or came into existence thereafter." [17]

The Court noted that Guatemala was the main centre of Nottebohm's business and he remained there for as many as 34 years. Even after his removal in 1943 as a result of war measures Guatemala remained the main seat of his business. As compared to this, in connection with Leichtenstein were extremely tenors. At the time of his application for naturalisation, he had neither any settled abode nor had resided in that country for a long time. Nor did he intend to transfer his business activities to Leichtenstein. Applying the above principle the Court held that Nottebohm did not enjoy the nationality of Leichtenstein. The Court said that it was the bond of nationality between a State and an individual which alone conferred upon the State the right to put forward claim on his behalf on the international plane, the grant of nationality was entitled to recognition by other States only if it represented a genuine connection between the individual and the State granting its nationality. Nottebohm's nationality was not based on any genuine prior link with Leichtenstein and the object of his naturalization was to enable him to acquire the status of a neutral national in time of war. On the basis of these reasons, the Court held that Leichtenstein was not entitled to espouse his case and put forward an international claim on his behalf against Guatemala.

(3) *By resumption.*—Sometimes it so happens that a person may lose his nationality because of certain reasons. Subsequently, he may resume his nationality after fulfilling certain conditions.

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[17] The Court further observed : "In order to decide upon the admissibility of the application, the Court must ascertain whether the nationality conferred on Nottebohm by Leichtenstein by means of a naturalization which took place in circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Leichtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala .... what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the application and secondly, that what is involved is not recognition by all States but only by Guatemala." Ibid., at pp. 16-17, see also p. 20.

(4) *By subjugation.*—When a State is defeated or conquered, all the citizens acquire the nationality of the conquering State.

(5) *Cession.*—When a State has been ceded in another State, all the people of the territory acquire nationality of the State in which their territory has been merged.

In addition to the above-mentioned modes, there may be some other modes whereby a person may acquire nationality. For example, if a person is appointed in the public service of another State, he acquires the nationality of that State.

Loss of Nationality.* —Following are the modes of loss of nationality :—

(1) *By Release.*—In some States law provides that the citizens may lose nationality by release. In the loss of nationality by release it is necessary to submit an application for the same. If the application is accepted, the person concerned is released from the nationality of the State concerned.

(2) *By deprivation.*—In certain States law may provide that if the national of that State without seeking prior permission of the government obtains employment in another State, he will be deprived of his nationality.

(3) *Long Residence Abroad.*—Yet another mode of the loss of nationality is the long residence abroad. State laws of many States contain provisions in this connection that if a person resides for a long period abroad, his nationality ends.

(4) *By Renunciation.*—A person may also renounce his nationality. The need for renunciation arises when a person acquires nationality of more than one State. In such a condition, he has to make a choice as to of which country he will remain the national. Consequently, he has to renounce the nationality, of one State.

(5) *Substitution.*—Some States provide for the substitution of nationality. According to this principle, a person may get nationality of a State in place of the nationality of another State. This is called nationality by substitution whereby he loses the nationality of one State and acquires the nationality of another State.

Double Nationality and Nationality of Married Women.**—Because of the conflict of the laws of nationality of different countries, a situation often arises when a person possesses nationality of more than one State. For example a woman, who after her marriage acquires the nationality of her husband may continue to possess her original nationality. Double nationality may also be acquired by birth such as by the parents who are at the time of birth in a Foreign State.[18] Treaties may provide that persons may by their will select their nationality. The Hague Conference of 1930 made an attempt to remove the difficulty arising out of double nationality in consequence of war. Articles 3 to 6 to the Hague Convention contain the provisions in this connection. For example Art. 5 provides that such a person shall be treated in third State as if he has only one nationality. The third State will either recognize the nationality of the State where he often resides or will recognize the nationality which is more relevant in accordance with the facts and circumstances of each individual case. Articles 8 to 11 provide for the nationality of married women. In these provisions, an endeavour has been made to remove difficulties arising out of double nationality. According to the principles contained in these provisions if a woman marries then she will automatically acquire the nationality of her husband. In the recent times the Convention on the Nationality of Married Women is yet another significant attempt to remove the difficulties and problems arising out of the double nationality.

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* See also for P.C.S. (1971), Q. No. 7(b) ; P.C.S. (1988), Q. 7.

** See also for I.A.S. (1968), Q. No. 12(b) ; I.A.S. (1958), Q. No. 2 ; I.A.S. (1956), Q. No. 6 ; P.C.S. (1973), Q. No. 10(b) ; P.C.S. (1969), Q. No. 3(d) ; P.C.S. (1968), Q. No. 8 ; C.S.E. (1983), Q. No. 5(c) ; For answer see also Nottebohm case discussed earlier ; P.C.S. (1988), Q. 7.

[18] As pointed out by an Indian author, "An individual may possess dual or multiple citizenship with or without intent and with or without knowledge. It may arise either from concurrent application of the principles of *jus soli* and *jus sanguinis* at birth or from the conflict of citizenship laws as to naturalization and expatriation. A person enjoying dual nationality would be subject to claim from both the States. He may be subjected to taxes by both of them ; he is not entitled by one of the two States of which he is national while in the territorial jurisdiction of the other ; both the States can insist on military service by him in case of a war ; one State could be suspicious of his loyalty to it and subject him to the disabilities of an enemy alien including sequestration of his property while the other holds his conduct treasonable". S.K. Agrawala, International Law, Indian Courts and Legislature (1965), p. 105.

Reference may also be made here to the Universal Declaration of Human Rights, 1948. Article 15(1) of the Declaration provides that every one has the right to nationality. Article 15(2) further provides that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. It is very unfortunate that the International Covenant on Civil and Political Rights, 1966 has not incorporated the right of everyone to a Nationality and the right not to be deprived of one's nationality. The Covenant however affirms the right of every child to acquire a nationality.[19]

Reference may be made here to the Convention on the Nationality of Married Women, 1957. This convention was adopted on 29 January, 1957. It entered into force on 11 August, 1958. As of 2013, this convention had 74 countries as parties.

On 7th November, 1967, the General Assembly of the U.N. adopted the declaration on elimination of discrimination against women.[20] Subsequently, on 18th December, 1979 the Assembly adopted the Convention on Elimination of All Forms of Discrimination Against Women.[21] This Convention came into force in 1981. As of 2nd June 2012, 187 countries have ratified the convention. Subsequently, optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women 1999 was adopted. So far 77 countries have ratified it. Under Article 9 of the convention, States Parties agreed to grant to women equal rights with men to acquire, change or retain their nationality. They also undertook to ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality to the wife, render her stateless or force upon her the nationality of the husband. State Parties shall also grant women equal rights with respect to nationality of their children.

Statelessness*.—Sometimes it so happens that a person does not possess the nationality of any State.[22] Such a state is referred to as the state of Statelessness. At present this is one of the burning problems of international law. A person who does not possess the nationality of any nation cannot exercise the rights conferred upon him by international law.[23] In *Stoeck* v. *The Public Trustee,*[24] it was held that if a person is not a citizen of any State, he will be called Stateless. The facts of this case are as follows :—

Under the Treaty of Versailles, 1919, the allied nations had reserved the right to retain and liquidate the property of German citizens. Some property of the appellant (Stoeck) also came under the said provisions, Stoeck filed a case contending that he was not a German citizen and hence his property could not be seized under the said provisions. When the case was proceeding, Stoeck was living in Germany. He was born in 1872 in Prussia, but in 1895 he left Prussia to live in Belgium. In 1896 he obtained release from the citizenship of Prussia, in accordance with the law of Germany. Thereafter, he never applied for German citizenship. In November, 1896, he left Belgium and came to England. He made England his permanent residence but could not get English citizenship through naturalisation. In 1916 he was interned and in 1918 he was deported from England. The Court held that Stoeck was not a German citizen.

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[19] See "After 30 years, an International Bill of Human Rights", U.N. Monthly Chronicle, Vol. XIII, No. 4 (April 1976), p. 50.

[20] Sea G A Resolution 2263 (xxii) of 7th November, 1967.

[21] See U.N. Doc. No. A/Res/34/180.

* See also for I.A.S. (1956), Q. No. 6 ; I.A.S. (1958), Q. No. 2 ; I.A.S. (1973), Q. No. 4 ; P.C.S. (1975), Q. No. 2(b) ; P.C.S. (1968), Q. No. 8.

[22] In the words of an Indian author, "......... Since the municipal laws of different States differ in many points concerning this matter, as a consequence an individual sometimes comes to possess more than one nationality and sometimes none at all" ; see supra note 17.

[23] "Stateless persons are not only without the diplomatic protection of any State, they are also refused enjoyment of rights dependent on reciprocity. Nationality is important to the individual not only with regard to political rights and privileges but also because his civil status and capacity may be dependent upon it. There are many essential rights, such as, personal capacity (attainment of majority, capacity of the married women), family rights (marriage, divorce, adoption of children), matrimonial regime (in so far as this is not regarded as part of the law of contract), and succession to movable (and in some cases to immovable) property which an individual cannot enjoy in a normal way so long as his personal State which determines these rights, is in doubt". Ibid, at pp. 105-106.

[24] (1921) 2 Ch. 67.

Russell, J. observed "the question of what state a person belongs to must ultimately be decided by the municipal law of the state to which he claims to belong or to which it is alleged that he belongs.[25]" The above rule has been followed in *Oppenhimer* v. *Cattermole*.[26] The same principle has been incorporated in Hague Convention of 1930. Article 2 of the convention provides that any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

The situation of Statelessness is recognized under German Law, English Law and under International Law. In International Law, it is generally agreed that whether a person is a citizen of a particular State is determined by the law of that State. Oppenheim has compared such persons with the ships floating in the open sea without the flag of any country. A serious attempt to remove the difficulties arising out of Statelessness was made in the Hague Convention of 1930. Later on after the establishment of United Nations attention was given to remove the difficulties arising out of this problem. According to Article 15 of the Universal Declaration of Human Rights, each person is entitled to have nationality and the nationality of any person cannot be taken away or snatched arbitrarily. Statelessness "is a condition which not only means great hardship and lack of security for individuals, but involves the existence of a serious gap in the application of International Law.[27]

Reference may be made here to the Convention on the Status of Stateless Persons, 1954. This convention was adopted on 28th September, 1954. It entered into force on 6th June, 1960. So far there are 62 parties to this convention.

Convention on the Reduction of Statelessness, 1961.—The International Law Commission considered the subject of Statelessness together with the question of nationality between 1952 and 1954. In 1954, the General Assembly decided to convene a Conference to conclude a Convention on reduction of Statelessness. The conference was called in 1959 and adopted in 1961 the Convention on the Reduction of Statelessness. The Convention on the Reduction of Statelessness, 1961 entered into force on December 13, 1975. So far 73 countries had ratified or acceded to the convention. India has not ratified it and, as such, is not a party to this convention. Following are the main provisions of the Convention:—

(i) A party to the Convention shall grant its nationality to a person born in its territory who would otherwise be Stateless. Such a nationality shall be granted either by birth or by operation of law.[28]

(ii) A child born in wedlock in a territory of a party to the Convention, and whose mother is national of that State, shall get that nationality in case the child would otherwise be Stateless.[29]

(iii) A contracting State shall grant its nationality to a person who is born in its territory and who would be otherwise Stateless and on account of certain reasons he is unable to acquire the nationality of the Contracting State. But this is subject to certain conditions including the condition that at the time of the person's birth the nationality of one of his parents was that of the Contracting State.[30]

(iv) A State party to the Convention shall also grant its nationality to a person who was although not born in the territory of such State party yet at the time of his birth, one of his parents was the national of that State party. Such a grant of nationality may be subject to certain conditions and may be granted either upon application or by operation of law.[31]

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[25] *Stoeck* v. *The Public Trustee*, (1921) 2 Ch., at p. 78.

[26] (1973) Ch. 264, pp. 270, 273.

[27] Starke, see supra note 1 at p. 346.

[28] Article 1 of the Convention.

[29] Ibid.

[30] Article 1.

(v) Loss of nationality as a result of any change in the personal status of a person such as marriage, termination of marriage, and adoption, shall be conditional upon possession or acquiring of another nationality.[32]

(vi) A person shall not be deprived of his nationality, so as to become Stateless, on the ground of departure, residence abroad or failure to register.[33]

(vii) Naturalisation abroad or renunciation shall not result in loss of nationality unless the person concerned acquires another nationality.[34]

(viii) Except in the circumstances provided in Art. 7, normally a person shall not lose the nationality of the State party to the Convention if such loss renders him Stateless.[35]

Following steps may be taken to solve difficulties arising out of Statelessness :—

(1) It should be the duty of the States either to regard definite nationality of the person or not to recognise it. In this connection, Hague Convention is the first important step to remove the difficulties arising out of Statelessness and to lessen the number of persons who do not possess the nationality of any State. In recent times, Convention on the Reduction of the Statelessness, 1961 is a significant improvement on the provisions of the Hague Convention and goes a long way to remove the number of such persons, who do not possess the nationality of any other State.

(2) It should also be the duty of the States not to deprive the nationality of persons unless and until there is sufficient cause for it.

(3) Stateless persons liberally be granted nationality.

(4) Stateless person should be conferred upon some rights through international treaties. In this connection, Geneva Convention of the Status of Refugees, 1951 and Status of Stateless Persons, 1954 deserve a special mention.[36]

Thus we see that efforts have been made to remove the number of Stateless persons under international law but still there are many difficulties in this connection. Much has been done in this connection but much still remains to be done. Regarding the deprivation of nationality of Ugandan-Asians, *Justice V.K. Krishna Iyer* has aptly remarked, "By this Convention (*i.e.*, the Convention of the Reduction of the Statelessness, 1961), Statelessness is sought to be minimised and grant of nationality liberalised and obligated. And if nationality is ensured to a person, he acquires political rights which stand four square between the offending State and the expelled. The Ugandan Asians, for instance, without complete disregard of the Convention of the Reduction of Statelessness cannot be deported. Nor can any particular racial groups be deported on the arbitrary fiat of any rule."[37]

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[31] Article 4.

[32] Article 5.

[33] Article 7.

[34] Article 7.

[35] Article 7.

[36] Ibid., at pp. 346-347.

[37] "Mass Expulsion as Violation of Human Rights", I.J.I.L., Vol. 13 (1973), p. 169 at p. 171.

CHAPTER 22

EXTRADITION*

Basis of the principle of extradition.—Ordinarily each State exercises complete jurisdiction over all the persons within its territory. But sometimes there may be cases when a person after committing crime runs away to another country. In such a situation, the country affected finds itself helpless to exercise jurisdiction to punish the guilty person. This situation is undoubtedly very detrimental for peace and order. In such a situation peace and order can be maintained only when there is international co-operation among the States. There is social need to punish such criminals and in order to fulfil this social necessity the principle of extradition has been recognised. "The inability of a State to exercise its jurisdiction within the territory of another State would seriously undermine the maintenance of law and order if there were no cooperation in the administration of justice. The awareness among national decision-makers of the social necessity of jurisdictional co-operation is illustrated by the widespread practice of returning a person who is accused or who has been convicted of a crime to the State in which the crime was committed." [1]

Meaning and definition of the term extradition.**—Extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed or to have been convicted of a crime, by the State on whose territory the alleged criminal happens to be for the time being." [2] According to Starke, "The term 'extradition' denotes the process whereby under treaty or upon a basis of reciprocity one State surrenders to another State at its request a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender.[3] In the view of eminent jurist Grotius, it is the duty of each State either to punish the criminals or to return them to the States where they have committed crime. In practice, however, States do not accept such obligation. Under International Law, extradition is mostly a matter of bilateral treaty. In principle, each State considers it a right to give asylum to a foreign national. "States have always upheld their right to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases where a treaty imposes an obligation to extradit them." [4] Thus there is no universal rule of customary international law in existence imposing the duty of extradition.

Is there a general duty of States in respect of extradition ?—International Law does not recognise any general duty of States in respect of extradition. Extradition depends on the provisions of the existing extradition treaties. In *Factor* v. *Laubenheimer*,[5] the Court held : "The principles of International Law recognize no right to extradition apart from treaty while a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he fled......the legal right to demand his extradition and the correlative duty to surrender him to the demanding State exist only when created by treaty." But as pointed out in Wheaton's *International Law*,[6] there is no universally recognised practice that there can be no extradition except under a treaty, for, some countries grant extradition without a treaty. Reference may be made here to the Extradition Act, 1962, which governs the law relating to extradition in India. Chapter III of the Act deals with the return of fugitive criminals from Commonwealth countries with extradition arrangements. Chapter II deals with extradition of fugitive criminals to foreign States and to Commonwealth countries to which Chapter III does not apply. Under Section 4 of the Act, a requisition for the surrender of a fugitive criminal of a foreign State can be made to the Central Government. The Central Government may, if it thinks fit, order for magisterial inquiry.[7] Under sub-section (4) of Section 7, if the magistrate is of the opinion that a *prima facie* case is made out in support of the requisition of the foreign State or Commonwealth country, he may commit the fugitive criminal to prison to await the orders of the Central Government, and shall report the result of his inquiry to the Central Government. If on the receipt of the said report and statement, the Central Government is of the opinion that the fugitive criminal ought to be surrendered to the foreign State or Commonwealth country, it may issue a warrant for the custody and removal of the fugitive criminal and for his delivery at a place and to a person to be named within the warrant.[8] Thus, extradition treaty is not the only basis for extradition of a fugitive criminal.[9] Further, definition of the words "extradition offence" in section 2 (c) includes "(ii) in relation to a foreign State other than a treaty State......an offence which is specified by notification under the second Schedule": Thus the second Schedule enumerates offence in relation to foreign States other than treaty States or in relation to Commonwealth countries.[10]

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* See also for I.A.S. (1973), Q. No. 11 (f); P.C.S. (1974), Q. No. 10(d); P.C.S. (1981), Q. No. 9 (b); P.C.S. (1982), Q. No. 6(a); C.S.E. (1988), Q. 7 (a) ; UPPCS (2004) Q. 6 ; UPPCS (2006) Q. 8(c).

[1] Edward Collins International Law in a Changing World (1969), p. 216.

** See also for P.C.S. (1972) Q. No. 4 ; P.C.S. (1968) Q. No. 3 ; C.S.E. (1992) Q. 6(b).

[2] L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 696; See also Oppenheim's International Law, Ninth Edition, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U. K. Ltd. and Mrs. Tomoko Hudson, 1992, pp. 948-949.

[3] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 352.

[4] Oppenheim's International Law, note 2, p. 950.

[5] (1993) 280 U.S. 276.

[6] Edn., 4, Ss. 116 (a) to (d), pp. 186 to 189.

It may, therefore, be concluded that although there is no universal rule of customary international law imposing a general duty of States in respect of extradition and generally extradition is granted on the basis of a treaty, it would be wrong to say that there can be no extradition apart from a treaty. As remarked by the Supreme Court of India, "Extradition with foreign States is, *except in exceptional cases,* governed by treaties or arrangements made." [11]

Purpose of Extradition.—The purpose of extradition is to prevent criminals who flee from a jurisdiction to escape from punishment for a criminal offence they have been accused or convicted of. The objective of extradition is to prevent crimes and punish the persons accused or convicted of crimes. If a person commits some crime in a country and to escape punishment flees from that country to another country, then through the process of extradition, such a person is brought to the jurisdiction of that country where he had committed the crime and is tried and punished for the crime. If on account of some technicalities of law or lack of jurisdiction, the criminal cannot be punished, then through the process of extradition he can be punished by being brought to the country where the committed the crime. In the country where he committed the crime, it would be convenient to adduce the evidence against the accused.

Thus, the object of the process of extradition is to prevent and reduce the crimes in the International field. Thus the role of extradition is to prevent crimes and punish criminals. It is the interest of all countries to prevent crimes because, the country in which a person of criminal character resides, it is in the interest of such a country to ensure extradition of such a person.

Generally, extradition depends on bilateral treaty and the principle of reciprocity. But in the absence of a bilateral interest if a country request another country where the accused or fugitive resides for the time being, to extradite the fugitive, it is in the interest of security and law and order of such country to extradite the accused. Such a step not only enhances international cooperation but is also in accordance with the purposes of the United Nations.

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[7] Section 5, of the Extradition Act, 1962 (34 of 1962).

[8] Section 8, ibid.

[9] See also Section 31, ibid.

[10] The Second Schedule enumerates offences of the Indian Penal Code (45 of 1860) and other offences. Such as culpable homicide (Sections 299 to 304); Attempt to murder (Section 307); kidnapping abduction, slavery and forced labour (Ss. 360 to 374), rape and unnatural offences, theft, extortion, robbery and dacoity (Ss. 378 to 402) ; cheating (Ss. 415 to 420) and damaging or destroying an aircraft in the air or attempting or conspiring to do so.

[11] *The State of Madras* v. *C. G. Menon*, A.I.R. 1954 S.C. 517 at p. 518.

From practical point of view also, it is desirable to extradite the person accused or convicted of a criminal offence because the country in whose jurisdiction the crime was committed, all the possible evidence are present and it is always practicable to try and punish the accused as compared to the country where he has fled away.

In view of the increasing crimes in the international field in recent years, the importance and prevalence of the extradition has increased. In recent years, the provisions relating to extradition find mention in international treaties. The universal recognition of human rights has enhanced the prevalence and importance of extradition. International cooperation is most essential in cases of extradition because there is hardly a country which has extradition treaty with all the other countries of the world.

European Convention on Extradition (1957)

European Convention on Extradition was adopted at Paris on 13th December, 1957. Under Article 1 of the convention, the contracting parties have undertaken to surrender to each other, subject to the provisions laid down in the convention, all persons against whom the competent authorities of the requesting party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order. The convention also lays down extraditable offences (Article 2), the principle of non-extradition for political offences (Article 3); Principle of non-extradition for military offences (Article 4). Contracting parties, right to refuse extradition of its own nationals etc.

The European Convention on Extradition (1957) entered into force on 18th April, 1964.

It may be noted that the European Convention on Extradition was amended by Additional Protocol to the European Convention. The Additional Protocol was concluded on 15th October, 1975. It came into force on 20th August, 1979. The European Convention on Extradition was further amended by Second Additional Protocol to the European Convention which was concluded on 17th March, 1978 and entered into force on 5th June, 1983.

It is suggested that since for the last two to three decades, number of international crimes especially acts of terrorism have witnessed a phenomenal increase, an Universal Convention on the lines of above mentioned European Convention is needed to curb the menace of terrorism

Distinction between 'expulsion' (under Foreigners Act, 1946) and Extradition

In *Hans Muller of Nuremburg* v. *Superintendent, Presidency Jail, Calcutta and others,*[12] the Supreme Court clarified the distinction between 'expulsion' and 'extradition'. The Supreme Court observed that the Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains. The law of extradition is quite different. Because of treaty obligations it confers a right on certain countries (not all) to ask the persons who are alleged to have committed certain specified offences on the territories; or who have already been convicted of those offences by their courts, be handed over to them in custody for prosecution or punishment. But despite that the Government of India is not bound to comply with the request and has an absolute and unfettered discretion to refuse.[13] The Extradition Act is really a special branch of the law of criminal procedure. It deals with criminals and those accused of certain crimes. The Foreigners Act is not directly concerned with criminals or crime though the fact that a foreigner has committed offences or is suspected of that may be a good ground for regarding him as undesirable. Therefore, under the Extradition Act warrants or summons must be issued ; there must be magisterial enquiry and when there is an arrest it is penal in character and this is most important distinction of all when the person to be extradited leaves India he does not leave the country as a free man. The police in India hands him over to the police of the requisitioning State and he remains in custody throughout. In the case of expulsion, no idea of punishment is involved, at any rate, in theory, and if a man is prepared to leave voluntarily he can ordinarily go as and when he pleases. But the right is not his under the Indian Law, the matter is left to the unfettered discretion of the Union Government.[14] Finally, the Supreme Court held that the Foreigners Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a requisition and a good case for extradition, Government is not bound to accede to the request. It is given an unfettered right to refuse for section 3 (1) of the Extradition Act says, "the Central Government may, if thinks fit." Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of Government to choose the less cumbrous procedure to the Foreigners Act when a foreigner is concerned.[15]

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[12] A.I.R. 1955 S.C. 367.

[13] A.I.R. 1955 S.C. 367 at p. 374.

In the present case, the petitioner, Hans Muller, who was not a citizen of India and was said to be a West German subject, was arrested by Calcutta Police on 18-9-1954 and was placed under preventive detention "with a view to making arrangement for his expulsion from India." On 9-10-1954, the West German Government wrote to the West Bengal Government saying that a warrant of arrest was issued against the petitioner in West Germany in connection with a number of frauds and that legal proceedings in connection with those warrants were still pending. The West German consul told the Government of West Bengal that his government would apply for extradition of the petitioner and requested that in the meantime the petitioner be detained up to the date of his extradition to Germany. The Government of West Bengal accepted the request. But the order to deport the petitioner could be passed by the Central Government only. No such order having been made by the Central Government up till the 20th of October, 1954, the petitioner applied to the High Court of Calcutta for a writ in the nature of *habeas corpus*, under Section 491, Cr. P.C. The High Court dismissed the petition on 10-12-1954. The petitioner thereupon preferred the present petition on the basis of the above observations (and on other grounds also) but the Supreme court dismissed the petition.

Essential conditions of granting extradition or restrictions on surrender*.—As pointed out earlier, under International Law extradition mostly depends on treaties among the States. However, the courts have also established certain principles and rules in regard to law of extradition. In other words, we may say that following are some restrictions on surrender of fugitive criminals or essential conditions for extradition :

(1) Non-extradition of Political Criminal.**—It is a very important principle of International Law that extradition for political crimes is not allowed. "Most States refuse to commit themselves to extradite...any person charged with 'political crimes' that is to say crime committed for political purposes or crimes that are politically motivated. The difficulty of applying political exception is obviously a problem that regularly plagues the courts." [16] The practice of non-extradition for political crimes began with the French Revolution of 1789. Later on other States also subscribed to this view. In the present period, almost all the States subscribe to this view although many difficulties arise in the enforcement of this principle. The most difficult problem is of the definition of the term

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[14] *Hans Muller of Nuremburg* v. *Superintendent, Presidency Jail, Calcutta* , AIR 1955 SC 367 at p. 375.

[15] Ibid, at pp. 375-376.

* See also for C.S.E. (1992) Q. 6(b) ; P.C.S. (1995) Q. 6(a).

** See also for P.C.S. (1970), Q. No. 2(b) ; P.C.S. (1982), Q. 6(a) ; P.C.S. (1984), Q. No. 4 ; C.S.E. (1993) Q. 7(b).

[16] Edward Collins International law in a Changing World (1969), p. 216. See also Sections 29 and 31 (a) of the Extradition Act, 1962 referred earlier.

'political crimes'.[17] "Although the principle is now widely accepted that political criminals should not be extradited, there is probably no rule of customary international law which prevents their extradition. However, serious difficulties exist concerning the concept of 'political crimes'." [18] Many attempts have been made to define the term 'political crime', but success has so far eluded.

"A crime is sometimes considered 'political' if committed from a political motive or if committed both from a political motive and for a political purpose or the term 'political crime' may be confined to certain offences against the State only, such as high treason, *lese majeste* and the like. So far all attempts to formulate a satisfactory and generally agreed definition of the term have failed." [19]

Further, "Since a political offence will usually be at the same time an ordinary crime such as murder, arson, theft and the like, the practical difficulty in any particular case is to determine whether the alleged political element is sufficient to give the ordinary crime a sufficient political colour to ensure to the perpetrator protection from extradition. This balance is, in the first place, to be struck by the State from which extradition is requested, in applying its laws to non-extradition of political offender." [20]

Reference may be made here to *Re Castioni,*[21] which is a leading case on non-extradition of political crimes. In this case the Swiss Government requested for the extradition of Castioni who was charged with murdering a member of the State Council of the Canton of Ticinio. Political dissatisfaction was prevailing in the said Canton for some time. An armed crowd including Castioni attacked the Municipal Palace and killed a member of the State Council. There was evidence that the shot was fired by Castioni. The Queen's Bench of England held that Castioni was guilty of a political crime and therefore he could not be extradited. Another important case on the point is *Re Meunier.*[22] In this case, the accused was an anarchist and was charged with causing two explosions in a Paris Cafe and two barracks. After committing the offence, he fled to England. France demanded his extradition. The accused contended that the nature of his crime was political and therefore he could not be extradited. The Court held that for an offence to be political, it is necessary that there should be two or more than two parties in the State, each wanting to establish its Government in the State. If an offence is committed with this objective, it will be called a political offence. In the present case, the offence committed was not a political offence.

Because of different political systems and ideologies, this rule is not likely to be forsaken.[23] Oppenheim has also pointed out, "Up to the present day all attempts to formulate a satisfactory conception of the term have failed, and the reason of the thing will probably, for ever exclude the possibility of finding a satisfactory definition." He further points out that with a view to deal with complex crimes without violating this principle, following three practical attempts have been made.

(i) *The Attentat clause.*—The so-called Belgian Attentat clause was enacted by Belgium in 1856 after the case of Jacquin in 1854. This case related to the attempt to murder the Emperor Nepolean III by Jacquin, a French manufacturer domiciled in Belgium, and a person named Celestin Jacquin who was a foreman in his factory by tryig to cause explosion on the railway line between Lilla and Calais. The extradition of the said two criminals was sought by France but the same was refused by the Belgian Court of Appeal which prohibited the extradition of political criminals. With a view to deal with such case the so-called Belgian *Attentat* clause was enacted. It provided that murder of the Head of a foreign Government, or of a member of his family, should not be considered a political crime. Britain and many other European States also adopted such *attentat* clause.

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[17] Oppenheim, see supra note 2, at p. 707, He adds : ".........Whereas many writers consider a crime 'political' if committed from a political motive, others call 'political' any crime committed for a political purpose ; again others recognise such a crime only as 'political' as was committed both from a political motive and at the same time for a political purpose; and thirdly, some writers confine the term 'political crime' to certain offences against the State only, such as, high treason, lese majeste and the like."

[18] Oppenheim's International Law, note 2, p. 963.

[19] Ibid at p. 964.

[20] Ibid at pp. 964-965.

[21] (1891) 1 Q.B. 149.

[22] (1894) 2 Q.B. 415; For more recent case on extadition regarding the ground of 'political crimes' see *Jimenez* v. *Aristeguieta*, 311 F. 2d. 547 (1962); *Sucha Singh's* case, *R.* v. *Governor of Brizton Prison, Ex parte* Kolcynski, (1955) 1 Q. B. 540; *R.* v. *Governor of Brizton Prison, Ex parte* Shtraks, (1963) 1 Q.B. 55.

[23] Philip C. Jessup, "The present State of Transnational Law" in the Present State of International Law and other Essays (1973) p. 339 at p. 342.

(ii) *The Russian Project of 1881.*—In 1881, Emperor Alexander II was murdered. Influenced by the murder, in the same year (*i.e.*, 1881) Russia invited other States to hold an international conference at Brussels to consider the proposal that murder or attempt to murder should not be considered as a political crime. But the Russian project failed to materialize because both Great Britain and France refused to participate in the proposed conference.

(iii) *The Swiss Solution to the Problem in 1892.*—In 1892, Switzerland enacted extradition law. Article 10 of the said law recognised the principle of non-extradition of political criminals. Article 10 also recognised that if the chief feature of the offence contained more aspect of an ordinary rather than a political crime, then political criminal would not be surrendered and decision as to whether such criminal could be extradited or not was left with the *Bundesgericht,* i.e.—the highest Swiss Judicial Court.

(2) Extradition is not allowed for military criminals also.

(3) Similarly, for religious crimes also persons are not extradited.

(4) *The Rule of Speciality**.—An accused is extradited for a particular crime, and the country which gets back the criminal is entitled to prosecute that person only for the crime for which he was extradited. This is known as the rule of speciality. In *U. S.* v. *Rauscher,*[24] America got Rauscher extradited from Britain on the ground that he had fled to Britain after murdering a fellow servant in an American ship. In America, Rauscher was tried not for murder but for causing grievous hurt to a man named Janssen. The Supreme Court of the United States of America held that when a person is brought under the jurisdiction of the Court under the extradition treaty, he may be tried only for such offence for which his extradition was sought.** The same law prevails in India.[25]

(5) *Double criminality****.—The crime for which extradition is claimed should be crime in both the countries (the country claiming the extradition and the country extraditing). This is called the rule of Double criminality.

(6) There should be sufficient evidence for crimes relating to extradition. In other words, the crime should be such that it should appear to be a crime *prima facie.*[26]

(7) For extradition it is also necessary that certain other prescribed formalities should be fulfilled.

(8) The conditions and the terms mentioned in the Extradition Treaty should be generally fulfilled. In this connection, a leading case is that of *Savarkar (1911).* Savarkar was an Indian revolutionary who was being brought to India

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* *See* also for I.A.S. (1978) Q. 4(b).

[24] (1886) 119 U.S. 407.

** *See* also for P.C.S. (1971), Q. No. 10.

[25] *See* Section 31 (a) of the Extradition Act, 1962; contents of Section 31 (a) have been referred later on in this very Chapter under the heading "Restrictions on the Surrender of Fugitive Criminal."

*** See also for I.A.S. (1978), Q. 4 (a).

[26] In the *Tarashov Extradition* case (1963), the accused was discharged by the court because no *prima facie* case was made out against him. The evidence adduced was inadequate to establish a *prima facie* case against the fugitive criminal. The Court observed that to constitute a *prima facie* case in extradition cases following requirements are essential : (a) the witness should be entitled to a reasonable degree of credit ; (b) the degree of proof should be higher than in ordinary criminal prosecutions ; and (c) the evidence must be incontrovertible leading to the probable and strong presumption of the offence against the accused. For the facts of this case *see* Appendix II; see also A.I.R. 1958 S.C. 98; (1962) 3 All E.R. at p. 455.

to be prosecuted on the ground of crimes which he was alleged to have committed. When the ship was in the port of Marcelese, Savarkar escaped, but later on he was apprehended by French police. But the Captain of the French ship returned Savarkar to the Captain of the British ship under the wrong impression that it was his duty to do so. Later on the Government of France requested the British Government to return Savarkar on the ground that the rules relating to his extradition were not strictly observed. This case was entrusted to the Permanent Court of Arbitration, Hague for its decision. The Court decided that International Law does not impose any obligation upon the State whereby on the above ground the criminal may be returned. That is to say, once a person is extradited, even though it was done in irregular way, the country receiving the fugitive or the criminal is not bound under international law to return the accused. This decision has been severely criticized by the jurists. In their view, it was not based on the sound principle of justice.

(9) When a person is charged with having been an accessory in a crime committed in a foreign State which seeks his extradition, it is not necessary that at the time of offence the said person must be present in the said foreign State. This was held in *Rex* v. *Godfrey.*[27] In this case Godfrey was a member of the firm which traded in England. The said firm obtained some goods in Switzerland on false assurances. At that time Godfrey was in England. On the request of Switzerland, the court ordered the extradition of Godfrey. The same view was taken by the Supreme Court of India in *Mobarak Ali Ahmad* v. *State of Bombay.*[28] In this case the Supreme Court held, "The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are judicially attributable to him notwithstanding that he is corporeally present outside India at that time, is not to give any extra-territorial operation to the law : for it is in respect of an offence whose locality is in India, that the liability is fastened on the person and punishment is awarded by the law, if his presence in India for the trial can be secured." In this case, Mobarak Ali Ahmad, who was undergoing trial for forgery and fraud in the Court of Sessions Judge at Bombay, fled to Pakistan and thereafter he went to England. The Government of India got him extradited under the Fugitive Offender's Act.[29] He was brought to Bombay to face the resumed Session trial. When he was in Bombay Jail a person filed a complaint against the accused for the offence of cheating. A warrant was issued by the Presidency Magistrate against the accused and he was brought before the Court to face trial. It was argued on behalf of the accused that he was a Pakistani national and was out of India during the period when the offence was alleged to have been committed. But this argument was rejected by the Supreme Court. The Court held that the Indian Courts would have jurisdiction over a case in which a person committed an offence although not being present in India at the time of the commission of the offence.[30]

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27. (1923) 1 K.B. 24.
28. A.I.R. 1957 S.C. 857 at p. 868.
29. *The Government of India* v. *Mobarak Ali Ahmad,* (1952) 1 All E.R. 1060.
30. The Supreme Court observed : "...........once it (i.e., offence) is treated as committed within the State the facts that he is a foreigner corporeally present outside at the time of such commission is no objection to the exercise of municipal jurisdiction under the Municipal Law. This emphasises the principle that exercise of criminal jurisdiction depend on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as Ambassadors, Princes etc." (A.I.R. 1957 S.C. 857 at p. 869). Further, "We have, therefore, no doubt that on a reading of Sec. 2 of the Penal Code the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside." (Ibid, at p. 870]. The Court finally held : "...........even on the assumption that the appellant has ceased to be an Indian citizen and was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code notwithstanding his not being corporeally present in India at the time." (Ibid. at p. 871).

(10) As pointed out earlier, extradition is generally a matter of bilateral treaty.* It has been held that there must be a *'formal treaty'* not simply an agreement or notification. This was held by the First class Magistrate in new Delhi in the *Tarashov Extradition* case on 29-3-63.[31] The Court made this observation while interpreting Section 31 (c) of the Extradition Act, 1962. The Court discharged the accused on the ground no *prima facie* case was made out against the accused. The facts and decision in this case may be summarised as follows :

On 7th January, 1963, the Minister Counsellor of the Embassy of the U.S.S.R. in India made a requisition under section 4 of the Indian Extradition Act, 1962, requesting the Government of India to institute proceeding against V. S. Tarashov, a Soviet citizen who was alleged to have committed theft on high seas on 17-11-1962 on a board of a Soviet oil tanker "Tchernovci" in which he was employed as an Electrician and Mechanic. The fugitive criminal denied these allegations and stated that he had been arrested on 28th November 1962 on the complaint of the Soviet Vice-Consul in Calcutta implicating him with the said offence but the Presidency Magistrate, Calcutta had discharged him for want of evidence. He further contended that the Soviet Government had fabricated the said charge against him because he had sought political asylum from American Government. The Magistrate discharged the fugitive on the ground, *inter alia,* that the requirements of Section 31 (c) of the Act are not complied. Section 31 (c) of the Act required a formal treaty and not an agreement. The notification issued by the Government (extending the provisions to U.S.S.R.) could in no case be called a formal treaty.

(11) Generally States do not allow the extradition of their own citizens.** In *Regina* v. *Wilson,*[32] it was observed that where the high contracting parties expressly provide that their own subject shall not be delivered up as in the case of treaty between England and Switzerland, the power to arrest does not exist. Thus what was observed by Cockburn, C.J., in that case was a "serious blot" on the British system of extradition and the Royal Commission on extradition of which he was the Chairman recommended in their report that "reciprocity in this matter should no longer be insisted upon whether the criminal be a British subject or not. If he has broken the laws of a foreign country his liability ought not to depend upon his nationality......The convenience of trying crimes in the country where they were committed is obvious. It is very much easier to transport the criminal to the place of offence than to carry all the witnesses and proofs to some other country where the trial is to be held." [33] Evidently, similar consideration led to the passing of the Extradition Act (1903) by the Indian Legislature providing for the surrender of criminals including Indian subjects for a variety of offences.[34] The Extradition Act, 1962 also provides for the surrender of criminals including Indian subjects.

Restrictions on Surrender under Indian Law.—Section 31 of the Extradition Act, 1962, provides certain restrictions on surrender of fugitive criminals. These restrictions are as follows :

(1) *Offence of political character.*—A fugitive criminal shall not be surrendered or returned to a foreign State Commonwealth country if the offence in respect of which his surrender is sought is of a *political character* or if he proves to the satisfaction of the magistrate or court before whom he may be produced or of

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* See also for P.C.S. (1976) Q. No. 5 ; For answer see also matter discussed under the heading "Is there a general duty in respect of Extradition ?"

[31] See I.J.I.L., Vol. 3 case No. 3 (July 1963), pp. 323-325 at p. 325.

** See also for P.C.S. (1972), Q. No. 4 (Problem).

[32] (1878) 3 Q.B.D. 42 : 37 L.T. 354.

[33] Wheaton, S. 120 (a), pp. 197, 198.

[34] *Dr. Ram Babu Saxena* v. *The State,* A.I.R. 1950 S.C. 155 at p. 157.

the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character.[35]

(2) *Prosecution for offence being barred by time.*—A fugitive criminal shall not be surrendered if prosecution for the offence in respect of which his surrender is sought is according to the law of that State or country barred by time.[36]

(3) *Extradition treaty or provision by law of Foreign State that Fugitive Criminal shall not be tried or detained in that State for any offence committed prior to his surrender or return.*—A fugitive criminal shall not be surrendered or returned to a foreign State or Commonwealth country unless provision is made by the law of the foreign State or Commonwealth country or in the extradition arrangement with the Commonwealth country that the fugitive criminal shall not, until he has been restored or has had an opportunity of returning to India, be detained or tried in that State or country for any offence committed prior to his surrender or return other than the extradition offence proved by the facts of which his surrender or return is based.[37]

(4) *If accused of some offence in India other than offence for which extradition is sought.*—A fugitive criminal shall not be surrendered or returned if he has been accused of some offence in India, not being the offence for which his surrender or return is sought or is undergoing sentence under any conviction in India until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.[38]

(5) *After expiration of 15 days after being committed to prison.*—Lastly a fugitive criminal shall not be surrendered or returned until after the expiration of fifteen days from the date of his being committed to prison by the magistrate.[39]

Where prosecution on trial of person extradited is made for lesser offence under Section 365, I.P.C. although said offence was not mentioned in extradition decree, it was held that it was not illegal as extradition of accused was allowed for higher offence under Section 364-A, I.P.C. This was held by the Supreme Court in *Suman Sood* alias *Kamal Jeet Kaur* v. *State of Rajasthan.*[40]

Unfettered power or discretion of Central Government to discharge any fugitive criminal.—Despite the provisions of the Extradition Act, 1962, particularly section 3 and section 12,[41] The Central Government has unfettered powers or discretion to discharge any fugitive criminal. If it appears to the Central Government that by reason of the trivial nature of the case or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith or in the interests of justice or for political reasons or otherwise it is unjust or inexpedient to surrender or return the fugitive criminal, it may, by order at any time stay any proceedings under this Act and direct any warrant issued or endorsed under this Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged.[42] It is further provided that notwithstanding anything to the contrary contained in section 3 or section 12 the provisions of section 29 and 31 shall apply without any modification to every foreign State or Commonwealth country.[43]

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[35] Section 31 (a) of the Extradition Act, 1962.

[36] Section 31 (b).

[37] Section 31 (c).

[38] Section 31 (d).

[39] Section 31 (e).

[40] AIR 2007 SC 2774.

[41] Section 3 provides that the Central Government may, by notified order, direct that the provisions of this Act other than Chapter III shall apply—(a) to such foreign State or part thereof or (b) to such Commonwealth country or part thereof to which Chapter III does not apply as may be specified in the order. Section 12 runs as follows : Chapter III shall apply only to any such Commonwealth country to which, by reason of an extradition arrangement entered into with that country it may seem expedient to the Central Government to apply the same. Further, every such application shall be by notified order, and the Central Government may, by the same or any subsequent notified order, direct that this Chapter and Chapters I, IV and V, shall in relation to any such Commonwealth country apply subject to such modifications, exceptions, conditions and qualifications as it may think fit to specify in the order for the purpose of implementing the arrangement.

Case relating to refusal to grant of extradition of two Burmese students

In November 1990, two Burmese students were persuaded to land at Calcutta airport. They had hijacked Thai International Airbus with 205 passengers and 16-member to highlight the cause of restoration of democracy in their country. Their six-point Charter of demands, written in blood, included restoration of democracy in Burma, ending military rule, release of all political prisoners and a direct dialogue with the Burmese Government. The Indian Government refused to hand them over to Burmese or Thai authorities. However, the Indian Government have charged them under Anti-Hijacking Act, 1982 and for criminal conspiracy.

Some Indian Cases on extradition

(1) *Savarkar's case.*—The facts and the decision of the Savarkar's case has been referred earlier while explaining the essential conditions of extradition.

(2) *Ram Babu Saxena* v. *State*[44].—This case deals with section 7 of Indian Extradition Act, 1903. Dr. Ram Babu Saxena was an employee under U. P. Civil Service and was deputed to the Tonk State. Tonk was an Indian State and it had an Extradition Treaty with the British Government according to which both States were bound to extradite certain persons who were accused of certain specified crimes. Dr. Ram Babu Saxena was later on living in the district of Nainital. It was contended that while serving in Tonk State, he committed crimes of Extortion under section 383 and cheating under section 420. Dr. Ram Babu Saxena argued in defence that British Government had an extradition treaty with the Tonk State and that treaty did not provide for crimes for which his extradition was being claimed. Hence he could not be extradited under section 7 of the Extradition Act, 1903. In this connection he made specific reference of section 18 of the Extradition Act, 1903, which provided that no extradition could be made against the provisions of the treaty. Since the treaty did not mention the specific crimes for which his extradition was sought, he contended that it will be beyond the jurisdiction of the court and whole proceedings were illegal. But the Supreme Court of India held that section 7 of Indian Extradition Act was rightly applied and he could be extradited. The Supreme Court held : "..............the Act does not derogate from any such treaty when it authorises the Indian Government to grant extradition for some additional offences, thereby enlarging, not curtailing, the power of the other party to claim surrender of criminals. Nor does the Act derogate in the true sense of the term from the position of an Indian subject under the treaty of 1869." [45] B. K. Mukherjee, J., observed : "When as a result of amalgamation or merger, a State loses its full and independent power of action over the subject-matter of a treaty previously concluded the treaty must necessarily lapse." [46] His Lordship concluded : "...........The Extradition Treaty between the Tonk State and the British Government in 1869 is not capable of being given effect to in the present day in view of the merger of the Tonk State in the United State of Rajasthan. As no treaty rights exist, Section 18 of Extradition Act has no application and as Section 7 of the Act has been complied with there is no ground upon which we can interfere." [47] Thus the Supreme Court dismissed the appeal.

(3) *State of Madras* v. *C. G. Menon.*[48]

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[42] Section 29

[43] Section 32.

[44] A.I.R. 1950 S.C. 155.

[45] Ibid, at pp. 157-158.

[46] Ibid, at p. 163; see also Hyde on International Law, Vol. III, p. 1535.

[47] Ibid.

[48] A.I.R. 1954 S.C. 517.

N.B.—For the facts and decision of the case, please see Chapter on "Relationship between International Law and Municipal Law."

(4) *Hans Muller of Nurenburg* v. *Supdt., Presidency Jail, Calcutta and others.*[49] The facts and principles laid down in this case have been discussed in detail earlier in this Chapter under the heading "Distinction between "Expulsion" (under Foreigners Act, 1946) and "Extradition."

(5) *Mobarak Ali Ahmad* v. *State of Bombay, 1957* [50].—The fact and principles laid down in this case have also been discussed earlier in this Chapter.

(6) *The Tarasov Extradition case, 1963*[51].—This case has been discussed earlier in this Chapter.

(7) *Sucha Singh's case.*—Sucha Singh was accused of murdering Pratap Singh Kairon, the former Chief Minister of Punjab and had fled away to Nepal and on the request of the Government of India, the Government of Nepal after starting proceedings against him in accordance with the law of Nepal, extradited him.

(8) *Dharam Teja's case.*—Dharam Teja, who was the Managing Director of Jayanti Shipping Corporation, committed embezzlement and bungling of crores of rupees and had fled away from India. He fled from one country to another to escape his arrest. When he was in Ivory Coast, the Government of India requested the Government of Ivory Coast to extradite Dharam Teja so that proceedings against him could be started in India. The Government of Ivory Coast refused to extradite Dharam Teja on the ground that there was no extradition treaty with India. Later on, when Dharam Teja was in London the Government of India came to know about his whereabouts and informed the British Government and requested it to apprehend Dharam Teja and to start proceedings of extradition against him. India has an Extradition Treaty with the Government of Britain under which both the countries are bound to extradite the accused of each other who run away after committing crimes in either country. Government of England accepted the request of India and proceedings were started against Dharam Teja in the court of law in England. The Court of law in England came to the conclusion that Dharam Teja could be extradited. Consequently, Dharam Teja was extradited to India. The Government of India started proceedings against him and Dharam Teja was convicted for having committed embezzlement and bungling of crores of rupees of Jayanti Shipping Corporation, while he was Managing Director of that Corporation.

(9) Naval Officer Extradition case (July, 1975).—Commander Elijah Ebrahim Jhirhad of Indian Navy was charged by the Government of India with misappropriating Rs. 13 lakhs of the Naval Prize Fund while he was functioning as the Judge Advocate-General of the Indian Navy in the early 1960. The matter was referred to the C.B.I. (*i.e.,* Central Bureau of Investigation) in 1966. Jhirhad had the responsibility of administering Rs. 70 lakhs of the prize fund. An ex-sailor made a complaint that he had not received his share of the prize money. On enquiry the Naval Headquarters discovered that the fund was never subjected to audit and that Commander Jhirhad had destroyed all records. A charge-sheet was filed by C.B.I. against him in 1968. But Jhirhad could not be apprehended as he fled from the country along with his family. Since then the Indian authorities were trying to find out his whereabouts. The C.B.I. then got in touch with the Interpol which had arrested him in April 1972 in New York. Proceedings for his extradition were then launched but Commander Jhirhad went in appeal. In July 1975, the New York Judge passed the extradition orders after accepting the Indian Government pleas in this regard. Thus Commander Jhirhad has been extradited to India and will now face trial of the charge of misappropriation of Rs. 13 lakhs of the Naval Prize Fund.

(10) *Narang Brothers Extradition Case (October 1976).*—In October 1976, the Government of India successfully concluded extradition proceeding in London against Manohar Narang and his brother Om Prakash Narang who were wanted in India on charges

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[49] A.I.R. 1955 S.C. 367.

[50] A.I.R. 1957 S.C. 867.

[51] Order of First Class Magistrate, (New Delhi) dated 29-3-1963.

of cheating, forgery and smuggling in connection with two stolen antique pillars known as Amin pillars in a village near Kurukshetra in Haryana. A London Magistrate held that there was a *prima facie* case for their trial and allowed the extradition application of the Government of India. Manoharlal Narang who was said to be financial adviser to the Liberian Embassy in Paris was arrested in May by the British Police for handling the stolen 2nd century B. C. Antique pillars valued at 250,000 pounds. The pillars were recovered from a local warehouse in London. The Magistrate rejected Manoharlal's plea for diplomatic immunity. On January 10, 1979, the Supreme Court of India dismissed an appeal filed by Narang brothers (Manu Narang and Omi Narang) questioning the legality of the warrants issued by a Delhi Court for their extradition from London in a case of breach of trust involving two antique pieces which were recovered from London. The Court also turned down a similar appeal by Ram Lal Narang, challenging the issue of process by a Delhi Magistrate requiring the three brothers to appear before him in the case which is pending for trial. The appeal filed by the Narang brothers was directed against the order of the Delhi High Court rejecting their applications for quashing the trial court orders. The Division Bench of the Supreme Court consisting of Mr. Justice N. L. Untwalia and Mr. Justice O. Chinnappa Reddy dismissed the two appeals and ruled that the investigating agency had not acted out of any malice nor did it commit any illegality in the investigations.[52]

S.A.A.R.C. Accord on Extradition

On 16th June, 1987, the Foreign Secretaries of South Asian Regional Countries entered into an agreement on extradition. The draft of the Agreement and recommendations were presented before the Standing Committee of Foreign Affairs Ministers. The Agreement provided for the extradition of persons accused of terrorist acts but not including acts of political nature. Later on a three-day Summit of South Asian Association of Regional Countries (SAARC), the Conference adopted a Convention on Terrorism on 4th November, 1987. The Convention was to be ratified within six months. The Convention provides for the extradition of person accused of terrorist acts. However, Article 11 of the Convention provides, that if the State concerned thinks that it is not proper and expedient to extradit the accused, there shall be no obligation to extradit. Similarly, there shall be no obligation to extradit if the matter is very ordinary and the request for extradition has not been made in good faith and is not in the interest of justice. But under the Convention it is the obligation of the member States to ensure the presence of the accused for prosecution under national laws. Under the Convention following six crimes shall not be considered as political crimes or crimes inspired by political motives :

(a) Crimes relating to aircraft hijacking under the Hague Convention of 16 December, 1970 on Hijacking ;

(b) Crimes relating to aircraft hijacking under the Montreal Convention of 23 September,1971 on Hijacking;

(c) Crimes under the Convention of 14 December, 1973 relating to Prevention and Punishment of crimes against Internationally Protected Persons;

(d) Crimes under any Convention of which SAARC States are parties and under which State parties are under obligation to prosecute or extradit the accused;

(e) Crimes relating to murder, assault ; making hostage etc. ; and

(f) Attempt to aid and advise the crimes etc., mentioned in (a) above.

The convention also provides that the Member States shall not consider political crimes the crimes concerning violence.

India—U.K. Pact on Extradition

In the first week of January, 1992 during his visit to India, British Home Secretary Kenneth Baker offered to sign an extradition treaty with India regarding extradition and confiscation of funds of terrorists and drug traffickers operating from Britain. This step is being taken to deter drug traffickings and terrorists in Punjab and Kashmir. The Treaty is subsequently signed. The treaty was ratified on 15th November, 1993. Earlier India had entered into in 1986 an extradition treaty with Canada. India is also making endeavours to enter into a similar treaty with the United States of America.

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[52] The Times of India, 11 January, 1979.

Extradition Treaty between India and Canada.—Desiring to make more effective the cooperation of the two countries in the suppression of crime by making provision for the reciprocal extradition of offenders, and recognising that concrete steps are necessary to combat terrorism the Government of India and the Government of Canada signed an extradition treaty on the 6th of February, 1987. According to Article 1 of the treaty, each contracting state agrees to extradite to the other, subject to the conditions of this treaty any person who being accused or convicted of an extradition offence as described in Article 3, committed within the territory of one state, found in the territory of the other state, whether or not such offence was committed before or after the coming into force of this treaty.

According to Article 3 of the treaty, an extradition offence is committed when the conduct of the person whose extradition is sought constitutes an offence punishable by the laws of both contracting states by a term of imprisonment for a period of more than one year.

India, Hongkong Pact on Extradition.—Before Hongkong became a part of China, Hongkong and India entered into a treaty on extradition in the mididle of June 1997. Since China has announced that China will abide by international treaties signed during the British rule, it is hoped that China will abide by this treaty.

Indo-U.S. Treaty on Extradition.—India and America have been cooperating with each other for a long time for curbing extremism and terrorism. In several cases in past, America has cooperated with India in respect of extradition of criminal who after committing crime had fled away to that country. Recently America extradited Daya Singh Lahoria at the request of the Government of India. A couple of more extraditions are expected soon. On 25th June, 1997 India and America entered into a treaty on extradition. It is a modern treaty containing exhaustive provisions relating to new trends on extradition.

In accordance with Article 23 of the treaty, instruments of ratification were exchanged at New Delhi on 21st July, 1999. Thus the treaty came into force immediately because Article 23 provides that this treaty shall enter into force upon the exchanges of the instruments of ratification.

Article 1 of the treaty provides that the contracting states agree to extradite to each other, pursuant, to the provisions of this treaty, person who, by the authorities in the Requesting State are formally accused of, charged with or convicted of an extraditable offence, whether such offence was committed before or after the entry into force of the Treaty.

Article 2 of the Treaty states that an offence shall be an extraditable offence if it is punishable under the laws in both the contracting states by deprivation of liberty, including imprisonment, for a period of more than one year or by more severe penalty. Further, an offence shall also be an extraditable offence if it consists or an attempt or a conspiracy to commit, aiding, or abetting, counselling or procuring the commission of or being an accessory before or after the fact to, any offence described above.

Article 3 provides that extradition shall not be refused if on the ground that the person sought is a national of the requested state. But extradition shall not be granted for political offence (Article 4) and military offence (Article 5). Extradition shall also not be granted when the prosecution has become barred by lapse of time according to the laws of the Requesting time (Article 7).

In case of urgency, a contracting state may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel. The facilities of the International Criminal Police Organisation (Interpol) may be used to transmit such a request. (Article 12)

Article 17 of the Treaty incorporates the Rule of speciality. Article 17 provides :

1. A person extradited under this Treaty may not be detained, tried or punished in the Requesting State except for :—

(a) the offence for which extradition has been granted or a differently denominated offence based on the same facts on which extradition was granted provided such offence is extraditable or is a lesser included offence;

(b) an offence committed after the extradition of the person; or

(c) an offence for which the executive authority of Requested State consents to the person's detention, trial or punishment. For the purpose of this sub-paragraph :

(i) the Requested State may require the submission of the documents called for in Article 9; and

(ii) the person extradited may be detained by the Requesting State for 90 days or such longer period of time as the Requested State may authorize, while the request is being processed.

2. A person extradited under this treaty may not be extradited to a third state for an offence committed prior to his surrender unless the surrendering state consents.

3. Paragraphs 1 and 2 of this Article shall not prevent the detention, trial or punishment of an extradited person, or the extradition of that person to a third state if;

(a) that person leaves the territory of the Requesting State after extradition and voluntarily returns to it; or

(b) that person does not leave the territory of the Requesting State within 15 days of the day on which the person is free to leave.

Last but not the least, Article 18 provides for 'Waiver of Extradition'. According to it if the person sought consents to surrender to the Requesting State, the Requested State may, subject to its laws, surrender the person as expeditiously as possible without further proceedings.

Extradition Treaty Between India and Germany.—With a view to combat crime, India and Germany signed an extradition treaty at Berlin on 27th June, 2001. The treaty will enable the two countries to extradite a person wanted in "extraditable offences." Under the treaty extraditable offences are the offences which are punishable under the laws of both the States and are punishable by a term of imprisonment of not less than one year. Extradition shall also be granted in respect of an attempt or conspiracy to commit, or aiding, abetting, inciting or participating as an accomplice in the commission of an extraditable offence.

Case of Extradition of Famous Music Director, Nadeem

Famous Music Director, Saifi Nadeem Akhtar, popularly known as 'Nadeem' is accused of in the murder of music baron Gulshan Kumar. Before the police in India could arrest him, he fled to England. The Government of India has sought his extradition. India and Britain had signed an extradition treaty in 1992. This treaty came into effect from 15th November, 1993 after having been ratified by the Parliaments of both countries. The Mumbai Police has tiled the chargesheet of the case in the British Crown Prosecution Office which would outline the details of the extradition case before the Bow Streets Court. Mere submission of chargesheet or arrest warrant is not sufficient. The Mumbai Police will have to provide sufficient corroborating evidence of Nadeem's involvement for extradition to take place that is to say, it will have to be established that Nadeem was *prima facie* involved in the murder of Gulshan Kumar. Taking advantage of the complex British process for extradition Nadeem is getting the decision in the case delayed. However it is clear that by refusing to go back to India voluntarily, Nadeem has probably lost the chance of returning to India. Even if he is successful in blocking the extradition, he may have to seek political asylum in Britain or shift to a third country.

Case of Extradition of Pinto

London based Brazilian business man A.E. Pinto is accused of having played the middleman between the Turkish firm Karsan and Indian agent Sumbasiva Rao in Urea

Scam. Pinto has been under arrest in London for more than a year pending his extradition as the Indian Government has sought his extradition. The CBI filed the charges against Pinto alleging that the National Fertilizers (NFL) Executive Director (Marketing) D. S. Danwar unauthorisedly signed the contract for the supply of urea with Karsan on behalf of NFL in July, 1995 and Tuncay Alankus was the signatory from the Karsan side. But the deal could not materialise and Karsan accused the NFL of failing to issue the "block find papers" . Subsequent to the fiasco of the first deal, another contract was signed between NFL and Karsan on October, 1995.

The entire amount of 38 million dollars was paid in advance but not a single grain of urea was received till the last date of fulfilling the contract immediately after the said expiry date, CBI registered the case and accused Pinto of having received 1.2 million dollars out of 38 million dollars remitted to Karsan. The CBI also claims to have recovered several incriminating documents from Pinto's residence in London during the raids conducted there. Besides Pinto, Karsan executives Tuncay Alankus and Cihan Karance and some former NFL officials are also facing prosecution.

The Bow Street Magistrate has already issued the order allowing the CBI plea for Pinto's extradition to India. Pinto's appeal against the said order of the Magistrate has also been rejected. Pinto has filed a revision petition against the order. According to legal experts his extradition is only a matter of time.

Extradition Treaty Between India and Russia

India and Russia also signed an extradition treaty. This treaty was approved and ratified by Russia on 15th April, 2000.

Extradition Treaty Between India and Spain

India and Spain have also signed an extradition treaty. It was signed in June, 2002.

Extradition Treaty Between India and France

India and France signed an extradition treaty on 24th January, 2003. Prior to the signing of the treaty France had apprehensions that the terrorists or criminals to be extradited to India might get death penalty. India removed such apprehensions by giving an undertaking that terrorists extradited to India would not be given death penalty. The treaty was signed by Deputy Prime Minister L.K. Advani on behalf of India and Dominique Perben, Minister for Justice of France, on behalf of France.

Extradition Treaty Between India and Bulgaria

India and Bulgaria signed an extradition treaty on 23rd October, 2002. This treaty aims to ensure that terrorists are not able to seek sanctuary abroad.

Thus India has so far signed extradition treaties with twenty-five countries.

Case Relating to Extradition of Quattroechi

Quattroechi, a man of Italian origin, is accused of Bofors' Commission Bribery case. Presently he is living in Malaysia. India made a formal request to Malaysia to extradite Quattroechi so that he could be tried in India. The lower Court of Malaysia rejected the request for extradition and set Quattroechi free. He had been on bail since his arrest in September 2000. India filed an appeal against this order in the High Court there. India sent an advocate to argue the case and sought the permission of Attorney-General there for the appearance of the advocate on behalf of India. But the High Court did not allow the Indian advocate to appear.

The problem of extradition of Quattroechi became difficult because India had no extradition treaty with Malaysia.

Extradition of Abu Salem.—Abu Salem was one of the most wanted accused persons in Mumbai Blasts of 1993. He was living in Portugal and the Government of India sought his extradition. After long drawn legal battle in Portugal, the Supreme Court of Portugal ruled in the last week of January, 2005 that Salem could be extradited to India for the trial in major offences. Thus Abu Salem was extradited to India and is facing trial in India. His wife, Monica Bedi, was also extradited to India and was facing trial. Subsequently, however, no charges were proved and she was released. Recently Abu Salem has been convicted and sentenced for life term. He could not be sentenced to death because of the terms of extradition between Portugal and India.

Case of Mallya's Extradition :

N.B.—For this please see Appendix II.

CHAPTER 23

ASYLUM*

Meaning and Definition.—By asylum we mean shelter and active protection extended to a political refugee from another State by a State which admits him on his request. Asylum involves following two elements—(1) a shelter which is more than a temporary refuge; and (2) a degree of active protection on the part of the authorities which have control over the territory of asylum.[1] The institute of International Law has defined asylum as "the protection which a State grants on its territory or in some of her place under the control of certain of its organs to a person who comes to seek it."

Right to Asylum.**—According to Article 14 of the Universal Declaration of Human Rights : "Every one has a right to seek and enjoy in other countries asylum from prosecution." It may however, be noted that the Declaration simply recognises the right of asylum, it does not grant right to receive asylum. "The so-called right of asylum is probably nothing but the competence of every State to allow a prosecuted alien to enter and to remain on, its territory under its protection. Such fugitive alien enjoys the hospitality of the State which grants him asylum ; but it might be necessary to place him under surviellance, or even to intern him at some place to make his entry subject to condition. For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State by organising hostile expeditions or by preparing common crimes against its Head, members of its Government or its property." [2]

In 1967, United Nations Declaration on Territorial Asylum was unanimously adopted by the General Assembly. Among its most important provisions, it called on Governments to refrain from measures such as rejection at the frontier of persons seeking asylum. Being a declaration, it lacked binding force, and it was considered necessary to strengthen the legal basis for granting asylum by means of a convention. With this aim in view the United Nations Conference of Plenipotentiaries on Territorial Asylum was held in Geneva from 10th January to 4th February, 1977. It recommended in its report that the General Assembly in 1977 consider reconvening a further session of the Conference at the appropriate time. The draft text, which was before the conference prepared by the legal experts also intended to reinforce to some extent Article 14 of the 1948 Universal Declaration of Human Rights but makes no mention of any obligation by States to grant asylum.[3] Thus although every one has a right to seek asylum yet there is no corresponding duty of States to grant asylum. "The only international legal right involved is that of the State of refuge itself to grant asylum." [4]

Types of Asylum and distinction between Territorial and Extra-territorial Asylum or Diplomatic Asylum*.**—Asylum may be classified into two categories (1) Territorial and (2) Extra-territorial. In the Asylum Case (*Colombia* v. *Perus*)[5] the International Court of Justice explained the distinction between territorial asylum and diplomatic asylum in the following words : "In the case of extradition (territorial-asylum), the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State. In the case of diplomatic asylum the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in such particular case." "The differences between the principles applying to the two kinds of asylum flow from the fact that the power to grant territorial asylum is an incident of territorial sovereignty itself, whereas the granting of extra-territorial asylum is rather a derogation from the sovereignty of the territorial State in so far that State is required to acquiesce in fugitives from its authorities enjoying protection from apprehension." Further each State "has a plenary right to grant territorial asylum unless it has accepted some particular restriction in this regard, while the right to grant extra-territorial asylum is exceptional and must be established in each case." [6]

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* See also for I.A.S. (1974), Q. No. 3 (e); I.A.S. (1971), Q. No. 11 (e); I.AS. (1969), Q. No. 3; P.C.S. (1970), Q. No. 2 (e).

[1] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 358.

** See also for C.S.E. (1982), Q. 5 (b) ; C.S.E. (1984), Q. 5 (d).

[2] Oppenheim's International Law, Vol. 1, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition Longman Group UK Ltd. and Mrs. Tomoko Hudson, 1992, p. 903.

[3] U. N. Monthly Chronicle, Vol. XIV, No. 3 (March, 1977), p. 81.

[4] Starke's International Law, Eleventh Edition (1994), Edited by I.A. Shearer, p. 324.

*** C.S.E. (1993) Q. 6(c).

[5] I.C.J. Reports (1950), p. 266.

Territorial Asylum.—Territorial asylum is granted by a State in its own territory and is considered as an attribute of the territorial sovereignty of the State. On 28th March, 1945, a Convention on Territorial Asylum was adopted at Caracas. Article 1 of the said Convention provided, "Every State has right in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable without, through the exercise of the right, giving rise to complaint by any other State." Besides this, Article 1 of the Draft Declaration of Asylum as adopted by the United Nations Human Rights Commission, provided : "Asylum granted by a State in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, shall be respected by all other States." Article 3 of the said Draft Declaration further provided, "No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights, should except for overriding reason of the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well founded fear of prosecution endangering his life, physical integrity or liberty in that territory......". Articles 31, 32 and 33 of the Refugee Convention of 1951 have incorporated the above principle.

In its resolution of 14th December, 1967 the General Assembly of the United Nations recommended that in practice the States should do the following :—

(a) When a person requests for asylum, his request should not be rejected or if he enters the territory of such State, he should not be expelled but when a large number of people request for asylum, it may be rejected on the basis of the national security of its own people.

(b) If any State feels difficulty in granting asylum, it should consider the appropriate measures with the feeling of international unity through the medium of individual States or the United Nations.

(c) When a State grants asylum to the fugitives, other States should respect it.

A State is free to grant asylum to the people of other States but this freedom can be restricted or regulated through treaties.

Reference to be made here to the United Nations Conference of Plenipotentiaries on Territorial Asylum which was held at Geneva from 10th January to 4th February, 1977. The Conference, which was attended by 92 countries, held its session in accordance with General Assembly Resolution 3456 (XXX) of 9th December, 1975 for the purpose of considering and adopting a Convention on Territorial Asylum. However, it did not reach a consensus on the matter. The Conference recommended for holding one more session at the appropriate time. The conference was the culmination of more than five years of preparatory work. In April 1971, a group of independent legal experts meeting in Bellgio, Italy, under the auspices of the Carnegie Endowment for International Peace, in consultation with the United Nations High Commissioner for Refugees, began to draw up a draft convention on Territorial Asylum and concluded its work in Geneva in January of 1972.[7]

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[6] Starke, see supra note 1, p. 358.

The International Protection of Refugees*.—The instruments for the international protection of refugees are the 1951 U. N. Convention Relating to the Status of Refugees and its 1967 Protocol. The Convention on the Status of Refugees, 1951 entered into force on April 22, 1954. So far the convention has been signed and ratified by 147 countries. It may be noted that India is not a party to this convention. Protocol Relating to the Status of Refugees entered into force on October 4, 1967. So far 147 States have ratified this protocol. Besides these, there is U. N. High Commissioner for Refugees (UNHCR) established on 1 January, 1961 to give legal protection to the refugees and to provide them material assistance. The convention is based on two principles—(i) non-discrimination, as far as possible between nationals and refugees; and (ii) no discrimination based on race, religion or country or origin amongst refugees. It may be noted here that Article 31 of the 1951 U.N. Refugee Convention exempts refugees directly from a country of prosecution from punishment on account of their illegal entry or presence provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Further the contracting states parties shall not apply to the movements of such refugees restrictions other than those which are necessary and that any restrictions shall only be applied until their status is regularized or they obtain admission into another country. According to Article 2 of the Convention refugees should respect the laws and regulations of their host country and refrain from activities which are inconsistent with their refugees status. Reference may also be made to the principle of non-refoulement incorporated in the Convention. This principle is fundamental to the entire structure of international action in favour of refugees. The observance of this principle is closely related to the determination of refugee status. The corollary to the principle of non-refoulement is that the repatriation of refugees must be voluntary.

As of 11 June, 2013, the convention Ralating to Status of Refugees has been signed and ratified by 147 countries.

It may be noted that until 1967, the Convention applied to persons who had become refugees before January 1, 1951. Under its Protocol adopted in 1967 which came into force on October 4, 1967, new groups of refugees are afforded the same protection. The 1967 Protocol which has widened the scope defines a refugee as someone who is outside his or her former house owing to a well-founded fear of persecution "because of reasons of race, religion, nationality, membership in a particular social group or political opinion". So far the Protocol has been signed and ratified by 147 countries as of 11 June, 2013.

In its note on International Protection of Refugees,[8] the U. N. High Commission on Refugees highlighted the problems faced by refugees. There are problems in regard to admission of refugees and to the standards of treatment accorded to them. States have a tendency to view asylum and the refugee concept in a restrictive manner and to resort to measures of "deterrence" including unjustified detention of refugees, sometimes under harsh conditions. In addition, there is intractable problem of violations of the physical safety of refugees through armed attacks on refugee camps and settlements, forced conscription, piracy attacks on the failure of passing ships to rescue asylum-seekers in distress on high seas.

A UNHCR Panel in Geneva on, 11 April, 1984 expressed concern about 'xenophobic attitudes' towards refugees and appealed to the public, the media and Governments to combat xenophobic trends and to treat refugees according to recognized humanitarian standards.[9] Last but not the least, since 1985, UNHCR has launched the U. N. Campaign to break down mounting barriers erected against the tide of refugees worldwide and to treat refugees as assets.

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[7] See supra note 3.

* See also for C.S.E. (1991) Q. 7(a).

[8] See U. N. Doc. A/AC. 96/643, 9 August, 1984.

[9] U. N. Chronicle, Vol. XXI No. 4 of 1984, p. 54.

The U.N. High Commissioner for Refugees (UNHCR) protects and supports refugees at the request of a government or U.N. and assists in their return or resettlement. The UNHCR was awarded the Nobel Peace Prize for 1954 and 1981. This Agency is mandated to coordinate international action to protect refugees and resolve their problem worldwide, it strives to ensure that everyone can exercise the right to seek asylum and find refuge in another State with the option to return home voluntarily, integrate locally or to resettle in a third country. As of 2004, the agency has rendered help to an estimated 50 million peoples to restart their lives. UNHCR has a staff of about 5000 people in more than 120 countries to help 20 million people.

Rudd Lubbere became High Commissioner on January 1, 2001 replacing Sadako Oqata (1999—2000). But Rudd Lubbere was accused of sexual harassment. He had to resign from his office which was trying to shore up its image, following series of scandals. He had to resign two days after he had assured that he would complete his full term.

Example of Dalai Lama and his Tibetan Followers.—Being oppressed from the repressive policies of China, Dalai Lama and some of his followers fled away from Tibet and sought political refuge in India. India granted asylum to Dalai Lama and his followers. It was an indication of territorial sovereignty of India. China made a great hue and cry over it and alleged that India was interfering in the internal affairs of China. But as a matter of fact and in accordance with the principles of territorial asylum, India as a sovereign State, was within her right to grant asylum to Dalai Lama and his followers. "A State being at liberty to do whatever it chooses within its own territory, without reference to the wishes of other States, so long as its acts are not directly injurious to them, it has the right of receiving and giving hospitality of asylum to emigrants or refugees, whether or not the former have violated the laws of their country in leaving it and whether the latter are accused of political or of ordinary crimes."[10] Since then Dalai Lama has been living in India and this is one of the points of irritation between India and China.

Example of the Influx of Refugees from Bangladesh*.—The repressive policies and genocide committed by the military regime of General Yahya Khan forced millions of refugees to seek political refuge in India. India not only liberally granted political refuge to these oppressed people but also fed them and set the example of providing hospitality which is unprecedented in the annals of the world. It was in keeping with Articles 1 and 3 of the Draft Declaration on Asylum adopted by Human Rights Commission as referred earlier. Moreover, it was in accordance with Articles 31, 32 and 33 of the Refugee Convention of 1951. If India had not granted refuge to the said refugees, their return or expulsion would have resulted in compelling them "to return to or remain in a territory where there was well-founded fear of prosecution endangering their lives or physical integrity." Thus the action of India in granting political refuge to millions of Bangalee refugees from erstwhile East Pakistan (now Bangladesh) was not only commendable on moral grounds but also in keeping with the norms and principles of International Law. India's action was also in accordance with Universal Declaration of Human Rights, 1948. Article 14 (1) of the Declaration provides that everyone has the right to seek and enjoy in other countries asylum from persecution. Article 14 (2) further provides that this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. Obviously in case influx of refugees from Bangladesh, Article 14 (2) does not apply. The influx of refugees from Bangladesh was due to political crimes and the refugees concerned were not guilty of violating the purposes and principles of the United Nations, rather, the Military Regime of Pakistan was guilty of violating the purposes and principles of United Nations.

Extra-territorial or Diplomatic Asylum.**—Extra-territorial asylum is granted by the State outside its territory, *e.g.*, its embassy or public vessels. Extra-territorial asylum may be classified and discussed under the following heads :—

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[10] Hall, International Law, Eighth Edition, p. 749.

* See also for I.A.S. (1972), Q. No. 7.

** See also for P.C.S. (1975), Q. No. 2(d), P.C.S. (1977), Q. 5 ; UPPCS (2002) Q. 6(a) ; UPPCS (2003) Q. 8(c).

*(a) Asylum in Foreign Embassies****.—International Law does not recognise a general right of a head of mission to grant asylum in the premises of the legation for the obvious reason that such a step would prevent territorial law taking its own course and would involve a derogation from the sovereignty of that State where the legislation or mission is situated. In the Asylum case the International Court of Justice observed, "A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively with in the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case." The facts of the *Asylum* (*Colombia* v. *Peru*)[11] *case* are as follows :

A political leader named Victor Raul Haya Dela Torre was accused of having instigated a military rebellion. He was a Peruvian national and was granted asylum in the Colombian Embassy at Lima on 3 January 1949. The granting of the said asylum was a subject of a dispute between Peru and Colombia. Both the parties agreed to refer the case to the International Court of Justice. According to the Pan-American Havana Convention on Asylum (1928), subject to certain conditions, asylum could be granted in a foreign embassy to a political offender who was a national of the territorial State. The question in dispute was whether Colombia, as the State granting the asylum, was entitled unilaterally to "qualify" the offence committed by the refugee in a manner binding on the territorial State that is to decide whether it was a political offence or a common crime. The Court was also asked to decide whether the territorial State was bound to afford the necessary guarantee to enable the refugee to leave the country in safety. In its judgment of 20 November 1950, the Court answered both these questions in the negative, but at the same time specified that Peru had not proved that Haya de la Torre was a common criminal. Lastly, the Court found in favour of a counter claim submitted by Peru that Haya de la Torre had been granted asylum in violation of the Havana Convention. On the day on which the Court delivered this judgment, Colombia filed a request for interpretation, seeking a reply to the question whether the judgment implied an obligation to surrender the refugee to the Peruvian authorities. In a judgment delivered on 27 November, 1950, the Court declared the request inadmissible.

Reference may also be made here to *Haya Dela Torre case.*[12] This case, a request to the above case, was instituted by Colombia by means of a fresh application.

Immediately after the judgment of 20 November, 1950, Peru had called upon Colombia to surrender Mr. Haya Dela Torre. Colombia refused to do so, maintaining that neither the applicable legal provisions nor the Court's judgment placed it under an obligation to surrender the refugee to the Peruvian authorities. This view was confirmed by the Court in its judgment of 13 June 1951. The Court, added that asylum to Haya Dela Torre had been irregularly granted because three months had passed after the suppression of the military rebellion which clearly showed that the urgency prescribed by Havana Convention as a condition for the regularity of asylum ceased to exist. But since Haya Dela Torre was a political offender, the Court held that despite the fact that asylum had been irregularly granted, Colombia was not bound to surrender Haya Dela Torre. The International Court of Justice held : "to infer......an obligation to surrender a person to whom asylum has been irregularly granted would be to disregard both the rule of the extra legal factors involved in the development of asylum in Latin America and the spirit of the Havana Convention."

The Court further added that although the Havana Convention expressly prescribed the surrender of common criminals to the local authorities, no obligation of the kind existed in respect to political offenders while confirming that asylum had been irregularly granted

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*** P.C.S. (1983) Q. 10 (b) : C.S.E. (1988) Q. 7 (a); P.C.S. (1990) Q. 8(b) ; UPPCS (2001) Q. 7(a) ; IAS (2005) Q. 6 (a).

[11] I.G.J. Reports (1950), p. 266.

[12] I.C.J. Reports (1951), p. 71.

and that on this ground Peru was entitled to demand its termination, the Court declared that Colombia was not bound to surrender the refugee. These two conclusions were not contradictory because there were other ways in which the asylum could be terminated besides the surrender of the refugee.

Under international law, a general right of States to grant asylum in foreign legations is not conceded. Asylum may be granted in legation premises in the three exceptional cases—(i) Asylum may be granted, for a temporary period, to individuals who are physically in the danger from mob violence or in case of a fugitive who is in danger because of political corruption in the local State; (ii) Asylum may also be granted where there is a well-established long recognised and binding local custom; and (iii) Asylum may also be granted if there is a special treaty between the territorial State and the State of the legation concerned.[13]

Illustration

A national of country *X* on a visit to India was given asylum in his embassy by the ambassador of country *Y* in India. He was secretly sent away by plane to country *Y*.*

As noted above, international law does not recognise a general right of States to grant asylum in foreign legations. Asylum may, however, be given under exceptional circumstances. In the present, none of the exceptions mentioned above applies. Therefore the conduct of ambassador of country *Y* in secretly sending the national of country *X* to country *Y* is not proper because it involves derogation of the sovereignty of India. India can make a diplomatic protest. But no other remedy is available to India. *Y* is under no obligation to return the national of country *X* to India.

(b) *Asylum in Consular Premises.*—The general principles relating to legation premises are also applicable to the grant of asylum in Consular premises.

(*c*) *Asylum in the Premises of International Institutions.*—International law does not recognise any rule regarding the grant of asylum in the premises of International Institutions. Temporary asylum may, however, be granted in case of danger of imminent violence. There is no general right to International Institutions "to grant asylum or even refuse asylum in their premises to offenders as against the territorial State, and semble not even a right of protection on humanitarian grounds. It is difficult to conceive, however, that a right to grant temporary refuge in an extreme case of danger from mob rule would not be asserted or conceded."[14]

(*d*) *Asylum in War Ships.*—Some writers are of the view that the individuals, not being the members of the crew, who board the vessel to take refuge after committing a crime on shore, cannot be arrested by the local authorities and removed from the vessel in case the commander of the ship refuses to hand over the fugitive. On the other hand some other writers have expressed the view that such fugitives should be handed over to the local police. Even such writers, however, concede that asylum may be granted only on humanitarian grounds in case where there is extreme danger to the life of the individuals seeking asylum. Asylum may also be granted to political offenders. In this connection, Fenwick has pertinently remarked : "While asylum is no longer granted to ordinary criminals, it is still granted quite frequently to political refugees."[15] Reference may also be made here of a Convention adopted at the Sixth International Conference of American States held at Havana in 1928 which forbids the grant of asylum on war ships to persons accused of or condemned for crime. The Convention, however, lays down certain conditions under which asylum may be granted to political offenders.

(*e*) *Asylum in Merchant Vessels.*—Merchant vessels do not enjoy immunity from the local jurisdiction and consequently asylum cannot be granted to local offenders in merchant vessels.

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[13] Starke, see supra note 1, at p. 361.

* C.S.E. (1988), Q. 7(b).

[14] Ibid, at p. 391.

[15] Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 387.

*Asylum and Extradition are Mutually Exclusive or Asylum stops, as it were, where Extradition begins***.—As noted earlier, asylum is the protection which a State grants in its territory or in some of her place under control of certain of its organs to a person who comes to seek it. On the other hand, extradition is the surrender or delivery of the fugitive criminal to the State on whose territory he is alleged to have committed a crime, by the State on whose territory the alleged criminal happens to be. The institution of asylum confers right upon the State to bring the person concerned within its jurisdiction. In case of territorial asylum, the person is in the territory of the territorial State and hence under its jurisdiction. By granting asylum, it grants protection to the person concerned in its territory. In case of diplomatic asylum, the person is not under the jurisdiction of the State granting asylum and by granting asylum protection is granted to the person concerned and he is brought under the jurisdiction of the granting State. It, therefore, involves derogation from the sovereignty of the territorial State or through the institution of asylum the person concerned is withdrawn from the jurisdiction of the territorial State.

In both types of asylum, however, the ultimate purpose is to accord protection to the refugee or person concerned and to bring him under the jurisdiction of the granting State. The institution of extradition does just the reverse. In case of extradition the fugitive criminal is in the territory and under the jurisdiction of the territorial State and either under an extradition treaty (or arrangement) or otherwise, it surrenders or returns the fugitive criminal to the State where he is alleged to have committed the crime. Thus the fugitive criminal which is under the jurisdiction of the territorial State is transferred to the jurisdiction of the State where he is alleged to have committed the crime. Thus asylum and extradition are mutually exclusive. Once the territorial State decides to extradite the fugitive criminal, the question of asylum does not at all arise, that is to say, asylum stops where extradition begins. On the other hand once the State concerned decides to grant asylum to a person the question of his extradition at least for the time being does not at all arise. But after a State has granted asylum to a refugee or fugitive criminal it may subsequently decide to extradite him at the request of the State where he is alleged to have committed the crime or to which State he belongs.

To conclude in the words of Starke, "The liberty of a State to accord asylum to a person overlaps to a certain extent which is its liberty to refuse extradition or rendition of him at the request of some other State, an overlapping best seen in the grant, commonly, of asylum to political offenders, who correspondingly are not as a rule extraditable. Asylum stops, as it were, where extradition or rendition[16] begins and this interdependence makes it convenient to consider the two subjects together."

** See also for I.A.S. (1963), Q. No. 12 (a); P.C.S. (1967), Q. No. 9; for elaboration of the answer : see also matter discussed earlier under the heading "territorial asylum"; C.S.E. (1988), Q. 7 (a); C.S.E. (1988), Q. 7 (d); C.S.E. (1992) Q.6)b) ; P.C.S. (1994) Q. (a) ; P.C.S. (1995) Q. 6(a).

[16] *Rendition* has been defined by Starke as a more generic term covering "instances where an offender may be returned to a State to be tried there, under *adhoc* Special arrangement in the absence of an extradition treaty, or even if there be such a treaty between the States concerned and irrespective of whether or not the alleged offence is an extraditable crime. A deportation or refusal of asylum may have the effect of a rendition although from the point of view of the deporting State or State of purported entry it is not of this mature stricto sensu."

CHAPTER 24

TREATMENT OF ALIENS*

Admission of Aliens—The reception or admission of aliens is a matter of discretion and every State is competent to exclude aliens from its territory. This discretion and competency flow from the territorial supremacy of every Sate over its territory.[1] The International Law does not impose any duty upon States to admit aliens[2]. "The absence of any duty at International Law to admit aliens is supported by an examination of State immigration laws, showing that scarcely any States freely admit aliens." [3] Similarly, in the absence of treaties providing the contrary, no State is under any obligation to refuse admission to aliens. On the contrary, as noted in earlier chapter, States are fully competent to grant asylum to the aliens in their territory. But no alien has right to receive asylum. It is the discretion of the State whether to grant or refuse the request of asylum. Although each State is fully competent and has discretion to exclude aliens, in practice States do not exercise this discretion to the fullest extent.[4] For example, States generally admit tourists, students, etc. A distinction is made between aliens who intend to visit the country for a temporary period and those who intend to settle down in the country. No alien is permitted to settle down in a country without its specific authorisation.

Position of Aliens after admission.—After being admitted into the territory of a State, the alien becomes subject to the laws of the State in the same way as citizens are. Since the alien is subject to laws of the admitting State, the "alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality." [5] The alien remains under the jurisdiction of the State in which he stays and is responsible to it for all the acts he commits on its territory. During his residence he owes allegiance to the State within the territory of which he resides.[6] He will also be responsible for illegal acts which he commits during the period when the territory concerned is temporarily occupied by the enemy.[7] The aliens who reside either permanently or for a long time may also be required to pay rates and taxes and may be compelled to serve in the local police and local fire-brigade for the purpose of maintaining public order and safety. But since the alien does not fall under the personal supremacy of the local State, he cannot be compelled to serve in its army, navy, or air force.

The standard of treatment of aliens, which is generally followed, is that they are to be treated in the same way as citizens are treated. There should be no discrimination between aliens and citizens. It does not, however, follow that if a State treats its own citizens badly, it can do the same with aliens. Therefore, there should be an international minimum standard. This view was supported by majority of States which participated in the Hague Codification Conference. Later on, this view was affirmed in the United Nations General Assembly Declaration on Permanent Sovereignty over Natural Resources

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* See also for I.A.S. (1976), Q. No. 5 ; I.A.S. (1964), Q. No. 6; P.C.S. (1972), Q. No. 6 ; P.C.S. (1970), Q. No. 6 ; P.C.S. (1966), Q. No. 2 ; P.C.S. (1964), Q. No. 8 (a) and 9(e) : I.A.S. (1970), Q. No. 7 : P.C.S. (1987), Q. 3: C.S.E. (1991) Q. 6(a).

[1] L. Oppenheim, International Law, Vol. I, Eighth Edition, at pp. 675-676.

[2] See also Oppenheim's International Law, Ninth Edition, Vol. I., Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group UK Ltd. and Mrs. Tomoko Hudson, 1992, p. 897.

[3] J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 348.

[4] As remarked by Fenwick, "The right of total exclusion is, however, more theoretical than real". International Law (Third Indian Reprint, 1971), p. 319.

[5] Ian Brownlie, Principles of Public International Law, Second Edition (1973) p. 509.

[6] Oppenheim, see supra note 1, at p. 679-680.

[7] See *De Haber* v. *The Attorney-General for Natal*, (1907) A.C. 326.

(1962).[8] It was also recommended by many tribunals and claims commissions. For example in the *Neer Claims*[9] the General Claims Commissions set up by America and Mexico observed : "......... the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of *international standards* that every reasonable and impartial man would readily recognize its insufficiency."

As pointed out by author,[10] "It is universally agreed that the jurisdiction of States is limited to the extent that International Law protects aliens and alien property situated within their territory.[11] Whenever treatment of an alien constitutes a violation of international customary or treaty law, the State of which the injured alien is a national has a legal *right* to make a diplomatic protest against, and submit a claim for damages to, the State responsible for the wrong which in turn has legal *duty* to make reparation. International Law does not require a State to take up the claim of its national and it does not allow a State to take up the claim unless the injured alien is its national.[12] A State incurs international responsibility for an injury suffered by an alien only if some fault of commission or omission can be attributed to its own officials ; if, for example, State officials fail to exercise reasonable diligence to protect an alien from a harmful action by private persons or if they fail to take remedial steps after such an action, the State may be held responsible by the home State of the alien." [13] Further, "What are the international rights of aliens, the deprivation of which constitutes a delict for which the alien's home State has a right to demand reparation ? It is with regard to the content of these rights, not their existence or the processes by which they are protected, that international controversy has often erupted. It is agreed that each State may determine for itself whether or not to admit aliens into its territory and that once admitted, aliens must obey local laws. It is also agreed that certain rights and privileges that are possessed by nationals, such as, the franchise may be denied to aliens. But International Law requires that in matters of fundamental importance to the individual, such as the right to life and personal liberty—a State must treat aliens at least as well as it treats its own nationals. If a State imprisons its own nationals only after a jury trial, for example, it must accord aliens the same right.[14] But as pointed out earlier many States (mostly western States) contend and claim that International law requires that States treat aliens in accordance with an 'international standard' or an international minimum standard of justice, regardless of how they treat their own nationals.

Protective Jurisdiction of a State over Foreigners :

N.B. :—For a discussion of this please see Chapter on *"State Jurisdiction"*.

'Exhaustion of Local Remedies' Rule*·—As noted above, whenever treatment of aliens constitutes violation of international customary or treaty law or otherwise damages or injury is caused to the person or property of the alien, the alien can approach his home State and the State of which the injured alien is a national has a legal right to make a diplomatic protest against or claim reparation, from the State responsible for the wrong or injury. But for a claim to be made at an international level it is a condition precedent that local remedies available to the alien in the territorial State must be exhausted first. This is popularly known as *'Exhaustion of Local Remedies'* rule. Thus, "one of the anomalies in the law of international responsibility is the procedural requirement that before a State can espouse a claim at the international level for injury to her national all the remedies available according to the municipal law of the respondent State must have been exhausted."[15] "Domestic jurisdiction and non-exhaustion of local remedies have been two of the most frequently raised pleas in international litigation ; by means of the former, the respondent State attempts to impede consideration of a matter at international level on the ground that it falls essentially within its jurisdiction, by means of the latter, the respondent State objects to consideration of a matter at international level on the ground that local remedies have not been exhausted and international action is thereby only warranted after the State has had a chance to redress the alleged wrong within the frame-work of its own legal system."[16] Further, "although both pleas of domestic jurisdiction and exhaustion of local remedies are meant to safeguard State sovereignty, they differ from each other in that the former is a substantive bar precluding any action at international level, while the latter stresses the subsidiary character of international jurisdiction. The plea of domestic jurisdiction has been raised before judicial organs either as an automatic reservation to compulsory jurisdiction or as a preliminary objection of incompetence, both forms—particularly, the former—being open to criticism. But political organs have proved more suitable to deal with pleas of domestic jurisdiction, while objections of non exhaustion of local remedies have been more often lodged, with judicial (and arbitral) organs. In practice, paradoxically as it may at first seem, the local remedies rule, apparently the less ambitions of the two pleas, has proved to be a far more effective and successful device for rejecting international claims and safeguarding State sovereignty. By contrast States raising the objection of domestic jurisdiction have thereby failed so far to achieve the proposed goal and have not been able to its discussion at international level."[17]

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[8] General Assembly Resolution 1803 (XVII), dated 14, December, 1962.

[9] (1926) R.I.A.A., IV, 60 ; emphasis supplied.

[10] Edward Collins, International Law in a Changing World (1969), p. 253.

[11] An alien is a person who is not a national of the State in which he is present, whether or not he is there permanently or temporarily. Alien property is the property in a State that is owned by non-nationals.

[12] ".........it is the bond between the State and individual which alone confers upon the State the right of diplomatic protection ...... " Panevezys— Soldertiskis Railway case (1939), Permanent Court of International Justice, Series A/B 76, p. 16.

[13] See also matter discussed under the heading 'State responsibility for the act of aliens' in the Chapter on 'State Responsibility'.

[14] Collins, see supra note 10 at p. 253.

* See also for I.A.S. (1977) Q. No. 10(b), P.C.S. (1987), Q. 3.

The application of the rule is subject to following conditions[18] :—

(1) The exhaustion of local remedies should involve using such local procedures as are available to protect interests which correspond *as closely as may be and in practical terms* with the interests involved in a subsequent international claim.

(2) The rule only applies when effective remedies are available in the national system.

(3) Remedy available will not be deemed to be effective if the local courts do not have jurisdiction in relation to the matter in issue *in terms of local law.*

(4) It is sometimes said that the rule does not apply when the issue arises from measures taken by the constitutional or legislative power or the highest executive organs. But this view is too dogmatic and the real test is whether or not there is responsible possibility of an effective remedy.

(5) Last but not the least, the rule applies only in connection with State responsibility for an unlawful act.

As pointed out by the Commission of Arbitration in *Ambatielos Arbitration,*[19] 'local remedies' available to the alien include "not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test........." The rule concerning the exhaustion of local remedies has also been recognised by the International Court of Justice in *The Interhandel case.*[20] The facts of this case are as follows :

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[15] B.O. Iluyomade, "Dual Claims and the Local Remedies Rule in International Law", I.J.I.L., Vol. 16 (1976), p. 489.

[16] A.A. Cancado Trindate, "Domesic Jurisdiction and Exhaustion of Local Remedies : A. Comparative Analysis", I.J.I.L., Vol. 16 (1976), p. 187.

[17] Ibid, at p. 216.

[18] Brownlie, see supra note 5, at pp. 484-487.

[19] Int. L.R. 23 (1956) ; (1956), R.I.A. A. xii, 83 ; see also Finnish Ships Arbitration (1934), R.I.A.A. iii.

[20] I.O.J. Reports (1959), p. 6.

Under the provisions of the Trading with the Enemy Act, 1917, America declared the assets of a Swiss company as enemy property and vested the shares. The majority of the shares were owned by Interhandel, another Swiss firm. In accordance with the procedure laid down by the Washington Accord of 1946 (Between France, the U.K. and the U.S. and on the other side Switzerland) the Swiss Authority of Review annulled an order provisionally blocking the assets of Interhandel in Switzerland. The Swiss Government claimed that America was bound by the said decision and consequently assets vested in the U.S. should be restored or the matter be referred to 'a conciliation procedure' as provided in the accord. But the U.S. Government contended that the majority of the shares were owned by Interhandel, another Swiss firm, and the decision of the Swiss Authority of Review did not apply to the property vested in the United States. In 1957 the Swiss Government filed an application in the International Court of Justice invoking the optional clause of the Statute of the Court. One of the preliminary objection raised by the U.S. against the admissibility of the application by the Court was that the local remedies available had not been exhausted.

The International Court of Justice upheld the objection raised by the U.S. and held : "This is one of the very cases which give rise to the application of the rule of exhaustion of local remedies."[21] As regards the rule that local remedies must be exhausted before international proceedings may be instituted, the Court observed that "it is a well-established rule of customary International law ; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of International law. Before resort may be had to an International Court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means within the framework of its domestic legal system."[22] Applying the rule in the instant case the World Court observed : "The court has indicated in what conditions the Swiss Government basing itself on the idea that Interhandel's suit had been finally rejected in the United States Courts, considered itself entitled to institute proceedings by its application of 2nd October, 1957. However, the decision given by the Supreme Court (on 14th October, 1957)......... granted a writ of *certiorari* and readmitted Interhandel into the suit. The judgment of that court on 16th June, 1958, reversed the judgment of the Court of Appeals dismissing Interhandel's suit and remanded the case to the District Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States Courts. Its suit is still pending in the United States Courts. The Court must have regard to the situation thus created.[23] The Court also made clear that the rule will apply only when private interest is involved, in case of public interest the rule will be inapplicable. Thus the rule of exhaustion of local remedies "serves some very useful purposes and has become generally accepted. The significant role it now plays in the determination of issues before the European Commission on Human Rights testifies to this".[24] Under Article 26 of the European Convention on Human Rights, 1950, the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of International law.[25]

Reference may also be made here to the decision of the International Court of Justice dated 20th July, 1989 in *case concerning Electronica Sicula S.P.A. (Elsi) (U.S.* v. *Italy)*[26] which involved the question, *inter alia,* whether the rule of Exhaustion of local remedies was applicable to a claim under the treaty which does not mention the rule. The

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[21] I.C.J. Reports (1959), at pp. 28-29.

[22] Ibid. at p. 27.

[23] Ibid. at pp. 26-27.

[24] B.O. Illuyomade, see supra note 15, at p. 498.

[25] See also Article 41(1) (c) of the International Covenant on Civil and Political Rights, 1966 ; Kevin Boyle and Hurst Hannum, "Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice : The Donnelly case", A.J.I.L., Vol. 68 (1974), p. 440 at pp. 447-451.

[26] Para 50 of Judgment dated 20 July, 1989.

Court was also requested to consider the allegation whether the objection that the local remedies had not been exhausted was barred by estoppel. The facts of case, in brief, were as follows :—

The United States of America transmitted to the International Court of Justice an Application instituting proceedings against the Republic of Italy in respect of a dispute arising out of the requisition by the Government of Italy of the plant and related assets of Raytheon-Elsi S.P.A., previously known as Electronica Sicula S.P.A. (Elsi), an Italian Company which was stated to have been 100 per cent owned by two United States Corporations. The Government of the U.S. also requested the Court, pursuant to Article 26 of the Statute of the Court, that the dispute be resolved by a Chamber of the Court. The Government of Italy also accepted this proposal. It was argued on behalf of the U.S. that the Government of Italy has violated the treaty of Friendship Commerce and Navigation (F.C.N. Treaty) between the U.S. and Italy and hence Italy is responsible to pay compensation to the U.S. The Government of Italy took the defence, *inter alia* that the Application filed on 6 February, 1987 by the U.S. Government is inadmissible because local remedies have not been exhausted and requested the Court to dismiss the claim.

It was argued on behalf of the U.S. Government that the rule of exhaustion of local remedies could not apply to a case brought under XXVI of F.C.N. Treaty. It was pointed out that the said Article is categorical in its terms, and unqualified by any reference to the local remedies rule ; and it seemed right therefore, to conclude that the parties to the F.C.N. Treaty, had they intended the jurisdiction conferred upon the Court to be qualified by the local bodies rule in cases of diplomatic protection, would have used express words to that effect ; as was done in an Economic Co-operation Agreement between Italy and the U.S. of America also concluded in 1948. The Chamber of the World Court held :

"The Chamber has no doubt that the parties to a treaty can therein either agree that local remedies rule shall not apply to claims based on alleged breaches of that treaty ; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law, should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so. This part of the United States response to the Italian objection must therefore be rejected."

The U.S. further agreed that the local remedies rule would not apply in any event to the part of the U.S. claim which requested a declaratory judgment finding that the F.C.N. Treaty had been violated. The Chamber of the World Court held :

"The argument of the United States is that such a judgment would declare that the United States own rights under the F.C.N. Treaty had been infringed ; and that such a direct injury the local remedies rule, which is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals, would not apply. The Chamber, however, has not found it possible in the present case to find a dispute over the alleged violation of F.C.N. Treaty resulting in direct injury to the United States, that is both distinct from and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett. The case arises from a dispute which the parties did not 'satisfactorily adjust by diplomacy' ; and that dispute was described in the 1974 United States claim made at the diplomatic level as a 'claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated."[27]

The Chamber of the World Court also referred the *international* case[28] and observed :

"In the present case, likewise, the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent.

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[27] Para 51.

[28] I.C.I., Reports (1959) p. 28.

Accordingly the Chamber rejects the argument in the present case there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part."[29]

After having decided that "the local remedies rule does apply in this case", the Court proceeded to answer the question whether local remedies were or were not exhausted by Raytheon and Machlett. After going through the facts and circumstances of the case the Chamber held :

It is never easy to decide, in a case where there has in fact been much resort to the municipal Courts, whether local remedies have truly been 'exhausted'. But in this case Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of Elsi, and of Elsi's trustee in bankruptcy, ought to have pursued and exhausted."[30]

However, the Chamber of the Court finally held that Italy "has not violated the F.C.N. Treaty in the manner asserted by the Applicant", and hence "the Chamber rejects also the claim for reparation made in the submission of the Applicant."[31]

Expropriation of property of Aliens.—This has been discussed earlier under the heading 'Expropriation of Foreign Property' in chapter entitled "State Responsibility".

Protection of Human Rights to Aliens.—This has been discussed in Chapter on "Human Rights".[32]

Departure of Aliens from the Foreign Country.—As pointed out by Oppenheim, "Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, in any circumstance, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as, payment of rates and taxes, fines, private debts and the like."[33] This right of alien has been recognised under Article 13(2) of the Universal Declaration of Human Rights, 1948, which provides that every one has the right to leave any country, including his own, and to return to his country. Article 12 of the International covenants on Civil and Political Rights also asserts this right.

Expulsion of Aliens.—Like the power to refuse admission, State can expel aliens as and when it desires. This is regarded as an incident of State territorial sovereignty. But this right must not be abused by proceeding in an arbitrary manner. "The *power* to expel and the *manner* of expulsion are, however, two distinct matters. Expulsion (or reconduction) must be effected in a reasonable manner and without unnecessary injury to the alien affected ...... Detention prior to expulsion should be avoided unless the alien concerned refuse to leave the State or is likely to evade the authorities. Also an alien should not be deported to a country or territory where his person or freedom would be threatened on account of his race, religion, nationality, or political views. Nor should he be exposed to unnecessary indignity."[34] Further, "......... it cannot be denied that, especially in the case of expulsion of an alien who has been residing within the expelling State for some length of time, and has established a business there, the home State of the expelled individual is, by its right of protection over citizens abroad justified in making diplomatic representations to the expelling State, and asking for reasons for the expulsion."[35] Moreover, expulsion must always be based on 'just causes'.[36] The law relating to protection of aliens from expulsion finally culminated in the International Covenant on Civil and Political Rights, 1966. Article 13 of the covenant provides : "An alien lawfully in the territory of a State Party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority".

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[29] Note 26, Para 52 of the Judgment.

[30] Para 63 of the Judgment.

[31] Para 136.

[32] See Chapter on "Human Rights".

[33] See supra note 1, at p. 690.

[34] Starke, see supra note 3 at pp. 350-351.

[35] Oppenheim, see supra note 1, at p. 692.

[36] See ibid, at p. 693.

Mass expulsion of aliens.—According to Starke, "International law does not prohibit the expulsion *en masse* of aliens, although this is resorted to usually by way of reprisals. It may, however, be treated as an unfriendly act and certainly would represent a breach of human rights."[37] The general proposition that International law does not prohibit the expulsion of aliens does not appear to be correct in view of the recent developments in the field of human rights and elsewhere. Article 1 of the European Convention on Human Rights provides :·"The high contracting parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in section 1 of this Covention". As aptly remarked by Fawcett, "This marks the great departure taken by the Convention from traditional forms of International protection of individuals, for *it dispenses with nationality as a condition of protection.*"[38] Article 1 of the American Convention on Human Rights prohibits discrimination on the ground of national or social origin. Article 22(6) of the American Convention permits expulsion of aliens only pursuant to a decision reached in accordance with law. Article 22(8) is almost similar to Article 13 of the Covenant on Civil and Political Rights, 1966, referred earlier. The most important provision, for the purpose of present discussion, is enshrined in Article 22(9) which says : *"The collective expulsion of aliens is prohibited"*.

In view of these developments, it would be wrong to say that International law does not prohibit the expulsion *en masse* of aliens. The correct statement of law would rather be that expulsion *en masse* of aliens is not justified.[39] In exceptional cases, it may be justified provided it is not contrary to international customary and treaty law (including the law of the United Nations) and norms and principles developed in the field of human rights. Moreover in the exercise of this right, there must be no discrimination against the citizens of a particular foreign State as such.[40]

Human Rights

N.B.—In view of the growing significance of human rights, it is proposed to further develop and elaborate the subject of Human Rights. It is therefore shifted from here to a separate *i.e.* Part VII of the book where a detailed discussion of the subject has been made. Please, therefore, see it in Part VII, *i.e.* after Part VI entitled "The Law of Neutrality".

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[37] Starke, see supra note 3, at p. 351.

[38] Fawcet, The Application of the European Convention on Human Rights (1969), p. 18.

[39] For example—Mass expulsion of Ugandan Asians has generally been regarded as violation of law. For details see Appendix III.

[40] See ibid : see also Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 321.

CHAPTER 25

INTERNATIONAL CRIMINAL LAW AND THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

There is controversy regarding the question as to whether there exists International Criminal Law or not. While on the one hand, it is argued that there is a small body of penal rules which can be said to be constituting International criminal Law and that "International Law has reached a stage of development when contrive of criminal international law has emerged distinctly"[1] on the other hand, it is asserted that international criminal law in the material sense of the term does not exist.[2] According to Prof. Schwarzenberger[3] six meanings can be given to the term International criminal Law—(a) in the sense of territorial scope of municipal criminal law—it covers those cases when criminal jurisdiction is exercised by a state either within its own territory or in places assimilated in it; (b) in the sense of internationally prescribed municipal criminal law—this is based on treaties and international customary law and covers cases such as piracy and slave trading ; (c) in the sense of internationally authorised municipal criminal law—it is an extension of the earlier category and covers cases such as piracy *Jure Gentium* and war crimes ; (d) in the sense of municipal criminal law common to civilized nations—it covers cases such as forgery of foreign currency; (e) in the sense of international co-operation in the administration of justice ; and (f) *in the material sense of the term.* The categories (a) to (e) can not be classified as 'international criminal law' in the real sense of the term.

The primary object of criminal law is to preserve and maintain public order. Crime has been defined as an offence against the society or community. According to Salmond, "A crime then is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual"[4] the purpose or end of punishment "is the protection of the society or else that punishment is looked as an end in itself......... the aim of protecting the society is sought to be achieved by deterrence, prevention and reformation." [5] Thus broadly speaking, a crime is prohibited by law or the omission to do an act commanded by law and the remedy for which is sanction or punishment by the state. The function of criminal law is, therefore, to protect fundamental social interests of the community. What is true of municipal criminal law should also hold good about the International criminal law. The function of international criminal law should be to preserve the public order of the world and to punish the conduct which attempts to disrupt such public order or which is intolerable to the community of nations. According to Prof. Quincy Wright, "A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal jurisdiction of any State." [6]

International criminal law in the material sense of the term can exist only when some pre-conditions are satisfied namely, (a) some external authority to enforce sanctions of international criminal law; (b) a code of criminal law, (c) an international criminal court; and (d) State as well as individuals should be amenable to international criminal responsibility.[7] In the absence of requisites such as these, Prof. Schwarzenberger has remarked that unless there is the transformation of "the present system of world power politics in disguise[8] into at least a world federation,[9] it is futile to conceive the idea of international criminal law. Before coming to a conclusion, let us first examine each of the above mentioned pre-conditions for the existence of international criminal law and also see how far international law has progressed towards the attainment of these goals.

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[1] D.N. Saraf, "Theory and Reality of International Quasi—Criminal Law", in New Horizons of International Law, and Developing Countries, (1983), p. 87 at p. 101.

[2] S.K. Agarwala, "The Concept of International Criminal Law", p. 71 at p. 76.

[3] G.Schwarzenberger, The Problem of International Criminal Law, p. 263; See also note 2, at pp. 74-76.

[4] Salmond on Jurisprudence, Twelfth Edition by P.J. Fitzerald (1966) p. 92.

[5] Ibid, at p. 351.

[6] "The Law of Nuremberg Trial", A.J.I.L., Vol. 41 (1947) p. 55 at p. 56.

[7] See Prof. S.K. Agrawala, note 2, at p. 78.

As regards the first pre-condition *i.e.* some external authority to enforce sanctions, it must be noted that international law operates in a decentralized system and sovereign equality of all states is the well established rule of international law. In view of this, it is neither relevant nor proper to compare sanctions operating in municipal law with those that operate in international law. It has been aptly pointed out, "International order, far from perfect though it has, its own sanctions seldom imposed by force or command but as it were, natural sanctions slow to mature and gradual in effect but made compelling by *the growing* interdependence of the world." Further, in fact, "there exist among states rules imposing obligations upon them." [10] Moreover, "The sanctions to enforce such norms need not necessarily be confined to deprivations of personal liberty or imposition of fine, these may include other measures such as deprivation of privileges of the group life, expulsion or suspension from membership of the group, reprisals etc. In all cases, however, it is essential to establish that the act complained of is universally condemned and payment of damages would not constitute adequate remedy for the wrong done.[11] Further the practice of states shows that there are certain acts against the community of nations which are universally condemned and if such acts are committed by individuals they are liable to be visited upon by the sanctions of criminal law. International Law has now reached a stage wherein international crime can be clearly distinguished from international delinquency.[12]

In this connection, reference may be made to some important International Treaties entered into after the establishment of the U.N. It may be noted here that one of the first tasks performed by the General Assembly in 1946 was to adopt the principles of Nuremberg charter and Tribunal thereby enlarging the jurisdiction of belligerent states in future wars to crimes against peace and crimes against humanity. Later on in 1947 the General Assembly requested the International Law Commission to "draft a code of offences against Peace and Security of Mankind". Unfortunately the task entrusted to the Commission is not yet complete. The work is going on at snail speed and the comments of the states are still being received.

In 1950, the General Assembly asked, the International Law Commission to take account of observations made by delegations on the formulations of Nuremberg principles while preparing a draft code of offences against the peace and security of mankind. The commission submitted final draft of code in 1954. In 1974 when the draft definition of aggression was submitted before the General Assembly, the Secretary General of the U.N. proposed resuming consideration of the draft code of offences against the peace and security of mankind as well as the issue of the establishment of an international criminal court. In 1977, the International Law Commission suggested that the 1954 draft be reconsidered. In 1980, seven nations asked for the item of "Draft Code of Offences against Peace and Security of Mankind to be included in the agenda of the General Assembly." It may be noted here that Eric Suy, U.N. legal advisor pointed out that following legal documents should be regarded as connected with the code. International convention on the Elimination of All Forms of Racial Discrimination, 1966 ; the convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968, convention on the Prevention and Punishment of crime against Internationally Protected Persons, including Diplomatic Agents, 1973, Definition of Aggression; Declaration on the Granting of Independence to colonial countries and peoples; and Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the charter of the U.N.

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[8] G. Schwarzenberger, The Frontiers of International Law, p. 209.

[9] J.E.S. Fawcett, The Law of Nations (1961) p. 18.

[10] H.L.A. Hart, The Concept of Law (1961) p. 226 ; See also Rahmatullah Khan, "International Law—Old and New", I.J.I.L., Vol. 15 (1975) p. 371 at p. 372.

[11] D.N. Saraf, note 1, at p. 90.

[12] Ibid.

Next important landmark is the Genocide Convention, 1948. It was adopted by Resolution 260 (III of the United Nations General Assembly) on 9 December, 1948. It entered into force on 15 June, 2000. So far 130 States have ratified the convention. Article I of the Convention, declares 'Genocide' as 'a crime under international law'. Article IV provides that persons committing Genocide shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article VI provides that they shall be tried by a competent tribunal of the state in the territory of which the act was committed or by an international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction. Though nearly four decades have passed since then such an international penal tribunal has remained a dream to be realized. The Convention on Narcotic Drugs, 1961 and its Amending Protocol of 1972 impose obligations upon states. Article 14 of the convention provides that if a party fails to carry out the provisions of the convention, the International Narcotics Control Board may call for explanations and if the explanation is unsatisfactory, the Board may call the attention of other competent U.N. organs and may even recommend a stoppage of drug imports or exports or both to and from the country or territory in default.

The next conventions that deserves mention are the *1970 Hague Convention for the Seizure of Air Craft and 1971 Montreal Convention* on the same subject. Under these conventions, states have undertaken to provide deterrent punishment to hijackers. Under these conventions, State Parties may have jurisdiction over hijackers in some or other way and these features of jurisdiction have made the offence of hijacking "very near to piracy under international customary law."[13] Reference may also be made to the *International Convention on the Suppression and Punishment of the crime of Apartheid,* 1973 which came into force on 18 July, 1976. As of January 2014, 107 countries have signed and ratified this convention. Article I of the convention declares *apartheid* as a crime against humanity, violating principles of international law and constituting a serious threat to international peace and security. Article V provides that persons charged with *apartheid* may be tried by a competent tribunal of any State Party to the convention *which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction.* Thus 1973 convention on Apartheid is "nearest to universalising the offence."[14] Yet another significant achievement made is the adoption of the definition of 'Aggression'[15] after 51 years of work by jurists and political experts.

A brief reference may also be made here to the 1973 *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents*[16] which under Article 2 declares certain acts enumerated in the same article as crimes. Article 7 of the convention provides that the state party in whose territory the alleged offender is present shall, if it does not extradit him, submit, without an exception whatsoever and without delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state. A similar provision has been made in the *International Convention Against the Taking of Hostages, 1979.*[17] It came into force on 3 June, 1983 as per condition of the convention, 22 country deposited instrument of ratification. As of December 2014, 174 countries had become parties to the convention.

A perusal of the above conventions makes it clear that serious attempts have been made to evolve a body of International criminal law. Provisions for the establishment of international penal tribunal have also been made in several conventions. Though sanctions in some or the other form exist, there is no code of international criminal law addressed directly to the subjects and objects of international law. The failure to adopt the "Code of offences Against the Peace and Security of Mankind" is a sad commentary of the efforts made in this connection. Although the normative bases of international criminal law have already been established, it would not be correct to say that there exists a body of international criminal law. The utmost that can be said is that it is in the offing. The need is to make sincere efforts in this direction. If and when evolved, both the state and the individuals should be amenable to international criminal responsibility. As regards the establishment of an international penal tribunal, though efforts have been made for more than 50 years, success has so far eluded. It has been aptly remarked, "If the essence of international criminal law lies in the existence of an international judicial authority with power to enforce mandatory rules of social conduct such a law does not exist."[18] It may be noted here that the Seventeen-member Committee established by the Seventh Session of the General Assembly to consider the draft statute of an International Criminal Court pointed out that some members of the Committee felt that at the present time "the substantive law to be applied by the court was not sufficiently mature to make the creation of an international criminal jurisdiction practicable" one of the main hurdles in the establishment of an international penal tribunal is the concept of national sovereignty.[19]

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[13] Shami Shubber, "Aircraft Hijacking under the Hague Convention, 1970—A New Regime", I.C.L.Q., Vol. 22 (1973) p. 687 at p. 725.

[14] S.K. Agrawala, note 2, at p. 80.

[15] For the definition of 'Aggression' see chapter on "The Security Council".

[16] See Annen to Res. 3166 (XXVIII).

[17] See Article 8 of the Convention ; See U.N. Doc. A/34/819.

Proposals for the Establishment of an International Criminal Court.—Proposals for the establishment of an international criminal court have been under consideration for more than 50 years. The Advisory Committee of Jurists which was given the task of preparing plans for the establishment of Permanent Court of International Justice also had before it a draft relating to the constitution of a High Court which could take cognizance of "crime committed against international good order and Universal law of nations." The Advisory Committee of Jurists met at the Hague in June, 1920 and drew up a Draft scheme for the Institution of the Permanent Court of Justice. The final draft of the Committee also included the recommendation that a High Court of International Justice be established and be given the jurisdiction to try offences against "international public order" or against "Universal law of nations" which might be referred to it by the Council or Assembly of the League of Nations. But this recommendation was rejected by the Assembly of the League of Nations on the ground that for the trial of criminal cases a special chamber of the Permanent Court of International Justice would be more practicable.

Alongwith the convention for the prevention and punishment of Terrorism, the League of Nations, drafted, in 1937, a Convention for the Establishment of an International Criminal Court. The proposed court was to consist of five judges and five deputies belonging to different nations to be elected by the Permanent Court of International Justice. The League of Nations requested the members to adopt the convention for the creation of International Court on 16 November, 1937. Although it was signed by Belgium, Bulgaria, Spain, France, Greece, the Netherlands, Romania, Czechoslovakia, Turkey and Yugoslavia, the convention never came into force as there were no ratifications. Though the said attempt proved to be a failure, this experience should be used in devising the modes of approach to the present solution of the issue. It should likewise be noted that this issue is a part of larger problem that of the evolution and development of international criminal law."[20]

After the establishment of the U.N., proposals for the establishment of an international criminal court were once again considered and the matter was further pursued. In 1948, the General Assembly requested the International Law Commission to study the desirability of establishing an international criminal court to try persons charged with genocide and other crimes. It was pointed out that jurisdiction over such crimes would be conferred by international conventions. In its Fifth Session, the General Assembly established a Committee (called the Geneva Committee) on International Criminal Jurisdiction. It submitted a draft statute of an International Criminal Court in the seventh session but instead of taking any decision on it, the General Assembly established a new Committee, called Seventeen-member Committee which submitted a revised draft statute of an International Criminal Court to the Ninth Session of the General Assembly. Though a large amount of work towards drafting the statute of the Court has been done by both the said committees, its consideration has been postponed several times by General Assembly pending the adoption of the definition of Aggression and the finalisation of the Draft Code of Offences against Peace and Security of Mankind. Thus the draft statute has neither been recommended to, nor accepted by any state.

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[18] D.N. Saraf, note 1, at p. 89.

[19] See also Proposal for the Establishment of an International Criminal Court in chapter on "Aircraft Hijacking".

[20] I. Blishchenko and N. Zhdanov, Terrorism and International Law (Progress Publishers, Moscow, 1984) pp. 254-255.

A number of problems such as the competence of the court, attribution of jurisdiction, the law of the court and access to the court arise in connection with the establishment of international criminal jurisdiction. Yet another problem is that of the way the Court is to be established. The Seventeen-Member Committee discussed four methods—(a) By Amendment of the charter of the U.N.; (b) by Multilateral convention ; (c) by General Assembly Resolution ; and (d) by a General Assembly Resolution to be followed by Convention. Most of the members of the committee favoured the establishment of the court by a multilateral convention and this seems to be the best of the said four methods.[21]

Apart from the U.N., the issue of the establishment of an International Criminal Court has attracted the attention of other institutions and persons. In this connection, reference may be made to the two conferences on international criminal law held in Racine, Wisconsin, U.S.A. in 1971-72 and in Bellagio, Italy in 1972 under the auspices of the International Foundation for the Establishment of an International Criminal Court. The Third International conference on International Criminal Law and fourth conference for the establishment of an International Criminal Court under the auspices of the Foundation were held at Dacca (Bangladesh) and at San Juan (Pureto Rico) in December, 1974 and January 1976 respectively. Besides this, representatives of 30 countries attended an international conference of experts on international criminal law and jurisdiction and major violations of international law in May 26-31, 1977 in Boston (U.S.A.). Last but not the least, a draft International Criminal Code prepared by eminent lawyer, Cherif Bassiouni, Secretary-General of the International Association of Penal Law was discussed at the International Institute of Higher Studies in Criminal Sciences. Despite all these efforts "the establishment of an International Criminal Court and a system of international criminal jurisdiction is still an object of scientific investigation and discussion."[22]

U.N. Commission on Crime Prevention and Criminal Justice

Realization has dawned on the international community that new breeds of criminality, including sophisticated computer crime, terrorism, illicit drug-trafficking, money laundering and violent street crime, are creating a pervasive feeling of insecurity throughout the world. Indeed growing crime rates threaten to become a Universal phenomenon comparable to ecological disaster. As many as 114 State Ministers met at Versailles (France) in November 1991 and voiced these concerns and considered the creation of an effective U.N. crime prevention and criminal justice programme. These concerns were affirmed by General Assembly of the U.N. on 18th December, 1991. The General Assembly unanimously called for the creation of a new commission—Commission on Crime Prevention and Criminal Justice as a functional body of the Economic and Social Council.[23] The General Assembly dissolved the existing Committee on Crime Prevention and Control and decided that its funds would be made available for the new Commission.

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[21] Blishchenko and N. Zhdanov, Terrorism and International Law (Progress Publishers, Moscow, 1984) at p. 261.

[22] Ibid., at p. 276.

[23] See Resolution 46/152.

The General Assembly also approved a Statement of Principles and Programme of Action of the U.N. Crime Prevention and Criminal Justice Programme devoted to providing States with practical assistance, such as data collection, information and training to help prevent crime within and among States. According to the new Statement of Principles, it is the belief of the Member States that : justice based on the rule of law is the pillar on which civilized society rests; lowering the world crime rate is related to the improvement of social conditions of the population; rising crime is impairing the process of development; and the growing internationalization of crime must generate new and commensurate responses.[24]

As pointed out by the then Secretary-General of the U.N., Perez de Cuellar, in a message to the Versailles Summit, nowhere was the transnationalism of crime more evident than in the problem of illicit drug trafficking and drug abuse. It has been estimated that 40 million peoples throughout the world consume illicit drugs. There is hardly a nation, a social group, an age group which has been spared.[25] According to the Director-General, Margaret J. Austee to the Third Committee (Social, Humanitarian and Cultural), the new Commission will consider establishing a foundation for crime prevention and formulating an international convention on crime prevention and criminal justice.

The inaugural session of the Commission on Crime Prevention and Criminal Justice—the newest functional body of the Economic and Social Council—was held at Vienna from 21st to 30th April, 1992. It approved an omnibus draft resolution which could serve as a blueprint for the future activities of the U.N. Crime Prevention and Criminal Justice Programme. It also accepted the recommendation of the Ministerial Meeting on the creation of an Effective U.N. Crime Prevention and Criminal Justice Programme held at Versailles (France) from 21st to 23rd November, 1991 and decided to consult Member States on the desirability of a convention on crime prevention and criminal justice. A review of the U.N. activities in the field of crime prevention and criminal justice revealed that crime was increasing at a global rate of 5 per cent, far greater than the rise in population growth. Speaking before the Commission on 21st April, 1992, Director-General of U.N. Office at Vienna, Giorgio Gia Comella; although U.N. cannot be a "world policeman", it could help mitigate conflicts and protect victims, particularly by providing technical assistance.

Priority areas of the Commission will include : national and transnational crime ; organized crime ; economic crime including money laundering. The role of criminal law in the protection of the environment; crime prevention in urban areas; and juvenile and violent criminality.[26] It may also be noted that the Ninth U.N. Congress on the Prevention of Crime and the Treatment of Offenders was held in 1995.

World Conference on Organized Crime

In its second session held at Vienna from 13 to 23 April, 1993, the Commission on Crime Prevention and Criminal Justice (now a 40-member body) accepted an offer by Italy to host a world conference on organized crime in the second half of 1994. It also welcomed the convening of an international conference on money laundering, also to be hosted in Italy.

Attended by the representatives of 142 nations, the world conference on organized Transnational Crime was held at Naples (Italy) from 21 to 23 November, 1994. The conference discussed in detail the new style criminal organizations of the 1990s or 'crime multinational' as termed by U.N. Secretary-General Boutros Boutros Ghali. It focussed attention on the rapid growth, increasing financial sophistication and predominantly international character of present day crime syndicates. Estimated to bring in as much as $750 billion annually, the major transnational crime groupings are disrupting economic development in key countries and the entire regions, and often contend with Governments for political power.

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[24] U.N. Chronicle, Vol. XXIX, No. 1 (March 1992) p. 87.

[25] U.N. Chronicle, Vol. XXIX, No. 1 (March 1992) p. 87.

[26] U.N. Chronicle Vol. XXIX, No. 3 (September 1992) p. 73.

The Naples Conference adopted the Naples Political and Global Action Plan and thus a step towards realizing the idea of a legally binding international convention on transnational crime. At the close of the conference, Italy announced plans to fund an international centre for training law enforcement personnel to combat transnational crime.

The conference endorsed : greater use of bilateral and multinational agreements on extradition and exchange of witnesses and evidence ; personnel exchanges between national enforcement agencies ; and international aid to criminal justice systems in developing countries. Further, the Naples Declaration said that states should consider : making money laundering a crime ; requiring greater transparency of banks and other financial enterprises; and establishing laws providing for the seizure of organized crime assets.[27]

Convention Against Transnational Organized Crimes.—On November 15, 2000, the U.N. General Assembly adopted the convention. It entered into force on 29 September, 2003. U.N. convention Against Transnational Crimes, 2000 has been ratified by 185 countries as of January 2015. Reference may be made to the Protocol to Prevent and Punish Trafficking of Persons Especially Women which entered into force on 25th December, 2003. As of December 2014, the Protocol has 166 parties. Besides this, Protocol against Smuggling of Migrants by Land, Sea and Air entered into force on 28th January, 2004. As of November 2014, 166 countries had become parties. Moreover, Protocol against Illicit Manufacturing and Trafficking in firearms their parts, components and ammunition entered into force on 3 July, 2005. As of March, 2014, 109 countries had become parties to the Convention.

Three Protocols to the above Convention were also adopted :

I. Protocol against Illicit Manufacturing and Trafficking in Fire-arms, their Parts, Components and Ammunition.

II. Protocol to present, suppress and punish trafficking of persons, especially women and children.

III. Protocol against Smuggling of Migrants by Land, Sea and Air, 2000.

Adoption of the Statute of International Criminal Court

The General Assembly, in its resolution 44/39 of 4 December, 1989, requested the International Law Commission to address the question of establishing an International Criminal Court. Through its resolution 45/41 of 28 November, 1990 and 45/54 of 9 December, 1991 the Assembly invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an International Criminal Court. Further, in resolutions 47/33 of 25 November, 1992 and 48/31 of 9 December, 1993, the General Assembly requested the Commission to elaborate the draft statute for such a court as a matter of priority.

The International Law Commission considered the question of establishing an International Criminal Court from its forty second session to its forty sixth session in 1994. At the latter session, the commission completed a draft statute for an International Criminal Court, which was submitted with General Assembly.

The General Assembly on its part, passed resolution 51/207 on 17th December, 1996 through which it decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a conventions on the establishment of an International Criminal Court. In its resolution 52/160 of 15th December, 1997, the General Assembly accepted the offer of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July, 1998. On 17 July, 1998, the conference adopted the statute known as the Rome Statute of the International Criminal Court. The Rome Statute for International Criminal Court entered into force on 1st July, 2002. On that date ten nations ratified the Statute thus making a total of 66 States Parties to the Treaty. Article 126 of the Rome statute required the ratification of 60 nations for the statute to come into force. As of 6 January, 2015, 123 countries had become parties to the Rome Statute. However, a number of states including China, India, Russia and the U.S. are critical of the Court and have not joined. Besides the Preamble, there are 128 Articles in the statute which are divided into following 13 parts :

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[27] U.N. Chronicle, Vol. XXXII, No. 1 (March 1995), p. 89.

(i) Establishment of the Court;
(ii) Jurisdiction, Admissibility and Applicable Law;
(iii) General Principles of Criminal Law;
(iv) Composition and Administration of the Court;
(v) Investigation and Prosecution;
(vi) The Trial;
(vii) The Penalties;
(viii) Appeal and Revision;
(ix) International Cooperation and Judicial Assistance;
(x) Enforcement;
(xi) Assembly of States Parties;
(xii) Financing; and
(xiii) Final clause.

The Rome Conference or the U.N. Diplomatic Conference of plenipotentiaries on the establishment of International Criminal Court was attended by 162 countries. Besides adopting the statute the Conference, through a resolution in its Part F (of Annex. I) established the preparatory commission for the International Criminal Court to prepare proposals for practical arrangements for the establishment and coming into operation of the Court.[28]

According to Article 126 of the statute, the statute shall enter into force on the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification acceptance, approval or accession with the Secretary General of the United Nations. For each State ratifying, accepting, approving or acceding to the statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the statute shall enter into force on the first day of the month after the 60th day following the deposit by such state of its instrument of ratification acceptance, approval or accession.

International Criminal Court

The main features of International Criminal Court to be established according to the above-mentioned Rome Statute are as follows :—

Establishment of the Court.—Article 1 of the Statute which establishes the International Criminal Court provides that it shall be a permanent institution and shall have power to exercise jurisdiction over persons for the most serious crimes of international concern, as referred to in this statute and shall be complimentary to national criminal jurisdiction. It is further provided that the court shall be brought into relationship with the U.N. through an agreement to be approved by the Assembly of State Parties to this and thereafter concluded by the President of the Court on its behalf.[29] The seat of the Court shall be established at the Hague in the Netherlands.[30] As of November 2019, 123 countries had become parties to the Statute of the Court.

Jurisdiction.—The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this statute with respect to the following crimes :

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.[31]

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[28] See Part F Annex I of U.N. Doc. A/Conf./83/10, 17 July, 1998.

[29] Article 2 of the Statute.

[30] Article 3.

[31] Article 5.

The Court has jurisdiction only with respect to crimes committed after the entry into force of the statute.[32] A state which becomes a party to the statute thereby accepts the jurisdiction of the Court with respect of the crimes referred to in Article 5.[33] However, the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.[34] The statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.[35]

International Criminal Court can generally exercise jurisdiction only in cases where the accused is a national of the State Party, the alleged crime took place on the territory of the State Party, or a situation is referred to the Court by the United Nations Security Council.

American Request for exemption from Jurisdiction of International Criminal Court for its personnel of Armed Forces allegedly guilty of War Crimes in Iraq.—America requested for exemption from the jurisdiction of the International Criminal Court in respect of members of its armed forces in Iraq allegedly guilty of war crimes. But this request has been rejected.

According to both the Clinton administration and the Bush administration, the International Criminal Court (ICC) is a seriously flawed institution and, as such, the United States of America should not join it. In their view, it was regretful that the Rome statute establishing the ICC broke with the long-standing legally precedent by asserting jurisdiction over nationals and military personnel from States that are not party to the treaty. This was the reason that forced the U.S. to take unusual steps to protect its people from the I.C.C.

Applicable Law.—According to Article 21 of the statute :

(1) The Court shall apply :

- (a) In the first place, this statute elements of crime and its Rules of Procedure and Evidence.
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of international law, including the established principles of the international law of armed conflict.
- (c) Failing that, general principles of law derived by Court from national laws of legal systems of the world including, as appropriate the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the statute and with international law and internationally recognized norms and standards.

(2) The Court may apply principles and rules of law as interpreted in its pervious decisions.

(3) The application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age,

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[32] Article 11.

[33] Article 12.

[34] Article 26.

[35] Article 27.

race, colour, language, religion, or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

General Principles of Criminal Law

(1) Nullum crimen sine lege.—A person shall not be criminally responsible under this statute unless the *conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court*. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.[36]

(2) Nulla Poena Sine lege.—A person convicted by the court may be *punished, only in accordance with this statute.*[37]

(3) Non-retroactively ratione personal.—No *personal shall be criminally responsible under this statute for conduct prior to the entry into force of the statute.* In the event of a change in the law applicable to a given case prior to final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.[38]

(4) Individual Criminal responsibility.—Article 25 of the statute which deals with individual criminal responsibility provides the following :

(1) The Court shall have jurisdiction over natural persons pursuant to this statute.

(2) A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this statute.

(3) In accordance with this statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime; whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide.

(4) No provision in this statute relating to individual responsibility shall affect the responsibility of states under international law.

Composition.—According to Article 34 of the statute, the Court shall be composed of following organs :

(a) The Presidency;
(b) An Appeal Division, a Trial Division and a Pre-Trial Division;
(c) The Office of the Prosecutor; and
(d) The Registry.

There shall be 18 Judges of the Court, to be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices nominations of candidates for election to the court may be made by any State Party to the statute every candidate for election to the Court shall (i) have established competence in Criminal Law and Procedure, and the necessary relevant experience, whether as a Judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or (ii) have established competence in relevant areas of international law such as international humanitarian law and the law of human rights extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. Further, every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the court (i.e. Arabic, Chinese, English, French, Russian and Spanish). No two judges may be nationals of the same State. The Judges shall hold office for a term of nine years. But at the first selection, one third of the Judges elected shall be selected by lot to serve for a term of three years; one third of the judges shall be elected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.[39]

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[36] Article 22.

[37] Article 23.

[38] Article 24.

Place of Trial.—Unless otherwise decided the place of the trial shall be the seat of the Court.[40]

Penalties.—Article 77 of the statute provides the following :

(1) Subject to Article 110 (which deals with review by the Court concerning reduction of sentence), the court may impose one of the following penalties on a person convicted of a crime under Article 5 of the Statute :

 (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

 (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

(2) In addition to imprisonment the court may order :

 (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

 (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.

Appeal and Revision.—A decision under Article 74 may be appealed in accordance with the Rules of Procedure and Evidence.[41] Appeal against other decisions may also be made in accordance with the Rules of Procedure and Evidence.[42] The convicted person or, after death, spouses, children, parents or one person alive at the time of accuser's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeal's Chamber to revise the final judgement of conviction or sentence on the grounds specified in the Statute.[43]

Compensation to an arrested or convicted person.—Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[44]

General obligation to cooperate.—States Parties shall in accordance with the provisions of the statute, cooperate with the court in its investigation and prosecution of crimes within the jurisdiction of the Court.[45]

Enforcement.—A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.[46]

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[39] Article 36.
[40] Article 62.
[41] Article 81.
[42] Article 82.
[43] Article 84.
[44] Article 85.
[45] Article 86.
[46] Article 103 (1) (a).

Assembly of State Parties

The Rome Statute also establishes an Assembly of States Parties. Each State Party shall have one representative in the Assembly who may be accompanied by alternative and advisers. Other states which have signed the statute in or the Final Act may be observers in the Assembly.[47]

The Assembly shall :

(a) consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) provide management oversight to the Presidency, the Persecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget of the court;

(e) Decide whether to alter, in accordance with Article 36, the number of judges;

(f) To consider pursuant to Article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this statute or the Rules of Procedure and Evidence.[48] The Assembly shall have a *Bureau* consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three year term.[49]

The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the court, in order to enhance its efficiency and economy.[50] Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the statute :

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.[51]

The Assembly shall adopt its own rules of procedure.[52]

Settlement of Disputes.—Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.[53] Any other dispute between two or more States Parties relating to the interpretation or application of the statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the statute of the Court.[54]

Reservations.—A unique feature of the Rome Statute of the International Criminal Court is that it does not provide for any reservations.[55]

Review of the Statute.—Seven years after the entry into force of this statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this statute. Such review may include, but is not limited to, the list of crimes contained in Article 5. The Conference shall be open to those participating States Parties and on the same conditions.[56] Besides this, at any time thereafter at the request of a State Party and for the purposes set forth above, the Secretary General of the United Nations, upon approval by a majority of States Parties, convene a Review Conference.

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[47] Article 112(1).
[48] Article 112 (2).
[49] Article 112 (3).
[50] Article 112 (4).
[51] Article 112 (7).
[52] Article 112 (9).
[53] Article 119 (1).
[54] Article 119 (2).
[55] Article 120.

Withdrawal.—Last but not the least a State Party may, by written notification addressed to the Secretary-General of the United Nations withdraw from this Statute. The withdrawal shall take effect one year after the date of the receipt of notification, unless the notification specifies a later date.[57]

Conclusion.—The adoption of the Rome Statute of the International Criminal Court is a great achievement. There are, however, certain glaring shortcomings. For example, the crimes of hijacking and terrorism which pose a great menace to the international community, especially to the innocent men, women and children, have not been included in the list of crimes over which the International Criminal Court shall have jurisdiction. Similarly, the enforcement mechanism devised is far from satisfactory. The statute shows that states are yet not prepared to establish a strong Court having compulsory jurisdiction over international crimes. The Statute represents the maximum agreement which could be reached in the present circumstances. A welcome features of the Statute is the provision of review of the Statute seven years after the entry into force of this Statute. Let us hope that when a Review Conference is held the present shortcomings will be removed. A good and auspicious beginning has been made with the adoption of the Statute. It is rightly said that well begun is half done, so be it.

Entry into Force of Amendments to the Regulations of the International Criminal Court.—On 18 December, 2007 amendments to the Regulations of the International Criminal Court adopted by the Judges on 14 June and 14 November, 2007, during their eighth and ninth plenary sessions, entered into force pursuant to Article 52 of the Rome Statute, the amendments of the Regulations of the Court will be circulated to States Parties for comments. If, within six months from circulation there are no objections from a majority of States Parties, amendments shall remain in force.

Latest position of the cases before the Court.—So far, the Court has opened investigation situations Northern Uganda, the Democratic Republic of the Congo, the Central African Republic and the Darfur. The Court has indicted fourteen people, seven of whom remain fugitives, two have died/or believed to have died, four are in custody and one is apparently voluntarily before the Court. International Criminal Court's first trial, of Congolese militia leader Thomas Lubanga, began on 26 January, 2009. On 24 November, 2009, the second trial started against Congolese militia leader Gumain Katanga and Mathier Ngudjolo Chui.

Mr. Lubanga and Mr. Katanga were convicted and sentenced to 14 and 12 years imprisonment.

The Bemba Trial in the Central African Republic situation is concluded. Mr. Bemba was convicted on two counts of crimes against humanity and three counts of war crimes. This marked the first time the ICC convicted someone of sexual violence as they added rape to his conviction.

Trials in *Ntagnda* case (PR. Congo), the Bemba et al. Goude trial in Cote-dilvoria situation are on going. The Benda trial in the situation of Darfur, Sudan, was scheduled to begin in 2014 but the start date was vacated. Charges against Dominic on given in Uganda situation and Ahmed-al-Faq in the Mali situation have been confirmed, both are awaiting their trials.

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[56] Article 123 (1).

[57] Article 127 (1).

U.N. War Crimes Commission to Investigate war crimes in former Yugoslavia

On 6th October, 1992, the Security Council of the U.N. through a resolution authorised Secretary General, Boutros Boutros Ghali to establish U.N. War Crimes Commission to investigate war crimes committed in former Yugoslavia. Though the scope of this Commission is very limited it is very significant landmark in the history of the United Nations. It is not a permanent Commission yet it is significant because it will definitely establish an important precedent.

The Security Council, on 6th October, 1992, asked States, relevant U.N. bodies and other organizations to provide within 30 days any substantial information concerning violations of humanitarian law. It may be noted here that two months before, on 13th August, 1992, in resolution No. 771, the Council had asked States and international organizations for such information on the former Yugoslavia.

On 6th October, 1992, the Council took the decision for the establishment of War Crimes Commission as it had been alarmed by reports of mass killings and "ethnic cleansing" in former Yugoslavia.[58] The Commission reported that it had several thousand pages of documentation, as well as video information on allegations of grave breaches of the 1949 Geneva Conventions and violations of international humanitarian law and was preparing a database on all reported crimes.

Establishment of an International Tribunal for Prosecution of Violators of International Humanitarian Law in former Yugoslavia.— Investigation of war crimes by U.N. War Crimes Commission would have been futile if the persons guilty of war crimes and violation of humanitarian law were not prosecuted and punished. Consequently as the natural next step, the Security Council, on 22nd February, 1993, decided[59] that an international tribunal "shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." It will be reckoned as a great landmark in the history of the U.N. because it is for the first time that U.N. has established an International Criminal Court with jurisdiction to prosecute crimes committed during armed conflict. The above-mentioned resolution was unanimously passed by the Security Council. The Council asked the U.N. Secretary-General Boutros Boutros Ghali to make specific proposals within 60 days for the organization and operation of such tribunal.[60]

On 3rd May, 1993, the Secretary-General reported[61] that the tribunal would operate as a subsidiary organ of the Security Council performing its functions, independently of political considerations and would "not be subject to authority and control" of the Council with regard to the performance of its judicial functions. Its life span would be "linked to the restoration and maintenance of international peace and security" in the former Yugoslavia.

The tribunal would consist of Trial Chambers, an Appeals Chamber, the Prosecutor and a Registry, servicing both Chambers and the Prosecutor. With regard to competence, the Tribunal will apply those rules of international humanitarian law which are "beyond any doubt part of customary law", such as international conventions relating to the protection of war victims, respective laws and customs of war on land and prevention of the crime of genocide. The tribunal will also deal with "crimes against humanity—first recognized in the Charter and judgment of the Nuremberg Tribunal—which include "inhuman acts of a very serious nature" committed as part of a "widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". In the case of the former Yugoslavia, such inhuman acts took the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[62]

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[58] See U.N. Chronicle, Vol. XXX, No. 1 (March, 1993) p. 7.

[59] See Resolution 808 (1993).

[60] See U.N. Chronicle, Vol. XXX, No. 2 (June, 1993) p. 5.

[61] Vide document (S/25704).

[62] See U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 13.

On 25th May, 1993, the Security Council decided to establish an International Tribunal for the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[63] The Council unanimously endorsed a 34-article draft statute of the tribunal annexed to the Secretary-General's report (S/25704). Under its statute, the Tribunal is to deal with "crimes against humanity", such as murder, extermination, enslavement, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhuman acts. Also acting upon an order of a Government or a superior would not relieve the perpetrator of criminal responsibility and should not be a defence. Obedience to superior orders could, however, be considered a mitigating factor should the Tribunal determine that justice so requires.

The Secretary-General was asked to made practical arrangements for effective functioning of the Tribunal, which would be located at the Hague.

It may also be noted here that on 28th May, 1993, too two items on the tribunal's financing and on election of its Judges were added to the agenda of the General Assembly's forty-seventh session.

On 17th November, 1993, the 11 member International Tribunal for Crimes in the former Yugoslavia was inaugurated at the Peace Palace in the Hague, Netherlands. The two-week first session of the Tribunal was held from 17th to 30th November, 1993. Judge Antonio Cassese of Italy was elected President of the Tribunal. During its two week session, the Tribunal also considered proposed rules of procedure and evidence. Earlier, Roman Escvar Salom of Venezuela was appointed Tribunal Prosecutor by the Security Council vide its resolution 877 (1993) of 21st October, 1993.

The first extraditions of suspected was criminals from former Yugoslavia were made on 12th February, 1995. A Bosnian Serb General and Colonel spent their first day in Dutch Jail on 13th February, 1995 after NATO, acting on the request of U.N. War Crimes Tribunal for former Yugoslavia, flew them out of Sarjeevo on 12th February, 1995. They had been detained two weeks ago by Muslim led government and accused them of committing war crimes on the other hand the Serbs were annoyed and pointed out that their names were not among the 52 indicted by the Tribunal. Prosecutors could not decide within weeks whether to indict or release General Djordje Djukic and Colonel Aleksa Krasmanovic.

Establishment of the International Tribunal for Rwanda.—Expressing its grave concern at the reports indicating that genocide and other systematic widespread and flagrant violations of international humanitarian law have been committed in Rwanda and determined to put an end to such crimes and take effective measures to bring to justice who are responsible for them, the Security Council on November 8, 1994, decided to establish an International Tribunal for Rwanda for the sole purpose of prosecuting persons responsible for genocide and other such violations of International humanitarian law committed in the territory of Rwanda and neighbouring states between 1st January, 1994 and 31st December, 1994 and to adopt the Statute of the International Criminal Tribunal for Rwanda. The Security Council established the Statute under Chapter VII of the U.N. Charter.

After the establishment of the International Tribunal for Prosecution of Violators of International Humanitarian Law in former Yugoslavia, it is the second tribunal of its kind and will not only contribute to the process of national reconciliation and to the restoration and maintenance of peace but will also prove to be a deterrent and an eye-opener for others.

On November 8, 1994, the Security Council decided to adopt the Statute of the International Tribunal for Rwanda. Prior to this the Security Council had received the request of the Government of Rwanda to establish the said Tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of neighboring States between January 1, 1994 and December 31, 1994. The Security Council established the Statute acting under Chapter VII of the U.N. Charter. The Tribunal delivered its first judgement in September 1998. It found Jean Paul Akayesu, the former Mayor of Taba, guilty of genocide and crime against humanity the Tribunal also found Jean Kambananada, former Prime Minister of Rwanda, guilty of genocide and crimes against humanity and sentenced him to life imprisonment.

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[63] See Resolution 827 (1993).

United Nations Convention against Transnational Organized Crime.—This convention was adopted by the United Nations in November, 2000.[64] U.N. Convention Against Transnational Crimes, 2000 has 185 countries as of January 2015. The purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively.[65] Defining the term "organized criminal group", Article 2(a) of the Convention states that it shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. As regards scope of application, Article 3 of the Convention provides the following :

> "1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of :
>
> (a) The offences established in accordance with Articles 5, 6, 8 and 23 of this Convention; and
>
> (b) Serious crimes as defined in Article 2 of this Convention where offence is transnational in nature and involves an organized criminal group.
>
> 2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if—
>
> (a) it is committed in more than one State ;
>
> (b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another state ;
>
> (c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State;
>
> (d) it is committed in one State but has substantial effects in another State."

Articles 5, 6, 8 and 23 referred to above deal with criminalization of participation in an organized crime, criminalization of laundering of proceeds of crime, criminalization of corruption and criminalization of obstruction of justice respectively.

It is also provided in the Convention that States Parties shall cooperate closely with one another, consistent with respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention.[66]

The Convention provides for the establishment of a conference of the Parties to the Convention to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of the Convention.[67] As regards the Secretariat, it is provided that the Secretary-General of the United Nations shall provide the necessary Secretariat services to the conference of the Parties to the Convention.[68]

The Convention shall be open to all States for signature from 12 to 15 December, 2000 in Palermo, Italy, and thereafter at United Nations Head quarters in New York until 12 December, 2002.[69] The Convention shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession.[70]

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[64] *See* U.N.G.A. Doc. A/55/383.

[65] Article 1 of the Convention.

[66] Article 27.

[67] Article 32.

[68] Article 33.

[69] Article 36.

On November 15, 2000, the Convention was adopted by the U.N. General Assembly. The Convention entered into force on 29th September, 2003. To supplement the convention two protocols—(1) Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children; (2) Protocol Against Smuggling of Migrants by Land, Sea and Air also tackle specific areas of transnational organized crimes that are of particular concern to U.N. member states. So far 176 countries have became parties to the Convention. India had signed and ratified this Convention in 5 May, 2011.

Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children.—The above-mentioned convention against Transnational Organized Crime (2000) in its Article 37 provided that this Convention may be supplemented by one or more protocols. In order to become a party to a protocol, a State or a regional economic integration organization must be a party to this Convention. A State Party is not bound by a protocol unless it becomes a party to the protocol in accordance with the provisions thereof. Further, any protocol to the Convention shall be interpreted together with this Convention, taking into account the purpose of the protocol.

The purposes of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children are—

(a) to prevent and combat trafficking in persons, paying particular attention to women and children ;

(b) to protect and assist the victims of such trafficking with full respect for their human rights ; and

(c) to promote cooperation among State Parties in order to meet those objectives.[71]

As regards the scope of application, the Protocol shall apply, except as otherwise stated herein, to the prevention and prosecution of offences established in accordance with Article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group as well as to the protection of victims of such offences.[72]

The Protocol remained open all States for signatures from 12 to 15 December, 2000 in Palermo, Italy, and thereafter at United Nations Head quarters in New York until 12 December, 2002. The Protocol is subject to ratification, acceptance or approval which shall be deposited with the Secretary-General of the United Nations.[73] The Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession but it shall not enter into force before the entry into force of the Convention.[74]

The Protocol become effective on 25 December, 2003. So far 173 countries have become parties to this Protocol.

Protocol Against the Smuggling of Migrants by Land, Sea and Air.—Relation of this Protocol with the U.N. Convention against Transnational organised Crime, its entry into force, binding effect on State Parties and interpretation are similar to that of the above Protocol *i.e.* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

The purpose of the Protocol Against Smuggling of Migrants by Land, Sea and Air is to prevent and combat the smuggling of migrants, as well as to promote co-operation among States Parties to that end, while protecting the rights of smuggled migrants.[75]

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[70] Article 38.
[71] Article 2.
[72] Article 4.
[73] Article 16.
[74] Article 17.
[75] Article 2 of the Protocol.

As regards scope of application of the Protocol, it is provided that the Protocol shall apply, except otherwise stated in the Protocol, to the prevention, investigation and prosecution of the offences established in accordance with Article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well to the protection of the rights of the persons who have been the object of offences.[76]

As with the above earlier Protocol, this Protocol also was opened to all States for signature from 12 to 15 December, 2000 in Palermo, Italy, and thereafter at the United Nations Head quarters in New York until 12 December, 2002.[77] This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession except that it shall not enter into force before the entry into force of the U.N. Convention Against Transnational Organized Crime.[78]

It entered into force on 28th January, 2004. It had 166 countries as of December 2014.

Reference may also be made here, as noted above, Protocol against Illicit Manufacturing and Trafficking in Fire-arms, their parts, components and ammunition. This protocol entered into force on 3rd July, 2005. As of May, 2019, it has been ratified by 117 countries (including 116 States and the European Union)

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[76] Article 4.
[77] Article 21.
[78] Article 22.

CHAPTER 26

INTERNATIONAL ECONOMIC CO-OPERATION AND THE EVOLUTION OF A NEW INTERNATIONAL ECONOMIC ORDER

Introduction.—"Since war begins in the minds of men, it is in the minds of men that the defence of peace must be constructed." [1] Order and peace require a certain degree of economic and social stability. "Economic and social inequalities are in part responsible for the failure to preserve peace and that economic and social factors are interwoven in the whole fabric of international relationships................."[2] Thus, to ensure world peace it is necessary to solve the economic and social problems of the world. It is well known that poverty breeds insecurity. It also breeds envy and provokes tensions. A combination of these elemental urges can jeopardise the efforts to maintain international peace and security.[3] Many of the tensions in the world are the outcome of fundamental economic maladjustments and conditions of economic disequalibrium. The ever-widening gap between the few developed countries and the numerous developing countries constitutes a major source of tension and insecurity. The present distribution of economic power in the world is imbalanced and unjust. More than two-thirds of the world's trade takes place among the developed countries themselves. Moreover, three-fourths of the world's income is generated in the developed countries.[4] The developing countries, therefore, want to change the traditional structure of international economic order. In July, 1964 the Secretary-General of the United Nations declared "a change of political dimension in the awareness of the need for a more organised international co-operation in the economic and financial field." [5] This awareness finds itself manifested in putting forward the concepts of 'economic decolonization', 'New International Economic Order' 'Collective economic security', 'Economic Rights and Duties, 'Collective developing world', 'self-reliance', etc. "The world has no choice but to move towards greater and greater global co-operation in economic, financial and technological spheres, simultaneously with the co-operation in the political field." [6]

U. N. Charter Provisions*.—The framers of the U. N. Charter were quite aware of the significance of the economic and social questions and recognised the importance of economic and social stability. The preamble of the Charter expresses the resolve 'to promote social progress and better standards of life in larger freedom' and 'to employ international machinery for the promotion of the economic and social advancement of all peoples.' After having made this resolve, the Charter enlists the achievement of 'International co-operation in solving international problems of an economic, social, cultural or humanitarian character'[7] as one of the purposes of the U. N. It is also provided that the General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the economic field.[8] The framers of the U. N. Charter attached so much importance to the International Economic and Social Co-operation that a Chapter (Chapter IX comprising of Articles 55 to 60) is exclusively devoted for this purpose. The most important Articles for the purpose of present

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1. Preamble of the United Nations Educational Scientific and Cultural Organisation (UNESCO).
2. Stepren S. Godspeed, "The Nature and Function of International Organisation" (Second Edition, New York, Oxford University Press, 1967), p. 395.
3. K. B. Lall, "Economic Inequality and International Law", I.J.I.L., Vol. 14 (1974), p. 6 at p. 11.
4. P. Chandrasekhar Rao, "Charter of Economic Rights and Duties of States", I.J.I.L., Vol. 15 (1975), p. 351 at 352.
5. United Nations Press Release S.G./I.S.M./110, July 16, 1964, p. 2.
6. S. L. N. Sinha, "Three Decades of International Monetary Co-operation", India Quarterly, Vol. XXXII (1976), p. 121 at p. 139.

* See also for I.A.S. (1979) Q. No. 9(a).

7. Article 13.
8. Article 13 (1) (b).

discussion are Article 55 and 56. Article 55 provides : "With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote : (a) higher standard of living, full employment, and conditions of economic and social progress and development ; (b) solution of international economic, social, health and related problems..........." Under Article 56, all the members have pledged to take joint and separate action in co-operation with the organisation for the achievement of the purpose set forth in Article 55. It may be noted that recommendations under Articles 55 and 56, are not binding as such but the word "pledge" in Article 56 implies that the members are under obligation to co-operate for attainment of the purposes set forth in Article 55.[9] Article 56 thus constitutes a legal obligation upon members in respect of International Economic Co-operation. The objectives mentioned above for the attainment of the International Economic Co-operation are sought to be achieved through a structure provided by the Charter. This comprises mainly of the General Assembly, the Economic and Social Council, various subordinate Commissions and Committees, the Secretariat and the specialised Agencies. The Charter provides that responsibility for the discharge of functions of the Organisation relating to Inernational Economic and Social Co-operations (mentioned in Chapter IX) shall be vested in the General Assembly and under the authority of the General Assembly in the Economic and Social Council.[10]

Evolution of a New International Economic Order*

Background to the proposed New International Economic Order[11].— The ever-widening gap between the rich and poor nations, prevalent injustice and inequality among the nations in the field of economic matters and the persistent denial of rightful place to the Third World in the world economic order are some of the main reasons impelling the developing countries to make all out efforts to transform the existing world economic order which was devised and developed at a time when many of the developing countries did not even exist as independent States. The concept of new International Economic Order was envisaged by the developing countries when they realised that they had acquired a new bargaining strength which could enable them to force decisions so as to make some changes in their favour in the existing world economic order.

"The present world economic order is supposed to be guided by the operation of free market forces propelled by free competition and enterprise, and based on free movement of goods and services, including technology. In the field of trade, it has been governed by the so-called General Agreement on Tariffs and Trade (GATT) principle of non-discrimination and free trade of fixed parties and dollar standard till recently. In practice, however, these principles have not been applied, in an untrammelled or consistent manner, but have been guided and manipulated in many respects. To take only a few examples, the industrialised countries have consistently tried to insulate their agriculture from competition, by seeking an exception of agriculture from the basic GATT rules in order to erect protectionist walls to shelter their agriculture. Under the name of free enterprise, transnational corporations, based in industrialized countries, control the production and trade of vital raw materials of the developing countries and other products through their cartel activities, tied purchasing, licensing devices, intra-corporate transfer pricing, arbitrary restrictions on exports by their subsidiaries in developing countries, etc. These selective departures have been made from the GATT principle of non-discrimination in order to promote intra-growth of groups of developed countries as in the case of European Economic Community (EEC), European Free Trade Association (EFTA) etc., and for forging neocolonialist links with groups of developing countries, as in the case of various exclusive trade arrangements between industrialized and developing counties. And the principles governing the international monetary system were unilaterally abrogated, once it was realized that fixed parties and dollar standard had served their historic purpose of triggering unprecedented growth and prosperity in the western world."[12]

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[9] M. Goodrich and Edward Hombro, Charter of the U. N. (New York, N. Y. 1969), p. 381.

[10] Article 60 of the U. N. Charter.

* IAS (2008) Q. 5 (c).

[11] For background see also Chapter on "GATT" and "UNCTAD", in Part III of the book; See also "The IMF" and "The World Bank" discussed in chapter on "The Specialized Agencies."

Recently America has made initiatives to widen the scope of the GATT, The U. S. has been pushing for liberalised trade environment under GATT for services like banking and travel. But this idea has been opposed by India, Brazil and some other developing countries. The GATT was designed to deal with only trade in merchandise. On September 20,1986, at Punta Del Este (Uruguay), a global accord was made by the 92-nation GATT ministerial conference. India later on had conceded that she was not against discussing services so long as they were not placed under GATT. Thus India succeeded in keeping the negotiations on services outside the framework of GATT.

The hike in oil prices further caused unprecedented strain upon the economic of the non-oil exporting countries. In the beginning even the developed countries were adversely affected by it but "thanks to their economic and technological capabilities, most of these surpluses were recycled to the developed countries. It took the developed market only one year to restore the over all equilibrium of their balance of payments.[13] On the other hand, the developing countries who were already immersed in a crisis of survival "were confronted with unprecedented balance of payment deficits, due to the increase in the prices of oil, food, fertilizers and other manufactured imports from developed counries. Their balance of payment deficits reached a figure of $ 28 billion in 1974 and rose to $ 35 billion in 1975."[14] Even after a decade there has been no improvement in the situation. According to the Geneva based GATT annual report on international trade, world trade based on the GATT system was being threatened with losing confidence in the system itself. It may be noted that while the value and volume of world trade increased modestly by 1 per cent respectively over 1984, developing countries primary commodities other than crude oil earned 9.5 per cent less in dollar prices for their exports in 1985. The Group of 77 developing countries have therefore rightly criticized very sharply the industrialized countries advice to the developing countries to introduce internal economic reforms.

The emergence of large number of States since 1960 changed the structure of International community and this was bound to have its impact on the economic sphere also. "The accelerated emergence of new nations since 1960 and their enormous increase in political power has led to what has sometimes been called a 'revolution of rising expectations.' The developing nations now clamour for greater participation in world trade rather than the traditional handouts of financial aid and technical assistance.........."[15] It is in the context of these developments that the objective of the establishment of a New International Economic Order has acquired a special significance. The most significant achivements so far in this direction are the adoption of the Declaration on the Establishment of a New International Economic Order, Programme of Action and the Charter of Economic Rights and Duties of States.

(A) U. N. Declaration On The Establishment of A New International Economic Order

In order to solve problems posed by economic inequality prevalent in the world, the developing countries have given the call to establish a New International Economic Order. The demand for the establishment of a *New International Economic Order* was officially voiced for the first time at the UNCTAD-III Conference in Santiago (Chile) in 1972, by the developing countries. The developing countries demanded, *inter alia*, easier access to the markets of industrialized countries, for producer cartels of the developing countries, to enforce higher export prices, for limitation of the use of synthetics, for an integrated raw materials programme and for linking the developing countries export prices to their import prices. It was at the instance of the developing countries that the *Sixth Special Session* of the U. N. General Assembly was convened. The Sixth Special Session was devoted entirely to the consideration of matters relating to International Economic Co-operation. The most significant achievement of the Sixth Special Session was the *U. N. Declaration on the Establishment of the New International Economic Order.* This declaration was adoped without vote at the Plenary Meeting No. 2229 of the Sixth Special Session of the U. N. General Assembly on May 1, 1974.[16] Through this Declaration the Members of the U. N. have proclaimed their "United determination to work urgently for *The Establishment of a New International Economic Order* based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social system which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development in peace and justice for present and future generations."

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[12] M. Dubey, "Problems of Establishing a New International Economic Order", India Quarterly, Vol. XXXII, No. 3 (July—September, 1976), p. 269 at pp. 269-70.

[13] Ibid, at p. 271.

[14] Ibid.

[15] Robin C. A. White, "A New International Economic Order" I.C.L.O. Vol. 24 July 1975, p. 524 at p. 531.

The U. N. Declaration on the Establishment of a New International Economic Order[17] noted that the developing countries, which constitute 70 per cent of the world population, account for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developing and developed countries continues in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality. Further, the present international economic order is in direct conflict with current developments in international political and economic relations. Since 1976, the world economy has experienced a series of grave crises which have had severe repercussions, especially on the developing countries because of their generally greater vulnerability to external economic impulses. The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community. All these changes have thrust into prominence the reality of interdependence of all the members of the world community. Current events have brought into sharp focus the realization that the interests of the developed countries and the interest of the developing countries can no longer be isolated from each other, that there is closer inter-relationship between the prosperity of the developed countries, and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. International Co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generation depends more than ever on co-operation between all members of International Community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.

The declaration also mentioned the principles on which the new International Economic Order should be founded. The principles mentioned are : (a) Sovereign equality of States, self-determination of all peoples inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States; (b) Broadest co-operation of all the member-States of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all; (c) Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries, while devoting particular attention to the adoption of special measures in favour of the least-developed, land-locked and island-developing countries as well as those developing countries most seriously affected by economic crisis and natural calamities, without losing rights of other developing countries; (d) Every country has the right to adopt the economic and social system that it deems to be the most appropriate for its own development and not to be subjected to discrimination of any kind as a result; (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation which means suitable for its own situation, including the right to nationalization or transfer of ownership to its nations this right being an expression of full permanent sovereignty of the State. No State may be subjected to economic, political, or any other type of correction to prevent the free and full exercise of this inalienable right; (f) All States, territories and peoples under foreign occupation alien and colonial domination or *apartheid* have the right to restitution and full compensation for the exploitation and depletion of, and damages to the natural and other resources of those States, territories and peoples; (g) Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporation operate on the basis of the full sovereignty of those countries; (h) Right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities; (i) Extending of assistance to developing countries, peoples and territories under colonial and alien domination, foreign occupation, racial discrimination or *apartheid* or which are subject to economic, political or any other type of measures to coerce them in order to obtain from the subordination of the exercise of their sovereign rights and to secure from them advantages of any kind, and to neo-colonialism in all its forms and which have established or are endeavouring to establish effective control over their natural resources and economic activities that have been or are still under foreign control; (j) Just and equitable relationship between the prices of raw materials, primary products, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and expansion of the world economy; (k) Extension of active assistance to developing countries by the whole international community, free of any political or military conditions; (1) Ensuring that one of the main aims of the reformed international, monetary system shall be the promotion of the development of the developing countries and the adequate flow of real resources to them; (m) Improving the competitiveness of natural materials facing competition from synthetic substitutes; (n) Preferential and non-reciprocal treatment of developing countries whenever feasible, in all fields of international economic co-operation wherever feasible ; (o) Securing favourable conditions for the transfer of financial resources to developing countries; (p) To give to the developing countries access to the achievements of modern science and technology, to promote the transfer of technology and the creation of indigenous technology for the benefit of the developing counries in forms and in accordance with procedures which are suited to their economics; (q) Necessity for all States to put an end to the waste of natural resources including food products; (r) The need for developing countries to concentrate all their resources for the cause of development; (s) Strengthening—through individual and collective action—of mutual economic, trade, financial and technical co-operation among the developing countries mainly on a preferential basis; and (t) Facilitating the role which producers' associations may play within the framework of international co-operation, and in pursuance of their aims, *inter alia,* assisting in promotion of sustained growth of world economy and accelerating development of developing countries.

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[16] For the text of the Resolution see Foreign Affairs Reports, Vol. XXIII, No. 6 (June 1974), pp. 119-22; U. N. Press Release GA/5022, May 2, 1974.

[17] Hereinafter referred as "the Declaration."

The Declaration further provided that U. N. as a universal Organisation should be capable of dealing with problems of international economic co-operation in a comprehensive manner and ensuring equally the interest of all countries. It must have an even greater role in the establishment of a new international economic order. Finally, the members of the U. N. expressed the hope that the Declaration shall be one of the most important basis of economic relations between all peoples and nations.

(B) Programme of Action on the establishment of A New International Economic Order

The Sixth Special Session of the General Assembly also adopted a resolution entitled, "Programme of Action on the Establishment of New International Economic Order.[18] The strategies to establish the new economic order were mentioned in detail in the Action Programme. A special programme was provided to mitigate the difficulties of the developing countries most seriously affected by the sharp hike in the prices of oil and other essential commodities. As regards raw materials, the action programme suggested 'recovery, exploitation, development, marketing and distribution of natural resources' which belonged to them and for facilitating the functioning of producers, associations, it advocated 'joint marketing arrangements, 'orderly commodity trading', etc., with a view to ensure increase of the share of developing countries in world trade, it suggested measures, such as, equitous pricing policies, expeditious commodity agreements, greater use of natural resources in preference to synthetic materials and compensatory financing scheme. The Action Programme made recommendation for the improvement of food and nutrition situation in the poor countries, promotion of equitable participation of developing countries in world shipping, etc. Finally, it envisaged the strengthening of the role of the U. N. system in the field of international economic co-operation.[19]

(C) The Charter of Economic Rights and Duties

Background.—The credit for initiating the discussion and elaborating the economic rights and duties of States goes to the UNCTAD. At the third session of the UNCTAD held at Santiago (Chile) in April, 1972, President of Mexico put forward the following proposal : "We must strengthen the precarious legal foundations of the international economy. A just order and a stable world will not be possible until we create obligations and rights which protect the weaker States. Let us take economic co-operation out of the realm of goodwill and put it into the realm of the law.[20] On 18th May, 1972, a resolution[21] was adopted by the UNCTAD whereby it decided to prepare the text of a draft Charter of Economic Rights and Duties and for this purpose of a working group comprising of governmental representatives of 31 member States was formed. The membership of this group was subsequently enlarged to 41 by the General Assembly through a resolution[22] dated 19th December, 1972. The developed and the developing countries were given equal representation in the working group. The group was expected to complete the work in 1973 in two sessions. Due to the complex nature of the work, it could not be completed in 1973 and the Group held four Sessions in between February, 1973 and June, 1974. Mr. Jorge Castaneda acted as the Chairman of the Working Group. Even the Fourth Session failed to adopt to generally agreed text. The developed countries wanted the Working Group to continue its efforts so as to narrow down the areas of disagreement and to produce a generally acceptable text. But this proposal was rejected by the Second Committee of the General Assembly.[23] The developed countries realized that if the discussion were prolonged further, they might widen the areas of disagreement instead of narrowing them. They, therefore, decided to present the text before the Special Session of the General Assembly. Thus the Charter of Economic Rights and Duties was finally adopted by the General Assembly on 12th December, 1974. More than two-thirds of the Charter received general support and only six countries voted against the Charter as a whole. The Charter of Economic Rights and Duties[24] was adopted by a roll-call vote of 120 in favour to 6 against with 10 abstentions. Belgium, Denmark, The Federal Republic of Germany, Luxemburg, the U. K. and the U. S. voted against the Charter. Austria, Canada, France,

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[18] G. A. Resolution 3202 (S-VI), 16th May, 1974.

[19] See Rahmatullah Khan, "The Struggle for World Resources", Foreign Affairs Reports, Vol. XXIV, No. 7 (July, 1975), p. 101 at pp. 112-113; see also Ibid, "International Law—Old and New", I.J.I.L., Vol. 15 (1975), p. 371 at pp. 378-79.

[20] A/PV 2315, p. 67.

[21] Resolution 35 (III).

[22] Resolution 3037 (XXVII) of 19th December, 1972.

[23] A/C/L. 1419.

[24] Hereinafter referred as "the Economic Charter."

Ireland, Israel, Italy, Japan the Netherlands, Norway and Spain abstained from voting. Australia, Finland, Greece, Iceland, Portugal, New Zealand, Sweden, China and the Socialist countries were among the developed countries who voted in favour of the Economic Charter as a whole.

Since the developed countries' suggestion to prolong the discussion so as to narrow down the areas of disagreement was not accepted by the developing countries and they hastened to adcpt the Charter despite opposition of the developed countries in respect of some of the important provisions of the Charter, some developed countries, particularly the U. S. apparently felt "oppressed" by the "tyranny of the majority". But this was countered by the Mexican representative in the following words : 'There was not tyranny of the majority for all were patiently heard. Furthermore, it should be expressly said that majority tyranny if indeed it exists, is a bad thing, but minority is even worse, and is what existed during the early years of the organisation when others were the tyrants governing of the destiny of the United Nations.[25]

However, the developed countries who voted against the Charter argued that although they were small in number, they occupied a significant place in the field of International Economic Relations and as such their views could not be ignored. In other words, they meant that so far as International Economic relations were concerned, they were *essential states* and unless their support was extended, the Charter could not achieve its objective.[26] To some extent atleast it cannot be denied that the Economic Charter can have universal application only after it is supported by a few most developed countries including the U. S. However, it may be observed that public opinion being the ultimate and greatest sanction behind International Law, and for that matter behind any law, in the course of time the said developed countries may also be compelled to accept the majority view and support the Charter. Thus the Economic Charter represents a significant stage in the development of International Economic Law despite the fact that some *'essential states'* or the States which really matter in the field of International Economic relations, have not supported it. It is bound to have the desired impact on the International Economic Co-operation.

Structure of Economic Charter.—The preamble of the Resolution which adopted the Economic Charter stressed the fact that "the Charter shall constitute an effective instrument towards the establishment of a new system of International Economic Relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries." [27] The Economic Charter comprises of 34 Articles and a preamble.[28] The preamble declared that the fundamenal purpose of this Charter is to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems. The preamble also emphasised the need to establish and maintain a just and equitable economic and social order through :— (a) the achievement of more rational and equitable international economic relations and the encouragement of structural changes in the world economy; (b) the creation of conditions which permit the further expansion of trade and intensification of economic co-operation among all nations; (c) the strengthening of economic independence of developing countries; and (d) the establishment and promotion of international economic relations taking into account the agreed difference in development of the developing countries and their specific needs.[29]

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[25] A/PV. 2315.

[26] As pointed out by Prof. Leo Gross : "A treaty, though formulating principles intended for universal application, will not achieve this objective unless it is supported by the Essential States. Essential States, in this context, refers to States without whose consent and acceptance the Treaty is not likely to achieve its intended purpose. Thus a convention along the lines of the principle adopted by the 1964 UNCTAD conference, even if accepted by the very large number of States, will not be productive unless it is also accepted by the very small number of economically developed countries. Law and politics can never be completely divorced." Sources of "Universal International Law", in Asian States and the Development of Universal International Law, edited by R. P. Anand, (1972), p. 189 at p. 196.

[27] See Resolution 3081 (XXIX), dated 12th December, 1974.

[28] For text of the Economic Charter; see U. N. Monthly Chronicle, Vol. XII, No. 1 (January 1975), pp. 108-18.

The Charter is divided into four Chapters, namely, Fundamentals of International Economic Relations, Economic Rights and Duties, Common Responsibility Towards the International Community and Final Provisions.

Fundamental Principles.—Chapter I provides that the economic as well as political and other relations among States shall be governed *inter alia* by the following principles :

(a) Sovereign, territorial integrity and political independence of States; (b) Sovereign equality of all States; (c) Non-aggression; (d) Non-intervention; (e) Mutual and equal benefit; (f) Peaceful Co-existence; (g) Equal rights and self-determination of people; (h) Peaceful settlement of disputes; (i) Remedying of injustices which have brought about by force and which deprive a nation of natural means necessary for its normal development; (j) Fulfilment in good faith of international obligation; (k) Respect for human-rights and fundamental freedoms; (l) No attempt to seek hegemony and spheres of influence; (m) Promotion of International Social Justice; (n) International co-operation for development; (o) Free access to and from sea by land-locked countries within the framework of the above principles.

"By and Large, the general principles are derived directly or indirectly from the Charter of the United Nations (*e.g.*, Articles 1 and 2)";[30] However, there was great controversy regarding principles (f) *i.e.*, peaceful co-existence and (i) *i.e.*, remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development and some developed countries voted against it. Yet another principle which aroused controversy was the principle (o) *i.e.*, relating to free access to and from the sea by the land-locked countries. Some countries including India had reservations to this principle. India and some seven other nations abstained from voting on this point. These countries were of the view that land-locked countries can be utilized by certain big powers for subversion of free nations. They recommended that access to and from sea should be a matter for bilateral negotiations and settlement. As pointed out by an author,[31] the land-locked countries numbering about 30 "have a legitimate concern to secure access to and from the sea, such access cannot obviously be an absolute one. Since such access involves transit over the territory of another sovereign State, the equally legitimate rights and interests of that State shall have to be fully respected. Consequently, the question of access must necessarily be regulated by mutual discussion and agreement between the land-locked and the transit States directly concerned and cannot be brought within the straight-jacket of a simple formulation as has been attempted in sub-paragraph (o). Besides, the question of access was also before the United Nations Conference of the Law of the Sea. It was in view of these considerations that certain developing countries including India abstained from the voting on sub-paragraph (o). Nepal and some other land-locked countries sought to interpret this paragraph as giving the whole hog and implying *the right of free access to and from the sea of the land-locked countries*,[32] an assertion which seems to go beyond even actual provisions of the Economic Charter. Besides, the so-called free access is subject to the other principles established in Chapter I such as, for instance, the principle of respect for the sovereignty of States and fulfilment in good faith of international obligations including those assumed in bilateral agreement between the land-locked and transit countries concerned. India's observations[33] in the General Assembly that, 'In our understanding the present Charter does not elevate access to and from the sea of land-locked countries to the level of a right under International Law, nor could it effect any way the present legal position on the subject' reflect on the correct legal position in the matter deserve a mention here." Some developed countries including the U. S., U. K. and France put forward a proposal that the principles enshrined in Chapter I should be treated as "directory instead of mandatory" but the same was rejected.

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[29] For text of the Economic Charter; see U. N. Monthly Chronicle, Vol. XII, No. 1 (January 1975), at p. 109.

[30] P. Chandrasekhara Rao, "Charter of Economic Rights and Duties of States", I.J.I.L., Vol. 15 (1975), p. 351 at p. 356.

[31] Ibid, at pp. 357-58.

[32] A/PV 3216, 27-30; Emphasis supplied.

[33] A/PV 2316, 3-5.

Economic Rights and Duties of States

Due to the paucity of the space it will not be possible to discuss critically all the Economic Rights and Duties of the States. However, an endeavour will be made to discuss briefly the more important Rights and Duties of the States incorporated in the Economic Charter. Chapter II which describes the Economic Rights and Duties of States forms "the essence of the Economic Charter." It may be noted here that there was general agreement in respect of a number of Rights and Duties mentioned in Chapter II and they were, therefore, unanimously adopted. Such rights and duties are contained in Articles 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 21, 22, 25 and 27. There was, however disagreement in respect of more important rights and duties contained in other Articles. Some of the more important rights and duties are being discussed below :

(1) Permanent Sovereignty over Wealth and Natural Resources.—Article 2, para 1 of the Economic Charter provides that every State shall "freely exercise full permanent sovereignty including possession, use and disposal, over all its wealth, natural resources and economic activities." There was no dispute in respect of the principle of full permanent sovereignty of natural resources but the developed countries objected to the words "wealth" and "economic activities." They contended that if a State transferred a portion of its wealth in some foreign country, the above principle could be interpreted to mean that the State would still retain full permanent sovereignty over such wealth. On this ground nine developed countries including U. S., U. K., Canada, France, Japan, the Federal Republic of Germany voted against this principle.[34]

(2) Foreign Investment.—The Economic Charter provided that each State has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment.[35] Obviously this principle was against the interest of the developed countries. Ten developed countries therefore, voted against this principle.[36] While the developing countries wanted full control over foreign investment, the developed countries in view of their interests emphasised the "International obligations" of States in respect of foreign investment.[37]

(3) Transnational Corporations.—Multinational Corporations have emerged as dominant factors on the International Economic scene during the last quarter of a century. "The main object of any Multinational Corporation anywhere is to maximise its profits and any impediment that comes in its way of maximising profit, is resented and for this purpose sometimes interference is resorted to. Political interference has been widely reported in other countries........."[38] In the view of an Indian economist, Mr. V. K. Narasimhan, "The very fact that a Multinational Corporation has enormous resources creates suspicion. Some of the revelations about the big Multinational Companies have shown how they tried to influence foreign government. These have created a certain climate of antagonism to the MNCs." [39]

According to Prof. Vernon, "Multinational enterprise is a parent company that controls a large cluster, appears to have access to common pool of human and financial resources and seen responsive to elements of common strategy.[40] This concept of MNC's was accepted by the group of Eminent Persons appointed by the Secretary-General in pursuance of a resolution of the Economic and Social Council to consider the role of MNC" and their impact on development and international relations.[41] Mr. L.K. Jha of India acted as the Chairman of the Group. On the basis of the recommendations of the Group, the U. N. has recently set up two bodies in this connection and has renamed 'multinationals' as 'transnationals.'

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[34] A/C 2/SR, 1648 : pp. 38-39; see also A/PV, 2315, 56.

[35] Article 2 (a).

[36] A/C 2/SR 1648, pp. 39-40.

[37] See A/PV, 2315, 56 and A/C 2/SR 1649, p. 21.

[38] V. Gauri Shanker, "The Performance of Transnational Corporations in India" India Quarterly, Vol. XXXIII, No. 2 (April—June, 1977), p. 180 at p. 187.

[39] "Whither Multinations ?" Span Vol. XVIII, No. 6 (June 1977), p. 29.

[40] Raymond Vernon, Sovereignty at Bay, (New York, 1971), p. 4.

Despite the widespread apprehensions and suspicions about the role of the Transnationals and their real objectives allegedly neo colonialism, they "are economic phenomenon of the twentieth century which no one-can wish away except at the cost of remaining on a Robinson Crusoe's Island in an ocean of prosperity." [42]

"Obviously, one would not want multinations to control one's scarce mineral resources. At the same time, their technology in such things as offshore drilling, as well as in some of the derivative of oil is something which one would not wish to deny oneself. One solution which in fact is already in operation would be to set up a contractual relationship with them paying for their services on an agreed basis and allowing them the requisite measure of technical control, but not proprietary control.[43]

It is in this context that the developing States want to exercise full control over transnational corporations. That is why, they were keen to include it as a right in the Economic Charter. Economic Charter, therefore, recognises under Article 2 (b) that each State has the right : "to regulate and supervise the activites of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational Corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard to its sovereign rights, cooperate with other States in the exercise of the right set forth in this sub-paragraph." Since most of the Transnational Corporations originate in the developed countries, this above right of the States conflicts directly with their interests. They, therefore, wanted adequate protection of the interests of Transnational Corporations. They were of the view that the transnational corporations should atleast have the same obligations and rights which any other foreign person enjoys in the host State. Since this was not conceded by the developing countries, U. S., U. K., Federal Republic of Germany and Japan voted against Article 2 (b).[44] But "An essential ingredient in the view International Economic Order, therefore is a set of policies to curb the monopolistic practices of the transnational corporations, especially in trade. Policies for the elimination of cartels and of exclusive dealing arrangements would have to be adopted and greater flexibility introduced in territorial markets and produce allocation arrangements." [45]

(4) Nationalisation and Expropriation of Foreign Property.—On this subject, there are a number of resolutions passed by the General Assembly wherein the developing countries have asserted their rights. The Economic Charter simply reaffirms their position on this subject. The Economic Charter recognises the right of every State "to nationalise, expropriate or transfer ownership of foreign property in which case

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41. See also, "Summary of the Hearings before the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations" ST/ESA/15, 1974—a Secretariat study which served as a background paper for the Group; see also A. Jaya Govinda, "Report of the Group of Eminent Persons on Multinational Corporations : An Analysis", I.J.I.L., Vol. 4 (Oct.—Dec., 1975), p. 521.
42. V. Gauri Shanker, "The Performance of Transnational Corporations in India", India Quarterly, Vol. XXXIII (1977), p. 181 at p. 192.
43. L. K. Jha, "Multinations As a Source of Technology—For Developing Countries "India Quarterly, Vol. XXXIII (1970), p. 49 at pp. 54-55; See also Mrs. S. K. Verma, "Taxation of Multinational Corporations" I.J.I.L., Vol. 16 (1976), p. 93; V. Gauri Shanker, "Taxation of Foreign Companies—An Indian Perspective with Reference to Code of conduct for Transnational Corporations", I.J.I.L., Vol. 17 (1977), p. 21 ; R. S. Bhatt, "Problems of Transnational Corporation", I. Q., Vol. XXXIV (1978), p. 1 at pp. 15-16. Mrs. S. K. Verma, "Taxation of Multinational Corporations", I.J.I.L. Vol. 16 (1976) p. 93.
44. See A/C 2/SR 1648, pp. 40-41.
45. Janina Gomes, "UNCTAD-IV—And the New International Economic Order", Foreign Affairs Reports, Vol. XXV, No. 8 (August, 1976), p. 110 at p. 127.

appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulation and all circumstances, that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned, that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means." [46]

This right generated a lot of controversy. It is significant to note that the developed countries did not dispute the right of States to nationalize or expropriate foreign property. Their main contention was that prompt, adequate and effective compensation or just compensation should be paid and in this respect they emphasised that State should fulfil in good faith their international obligations.[47] On the other hand, the developing countries accepted the principle of "appropriate compensation" but reserved to themselves the right to determine it, "taking into account its relevant laws and regulations and all relevant circumstances that the State considers pertinent" and in case of any controversy "to settle under the domestic law of the nationalizing State and by its tribunals." In view of this disagreement between the developing and the developed countries as many as 16 developed countries voted against Article 2 (c)." [48]

(5) Organisation of Primary Commodity Procedures.—Article 5 of the Economic Charter recognises the right of all States to associate in organisations of primary commodity producers in order to develop their national economic resources to achieve stable financing for their development, and in pursuance of their aims assisting in the promotion of sustained growth of the world economy in particular accelerating the development of developing countries. Corresponding all States have the duty to respect that right by refraining from applying economic and political measures that would limit it. The developed countries voted against this Article.[49] The developed countries were of the view that the commodity problems are the concern of the exporters and importers and should therefore, be planned and executed by them.[50] Since the developing countries possess most of the materials of the world and the developed countries import these raw materials and by the application of advanced technology finished goods are exported to developing countries there being no rational proportion between the price of the raw materials and the finished goods, organizations of primary commodity producers are expected to go a long way to protect their interest and to ensure stable financing for their development. It has been rightly observed : "There is clearly concern among the developed nations who import considerable quantities of raw materials that the success of the oil exporters will cause a succession of increases and cartels among producers of raw materials with its consequent problems of recycling the capital used to finance the purchases into the very economic form which it came so that economic collapse is avoided. But it is dificult to see the grounds upon which it can be argued that there is no right to associate. The economic repercussions are great but that alone cannot justify the denial of the right." [51]

(6) Transfer of Technology.—Article 13, para one of the Economic Charter recognises the right of every State to benefit from the advances and developments in science and technology for the acceleration of its economic and social development. It further provides that all States "should" promote international scientific and technological co-operation and the transfer of technology, with proper regard for all legitimate interest *inter alia* the rights and duties of holders, suppliers and recipients of technology." In particular, all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs.[52] Accordingly, developed countries should co-operate with the developing countries in the establishment, strengthening and development of their scientific and technological *infra* structures and their scientific research and technological activities so as to expand and transform the economies of the developing countries.[53] Finally, all States should co-operate in exploring with a view to evolving, further internationally accepted guidelines or regulations for the transfer of technology taking fully into account the interest of developing countries.[54] The right relating to transfer of technology contained in Article 13 was unanimously adopted. This was probably due to the fact that this right has been expressed in general terms and in permissive language. Instead of the word 'shall', the world 'should' has been used.

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[46] Article 2 (e).

[47] See A/C 2/SR 1938 pp. 5-6; A/C 2/L 1404.

[48] A/C, 2/SR 1648, p. 41; See also matter discussed in this connection under chapter on "State Responsibility."

[49] A/C 2/L 1406.

[50] For British and Canadian Views See A/C. 2/SR, 1650, p. 17 and A/C 2/SR 1649, p. 1 respectively.

[51] Robin C.A. White, "A New International Economic Order", I.C.L.Q., Vol. 24 (July, 1975), p. 542 at p. 549.

As pointed out in the preamble to the Programme of Action adopted in Vienna in 1979 by the U. N. Conference on the Science and Technology for Development, developed countries dominate the field of science and technology to the extent that around 95 per cent of research and development is executed by them, while developing countries which all represent 70 per cent of the global population have only 5 per cent of the world's research and development capacity. It may also be noted here that most of the technology is owned by multi-national corporations. The developing countries represented by the Group of 77 insist on the adoption of an international code relating to transfer of technology universally applicable. The resolution of the General Assembly which proclaimed the International Development strategy for the Third U. N. Development Decade also called upon States to finalise at an early date the adoption of an international code. Though such a code will have certain advantages, it is not "the complete answer to all the scientific needs of the L.D.C....mere import of technology does not ensure development."[55]

(7) Promotion, Expansion and Liberalization of World Trade.—The duty of each State for promotion expansion and liberalization of world trade finds mention in Article 14 which was also unanimously adopted. Article 14 provides that every State has the duty to co-operate in promoting a steady and increasing expansion and liberalization of world trade and an improvement in the welfare and living standard of all peoples, in particular of those developing countries. Accordingly, all States should co-operate *inter alia,* towards the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade and to these ends, co-ordinated efforts shall be made to solve in an equitable way the trade problems of all countries taking into account the specific trade problems of the developing countries.

(8) Utilization of Resources Freed by Effective Disarmament Measures.—The Economic Charter recognises the duty of all States "to promote the achievement of general and complete disarmament under effective international control and utilize the resources freed by effective disarmament measures for the economic and social development of countries, allocating a substantial portion of such resources as additional means for the development needs of developing countries." [56] This principle may be traced back to the General Assembly Resolution 3176 (XXVIII) wherein it was approved by consensus. The developed countries including the U. S., the U. K., France and Federal Republic of Germany wanted this Article to be omitted but their proposal was rejected.[57] The developed countries neither appreciated the link between disarmament and development nor were they prepared to accept any such obligation.

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[52] Article 13, para 2.

[53] Article 13, para 3.

[54] Ibid., para 4.

[55] S. K. Agrawala, "Transfer of Technology to LDC's : Implications of the Proposed Code", I.J.I.L., Vol. 23 (1983) p. 246 at p. 263.

[56] Article 15.

[57] A/C 2/SR 1648, pp. 7-8.

(9) Elimination of Colonialism, *Apartheid*, Racial Discrimination, Neo-colonialism and Restitution and Full Compensation for Exploitation of the Natural and Other Resources of the Territory affected.—Article 16 of Part I of the Charter provides that it is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination and the economic and social consequences thereof as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the "restitution and full compensation for the exploitation and depletion of and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them. Further, no State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force." [58] The concept of payment of compensation to the colonial people, victims of racial discrimination and those affected by foreign aggression was strongly opposed by imperialist powers like U. K. and France. "It is only natural and logical that the developing countries are pressing for the former colonial powers to return their plundered riches to their rightful owners the peoples of Asia, Africa and Latin America. Essentially, this is a matter of imperialism making historical repression for its oppression, exploitation and robbery of the peoples of the former colonies and semi-colonies. The economic declaration of the recent Non-aligned Summit explicitly and very justly states that peoples, countries and territories subjected in the past to colonial exploitation and plunder are entitled to reparation and full restitution for this exploitation and depletion of their natural resources." [59]

(10) Extension of Tariff Preferences.—Article 18 provides that the developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and decisions as adopted on this subject, in the framework of the competent international organizations. Article 19 further provides that with a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic co-operation where it may be feasible. These two Articles were also opposed by developed countries including the U.S., U. K and France.

(11) Most-Favoured-Nation Treatment.—The Economic Charter provides that all States have the duty to co-exist in tolerance and live together in peace, irrespective of difference in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries on the basis of mutual advantage, equitable benefits and the exchange of "most favoured-nation treatment." [60] As many as 14 developed countries cast their votes against this principle.[61] Among the socialist countries, China and Albania also voted against this principle.

(12) Indexation of Prices.—The Economic Charter recognises the duty of all States "to co-operate in achieving adjustments in the prices of exports of developing countries in relation to prices of their imports so as to promote just and equitable terms of trade for them, in a manner which is remunerative for produces and equitable for producers and consumers." [62] This provision is very important for the developing countries because one of the main reasons for the existing economic inequality is the wide gap between the prices of exports and imports of goods. According to the studies made by the U. N., export of basic commodities of developing countries accounted for more than 75% of their total export in 1970. There has been no relation between the price of exports and those of imports while the prices of goods exported by developing countries have been constantly rising, the prices of goods imported by them have not risen significantly. For example, cost of cereals increased by 150 per cent and that of meat rose by 350 per cent. Similarly, the price of wheat doubled from July 1972 to July 1973, then again nearly doubled during the second half of 1973. The prices of fertilizers also doubled between June 1972 and September, 1973. The developed countries have made a great hue and cry over price hike in oil by Arab countries. But if one looks at the statistics and arguments of such countries, hike in prices of oil will not appear to be as un-reasonable as is made out.

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[58] Article 16, para 2.

[59] A Vladmiroy, "On fair and Democratic Principles", New Times, Vol. 42 (October, 1976), p. 18 at p. 19.

[60] Article 26.

[61] A/C 2/SR, 1648, pp. 57-58.

[62] Article 28.

It is in this context that the developing countries included the principle of indexation of prices in the Charter. But the response of the developed countries was most discouraging and they greeted these proposals "with howls of anguish." While some developed countries proposed the deletion[63] of Article some others considered that such a principle was not desirable or feasible.[64]

Common Responsibilities towards the International Community.—Chapter III deals with the common responsibilities of States towards international community in respect of sea-bed and ocean floor and Environment. Chapter III comprises of only two articles—Articles 29 and 30.

Final Provisions.—Chapter IV entitled "Final Provisions" comprises of four articles—Articles 31 to 34. Article 31 emphasizes the inter-dependence of developed and developing countries for balanced expansion of the world economy. Article 32 deals with the prohibition of coercion in relation among states. Article 33 deals with inter-relationship between the Charter of the U. N. and the Economic Charter. Finally Article 34 provided for the review of Economic Charter in the XXX session of the General Assembly and thereafter on the agenda of every fifth session.

Significance of the Declaration on the establishment of a New International Economic Order, Programme of Action and the Economic Charter.*—Since the resolutions and declarations of the General Assembly are said to be generally of the recommendatory nature, it is pertinent to consider the significance of the Declaration, Programme of Action and Economic Charter which aim to establish a new international economic order. Strictly speaking a General Assembly resolution is only of recommendatory character and does not create binding obligations. But a resolution of the Assembly unanimously adopted or a resolution adopted unanimously interpreting the U. N. Charter may create legal implications. Similarly, if on a subject numerous resolutions are adopted unanimously or by overwhelming majorities, then all these resolutions taken together may create legal implications provided, of course, it is to attain the purposes of the U. N. and is not expressly prohibited under the Charter.[65] A resolution unanimously adopted or passed by a overwhelming majority declaring customary rules of international law or enunciating new rules of international law may have legal implications. It is also generally recognised that the resolutions of the General Assembly help in the evolution of general international law. It is in this context that the documents relating to the establishment of a new international economic order have to be studied.

It has been rightly pointed out, "In a strict legal sense, therefore, the Charter is a declaration of the General Assembly and will have the force which such declarations have. But it is a declaration of special significance. The value of the declaration has to be assessed in the context of the fact that 120 States supported its adoption.........Of course it has to be remembered that amongst the States which have voted against or abstained are most of the most developed States of the world to whom many of the obligations under the Charter have been addressed, and many of the amendments, though defeated, came from the very same countries.[66] Further, "Let it be said that the Charter is not based on complete mutuality and has not enunciated the existing rules of international law on economic relations. It aims at removing the imbalances in world economy, at bridging the gap between the developed and developing countries, and has accordingly laid down norms which could achieve the purpose. Naturally, some involve progressive development on the subject." [67]

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[63] A/C 2/L, 1413.

[64] A/C, 2/SR 1649 p. 19.

* See also for C.S.E. (1983) Q. No. 6.

[65] J.A.C. Gutteridge, The U. N. in a Changing World (1969), p. 8.

As pointed out by another author,[68] "It is the assertion of political power by the developing nations that makes the Declaration, Programme of Action and Charter so important. Quite clearly the documents are not perfect and have met severe criticism from the highly industrialized nations, *but they do present a comprehensive series of norm-creating statements on a new international law of co-operation in the sphere of economic rights and duties*." Further, "The main criticism that can be levelled against the documents is that in some respects they appear to be based upon the first approach rather than the second. Nevertheless they will provide *primary evidence and guidance for all nations of international legal norms governing international economic relations. It is not an overstatement to say that a new era in the international law of economic co-operation has arrived*.[69] In the words of another eminent author,[70] "The Economic Charter represents the first systematic effort ever made to embody in a single and comprehensive document various economic rights and duties of States which have been explicitly or implicitly referred to in several multilateral treaties and resolutions of the United Nations and other related international organizations, and to build guidelines for future action in this field. It was never intended to be a complete instrument, but only a basic legal Code on economic principles.........Generally speaking, the General Assembly resolutions are only of a recommendatory nature. But *they may by general agreement reflect the developments of general international law*. The Economic Charter is something more than a mere programme of action such as the International Development strategy for the Second Development Decade or the one adopted at the Sixth Special Session of the General Assembly. Nor is it a convention or a treaty in a Technical sense. *It lies somewhere in beween a mere programme and a treaty*. The Economic Charter looks forward in the direction of laying the foundations for the evolution of a just and equitable economic law.[71]

Thus the Charter of Economic Rights and Duties of States and the resolutions of the General Assembly relating to the establishment of a new international economic order "represent the *radicalization of* international relations and *constitute the normative bases of the new international law that has come into being*.[72] It is significant to note here that a number of rights and duties incorporated in the Economic Charter have been adopted unanimously. Many of the principles are such as have been explicitly or implicitly referred in a number of resolutions passed earlier by the General Assembly. Even in respect of the principles which have generated controversy between the developed and the developing countries, the controversy resolves not on the general principles but in respect of their implementation and specific obligation upon the developed countries. It would not be an overstatement to say that atleast in respect of the principles which have been adopted unanimously, the Economic Charter may be said to have created, to say the least, legal implication. Even if it is conceded that these documents have yet not established a new international economic order it cannot but be admitted that the Economic Charter has brought about a significant change in respect of the normative bases of international economic relations among nations and will hasten the establishment of a new international economic order.

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[66] S. K. Agarwala. "The Emerging International Economic Order, I.C.I.L., Vol. 17 (1977), p. 261 at p. 273.

[67] Ibid, at p. 274.

[68] Robin C. A. White, "A New International Economic Order", I.C.L.O., Vol. 24 (July 1975) p. 542, at p. 552; emphasis supplied.

[69] Ibid; emphasis added.

[70] P. Chandrasekhara Rao, "Charter of Economic Rights and Duties of States." I.J.I.L., Vol. 15 (1975), p. 351 at pp. 369-70, emphasis supplied.

[71] Speaking on the significance of the Economic Charter, the Australian representative said "The Charter might have a significant effection on the development of international economic law; while it could not itself create law, it might influence the *opinio juris* and decisions by States on what their practice should be in the light of international law", A/C 2/SR 1650, p. 6.

[72] Rahmatullah Khan, International law—Old and New," I.J.I.L., Vol. 15 (1975), p. 371 at p. 379.

Eleventh Special Session of the General Assembly on new International Economic Order.—The eleventh Special Session of the General Assembly was held from 25th August to 15th September, 1980. The Assembly took note with satisfaction of the consensus reached on the text of the International Development Strategy for the Third United Nations Development Decade which was to come into effect and to be implemented from Ist January, 1981. During deliberations on the strategy, agreement was reached on a target level of 0.7 per cent of the gross national product of developed countries as official development assistance to developing countries. It was agreed that, that target should be achieved by 1985, but not later than the second half of the Decade, and that a target of 1 per cent should be reached as soon as possible thereafter. It was proposed that the first review and appraisal of progress made in implementation the strategy should be undertaken by the Assembly in 1984. However, the Special Session did not adopt the strategy. It was decided that the document would be considered by the thirty-fifth regular Assembly Session. Finally, the General Assembly on 5 December, 1980, proclaimed the Third United Nations Development Decade. It also approved the International Development Strategy emphasizing the most important objectives that should be pursued by Member States in implementing the goals of the Decade, starting 1 January, 1981. As regards action on New Economic Order, the General Assembly adopted a resolution (35/57) on the new International Economic Order and the Charter of Economic Rights and Duties by 134 to 1 votes with 12 abstentions.

Implications of the New International Economic Order.—The New International Economic order called by the U. N. General Assembly in 1947 would have following certain essential characteristics :

(1) It would support the development effort of poor countries in all areas by changing unfair and inadequate rules and regulation that now exist. Such changes would be particularly important in trade and monetary affairs where developing countries say that existing rules and regulations either actively discriminate against them or do so by not making allowance for their weakness.

(2) It would increase the share of developing countries in world industrial and agricultural production, including food, as well as in such areas as trade, transport and communications.

(3) It would change the patterns of trade, technology, flow, transport and communications from a primarily North-South orientation to one of more equal interchanges, one-sided dependence would be replaced by genuine interdependence.

(4) It would require States to behave according to an agreed Code in international economic relations. The norms of such behaviour have been set out in the Charter of Economic Rights and Duties of States, a seminal documents of the North South encounter. The aim of the charter is to ensure that small countries are not bullied out of their natural resources and that in decisions affecting them their views are considered.[73]

Conclusion.—The present structure of international economic relations does not accord with the key interests of most of the developing States. That is why the reconstruction of international economic intercourse on democratic lines and the establishment of a system of equal and mutually advantageous international economic co-operation is today among the problems in the focus of world attention. The existing system of international economic relations, in its character, may be said to be a transitional one.

In view of the wide gap between the views of the developed and the developing countries and even "confrontation" in respect of important matters, it has been pointed out that the respects for establishing a new international economic order do not appear to be particularly promising. In any case, it seems unlikely that a new world economic order will be brought about as a matter of conscious, well-planned and systematic global policy.[74] Although there are formidable difficulties in the establishment of a new International Economic Order, it would be wrong to say that nothing has so far been achieved in this connection. The Charter of Economic Rights and Duties of States and the Declaration and Programme of Action on the Establishment of a New International Economic Order are the important documents which have been adopted by the General Assembly as a result of this struggle. These documents constitute the normative bases of the new international law that has come into being.

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[73] U. N. Chronicle, Vol. XIX No. 9 (1982) pp. 37-38.

The present existing system of international economic relations being only a transitional one in character, the documents cited and discussed above may be reckoned as the first important stage in the establishment of a new international economic order. A number of principles incorporated in these documents have been adopted unanimously and to that extent they create legal implications. It is also significant to note that the realization that the West's writ cannot run any more on the Third World has dawned upon the developed countries, and therefore, slowly but steadily the developed countries are trying to accommodate the interests of developing countries. For example, in the Geneva Conference sponsored by the UNCTAD, the developed countries on April, 1977, agreed to establish a "Common Fund" to maintain commodity price stabilization. It may, however, be added that the concept as proposed by the developing countries who wanted a common fund to finance buffer stocks of 10 commodities to keep prices of 10% above are below a target price, was greatly diluted because the industrialized nations made it clear that the "Common Fund" must not interfere with the working of world markets and should not have control over commodity arrangements, which should be entered into between producer and consumer nations independently of the Fund. London Summit of 7 industrialized held in May, 1977, confirmed and further advanced the concept "Common Fund." However, the talks between the developed and the developing countries were completely deadlocked at the Paris Summit held in June, 1977, and no significant advancement could be made.[75]

The Cancun Summit (23-24) October, 1981).—The proposal for such a summit was put forward by Brandt Commission in 1980. This summit assumed significance in the context of the rigid attitude adopted by Mr. Ronald Reagan towards the developing countries since he assumed the office of the United States of America. Mr. Reagan was not in favour of North-South dialogue and wanted his allies to do the same. The Cancun Summit which was attended by 22 States 8 developed and 14 developing including India, brought about a change in the attitude of the U. S. The only significant achievement of this summit was that the doors for North-South dialogues would not be closed and that they would be held in future also on economic matter.

UNCTAD VII.—The United Nations Conference on Trade and Development held its seventh session from 6th July to 31st September, 1987 in Geneva. In the Conference certain procedures were agreed which, it may be hoped, may ease developing countries' burden of debts. A consensus was arrived at that talks should continue on this matter and that there should be division of responsibilities. It is a great achievement of the conference that on 14 July, 1987, Soviet Union announced that in order to bring about stability in the prices of commodities, it has decided to become a member of the 'Commodities Fund'. After joining of Soviet Union, the Fund has now 45 members and 84% of 47 crores of investment has been reached. Thus only 2% more investment is required for entry into force of the Fund. It is rightly hoped that soon this requirement will also be fulfilled. UNCTAD VII gave emphasis mainly on the point that an environment may be created by multilateral corporation so that international trade may be developed and promoted.

Brady Plan.—The problem of the constant increase of debts of developing countries has assumed serious magnitude. According to an estimate of the World Bank, by the end of year 1988, total amount of the debts of the third world has reached 1.3

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[74] India Quarterly, Vol. XXXII, No. 3 (1976) pp. 287-88.

[75] See S. D. Muni, "The Paris Dialogue on International Economic Cooperation : The North's Strategy and the outcome" Foreign Affairs Reports, Vol. XXXV No. 10 (October 1977), p. 205 at pp. 210-11.

billion. This amount is 50 per cent of the national production of these countries. The U. S. Treasury Secretary, Mr. Nicholas Brady proposed a scheme to reduce the debts of most-debted countries. According to this scheme, the debt of 17 most debted nations would be reduced by 20% and the payment of their debts would also be reduced proportionately with a view to achieve this, there is a scheme for the contribution of 12 billion by the International Monetary Fund and the World Bank. But this scheme is subject to the increase in contribution quotas of members and also to make more funds available to Commercial Banks. While a controversy has started among the developed countries in this respect, this has not been completely welcomed by the developing countries.

Paris Summit Conference of 7 Developed Countries.—Seven developed countries—Britain, Italy, France, West-Germany, Canada, Japan and America held a summit conference in Paris on 16th July, 1989. In this conference they pledged to help the developing countries by opening and widenning the world trade system. It is to be seen how they fulfil their pledge and whether this renders help to developing countries in real terms.

Ninth Replenishment of I.D.A.—Talks for ninth replenishment of International Development Association (I.D.A.), an affiliate of the World Bank, began in February 1989. Both the Group of 24 developing countries and the development committee of the World Bank had in their mid-term meetings in April 1989, underlined the need for an early finalisation of the ninth I.D.A. replenishment to enable recipient countries to gain and maintain their development momentum and make progress in poverty alleviation. The Group of 24 had suggested that I.D.A. donor countries take into account the gains that had been made as a result of I.D.A. assisted operations which should be sustained and maintained. The World Bank's latest report acknowledges that despite impressive progress in such areas as food self-sufficiency, health and institutional capacity to manage disaster relief, the overall picture is not encouraging for over half of the developing countries' poor—nearly 500 million people—who are overwhelmingly concentrated in Asia.

UNCTAD VIII.—The Eighth Session of UNCTAD took place in February 1992, at Cartagena. More than 40 least developed countries sought the cancellation of all bilateral official debts and urgent measures for reduction of Least Developed Countries (L.D.Cs.) debt stock and debt serving burdens including those due to multilateral financial institutions and commercial debts. Mr. P. Chidambram, Union Minister of Commerce who attended UNCTAD session on behalf of India, said of the five areas under negotiations, one area where UNCTAD might make a move was the convening of an international commodities conference.

The UNCTAD VIII was held at Cartagena de Indias, Colombia from 8th to 25th February, 1992. In its final document, approved by consensus, UNCTAD VIII stressed that, without economic progress, there could be neither peace nor security. The document included : a concise political declaration entitled, "The Spirit of Cartagena" ; a programme document—"A New Partnership For Development : The Cartagena Commitment"; a note on a proposed world commodity conference and a message to the U.N. Conference on Environment and Development (UNCED). The Conference, in its Cartagena Commitment, stated that the international community faced an unprecedented conjunction of challenges and opportunities, responses to which would shape the outcome of efforts to build a "healthy, secure and equitable world economy."

The Conference decided by consensus that UNCTAD Secretary-General should hold consultations on a world conference on commodities. Subject to a positive outcome of such consultations and the deliberations in the Standing Committee on Commodities, the Trade and Development Board—UNCTAD's executive body—should "decide on an invitation to the General Assembly of the U. N. to convene a world conference on commodities under UNCTAD auspices".[76]

UNCTAD-IX.—UNCTAD-IX was held in Midrand (South Africa) from 27 April to 11 May, 1996.

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[76] U.N. Chronicle, Vol. XXIX No. 2 (June, 1992) pp. 67-69.

UNCTAD-X.—UNCTAD-X was held in Bangkok (Thailand) from 12 February to 19 February, 2000.

UNCTAD-XI.—UNCTAD-XI was held in Sao Paulo (Brazil) from 13 June to 18 June, 2004.

UNCTAD-XII.—UNCTAD-XII was held in Accra (Ghana) from 21 April to 25 April, 2008. It adopted wide ranging conclusions. Against the background of surging food prices and global economic uncertainties, UNCTAD-XII ended with the adoption of comprehensive conclusions aimed at reinforcing international efforts to extend gains from globalisations to the million being left behind.

UNCTAD Secretary-General Supachai Panitchpakdi hailed the Accra Accord and its accompanying political declaration for embodying the shared commitment of the developing and developed world to work toward making globalisation a powerful means to achieve poverty eradication Dr. Supachai also referred to a new mood of "development solidarity" around the objective of narrowing gaps between the countries and achieving the Millennium Development goals, which include halving extreme poverty by 2015.

In concluding declaration on 25 April, 2008, Ministers pledged to resist Protectionism, Boost Lagging Poverty Reduction strategy as UNCTAD ended in Ghanna.

UNCTAD-XIII.—UNCTAD-XIII was held at Doha (Qatar) from 21 to 26 April, 2012. Currently UNCTAD-XIII has 194 Members.

One of the main achievements of UNCTAD has been to conceive and implement the Generalised System of Preferences (G.S.P.). It was argued in UNCTAD that in order to promote exports of manufactured goods from developing countries it would be necessary to offer special tariff concessions to such exports. According to this argument, the developed countries formulated the GSP scheme under which manufacture exports and agricultural goods from developing countries either duty-free or at reduced rates in the developed countries. Since imports of such items from other developed countries are subject to normal rates of duties, imports of the items from developing countries would enjoy a competitive advantage.

It may be noted here that currently UNCTAD has 193 member states. Its Headquarters is at Geneva. In the 1970s and 1980s UNCTAD was closely associated with the idea of New International Economic Order (NIEO). As compared to this, the theme has changed and the emphasis shifted to globalisation and sharing the advantages thereof with the developing countries. That is why, UNCTAD-XII concluded by pledging to work toward making globalisation a powerful means to achieve poverty eradication.

UNCTAD-XIV.—UNCTAD-XIV was held in Kenya from 17 to 22 July, 2016. The theme of the Conference was "From decision to action : Moving towards an inclusive and equitable global economic environment for trade and development".

G-20 Leaders Meet (July, 2017).—G-20 Leaders Meet was held in Hamburg (Germany) in the second week of July 2017. The divide between the United States of America and the rest of world on the Paris Agreement on climate change was further formalised on 11 July, 2017 with the G-20 declaration in Hamburg taking note of the American intent to withdraw from the deal. It may be noted that in Paris, America had announced its withdrawal from the Paris Agreement on climate change.

While leaders of 19 countries of G-20 including India, called the deal on Paris Agreement on climate change "irreversible", the United States of America alone stood by itself. However, America managed to get its position on fossil fuels inserted in the joint statement through a formulation promising more efforts for "clean and efficient" use without any commitment to its end.

On 11th July, 2017, American President Donald Trump promised $ 639 million in aid to feed people left starving because of drought and conflict in Somalia, South Sudan, Nigeria and Yemen. The new funding brings to over $ 1.8 billion aid promised by America for the fiscal year 2017 for the crises in the said four countries, where the United Nations has estimated more than 30 millions need urgent and food assistance. It may be noted here that the World Food Programme estimates 109 million people around the world will need food assistance this year, up from 80 million last year.

Further, G-20 leaders adopted a World Bank funding plan of upto $ 1 billion for women entrepreneur in developing nations, an initiative which was championed by U.S. President Donald Trump's daughter Ivanka. This initiation was launched in Hamburg by World Bank Chief, Jim Yong Kim in the presence of Ivanka and her father and other world leaders. According to G-20, women enterpreneurs play a critical role in economic development by creating jobs and boosting growth, but women face numerous challenges. These include access to capital, lack of networks and knowledge resources, as well as legal and policy obstacles to business ownership and development.

During the G-20 meeting, the question of North Korea was also discussed between American and Chinese Presidents. It may be noted that North Korea's successful test launch of an International Continental Ballistic Missile was a major milestone in its long term effort to build a nuclear that could carry a nuclear warhead to reach different parts of the United States of America. The meeting between the two Presidents took place after the American President publicly declared the "aspiring nuclear power" (*i.e.* North Korea) as he met with Asian allies on the sidelines of international summit to find consensus on next steps after North Korea's recent launch of an inter continental ballistic missile.

Donald Trump to Xi, the Chinese President that something has to be done about North Korea. Chinese President Xi stressed to Trump, Chinese's adherence to resolving the North Korean nuclear issue via talks. It may also be noted that the American President, Japanese President and the British Prime Minister held a meeting on the final day of the G-20 meeting. The three nations have been calling for "early adoption" of a new U.N. Security Council resolution and additional sanctions to demostrate sanctions to Pyongyang the consequences of its actions. Bringing China is a key part of the plan.

Last but not the least, Indian Prime Minister, raised the question of the menace of terrorism in the G-20 and Bricks meets and said that to solve this menace those countries who provide funds, safe haven and otherwise support terrorist ought to be targeted.

World Trade Organisation

N.B. : This has been discussed in greater detail in a separate Chapter *i.e.* Chapter 40 in Part IV of the book.

India and U.S. agree on Trade Pact framework.—On 26th October, 2009, India and the U.S. agreed on a framework to promote trade and investment and hoped to sign an agreement soon. The U.S. Trade Representative, Ron Kirk, pressed for further opening up of India's services sector, especially the financial market. The joint statement issued after the Sixth Ministerial Meeting of the Bilateral Trade Policy Forum (TPF).

After his meeting with Kirk, Commerce Minister, Anand Sharma, said he hoped the agreement would be signed soon. The two sides also agreed to work together to support greater involvement by small and medium enterprises in each others markets, and to pursue initiates in the future development of India's infrastructure and collaboration on clean energy and environmental services and other sectors.

Pitching for greater access to the Indian services sector, Kirk hoped India would further strengthen its IPR regime.

Officials of the two countries will meet twice a year to complete the remaining task of the TPF, formed in 2005 to discuss trade and investment issues. The two governments agreed on a framework for promoting real and meaningful cooperation in trade and investment.

CHAPTER 27

DEVELOPMENT AND ENVIRONMENT

Development

Environmental consequences of industrialization and economic development and the pollution of air, water and soil, on which our life depends, is the high or dear cost which man has to pay for economic progress.[1] While in developed countries environmental problems are as a result of industrialization and technological development, in poor countries these problems are due to less development. Since the developed countries are facing environment crisis, they argue that the developing countries will also have to face the same crisis if they make the same development. On the other hand, poor countries feel that the greatest source of pollution is poverty.[2] While speaking before U. N. Conference on Human Environment at Stockholm, late Prime Minister Mrs. Indira Gandhi had said that for the developed countries development might be the cause of destruction of environment, for a country like India it was the primary means for improving the standard of living, to make available food products, water, cleanliness, shelter, to bring about greenery in deserts and to make hills and mountains worth living.

Development and Environment are invariably related to each other. Even the developing countries cannot afford to ignore the environmental consequences of the process of development.[3] Hence an essential and grave problem is to maintain harmony between development and environment. The future of the developing countries greatly depends on better international understanding of the right of development because this right depends on several other human rights.[4] Article 55 of the U. N. Charter describes economic development and respect for human rights as the twin foundations of friendly and peaceful relations among nations. Economic development and human rights are thus intimately connected with each other. Development is linked with human rights through the clear acceptance of social and economic rights as well as established human rights. Thus human rights and economic development are clearly complementary to each other.[5]

There is great confusion over the right to development. This confusion is in respect of its origins, formulations, ambit, existence and nature. Although this controversy is mainly among international jurists, its implications run deep for the future of U. N. system as well as mankind.[6] It may, however be noted that right to development is crystallizing as a rule of international law. Reference may be made in this connection to the *'Declaration on the Right to Development"* adopted by the General Assembly on 4th December, 1986.[7] The Declaration provides that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[8] States have the primary responsibility for the creation of national and international policies with a view to facilitating the full realization of the right to development.[9] States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating

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1. See R. P. Anand." Development and Environment : the case of Developing Country", I.J.I.L. Vol. 20 (1980) p. 1.
2. Ibid at p. 9.
3. Ibid, at p. 13.
4. C. G. Weeramantry, "The Right to Development", I.J.I.L., Vol. 25.
5. See M.G. Kaladharan Nayar, "Human Rights and Economic Development : The Legal Foundations", Universal Human Rights, Vol. 2 (1980) p. 55.
6. Upendra Baxi, "The New International Economic Order, Basic Needs and Rights Notes Towards Development of the Right to Development", I.J.I.L., Vol. 23 (1983) p. 225 at p. 226.
7. See resolution 41/128 dated 4th December, 1986 of the General Assembly.
8. Article 1 of the Declaration.
9. Article 3.

the full realization of the right to development.[10] Finally, steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.[11]

There is close relationship between development and conservation of environment. This relationship was acknowledged in 1972 Stockholm Conference on Human Environment. In 1979, the General Assembly, with a view to formulate the right of development had stated in a resolution (G. A. Res. 34/46) that right to development is a human right that nations have the same right of equality of opportunity and as people have within the nation.

In August-September 1980 in the General Assembly in its International Development Strategy for the decade 1981-1990 had said that in the developing countries rapid development will enhance their capacity for improving the environment. Environmental implications of mutual relations of poverty and less development and populations and resources should be kept in mind. It is essential to ensure that the process of economic development be such that it must be environmentally sustainable for a long time. Efforts should be made to prevent deforestation, soil erosion, degration of land and spread of deserts.

As pointed out by Starke, "The international law of development has yet not reached the stage where it can be set down as a substantial body of binding rules, conferring specific rights upon developing states and imposing duties on developed countries. For the most, it is best described as institutional law, that is to say the law of various bodies and agencies through which development is promoted and development aid is channelled.[12] But this cannot be denied that the 'right to development' is constantly developing.

With a review to find the satisfactory solution of the problem, it is necessary to enlist the cooperation of all countries—Communist and Capitalist, rich and poor, satisfied and dissatisfied—otherwise the survival of the whole mankind will be in danger. As pointed out by Commission on International Development (Pearson Commission), which was established by the President of the World Bank Group, in its 1969 report : Who can now say where his country will be after a few decades without asking where the world will be. If we want a safe and prosperous world, we will have to take into account common problems of people. Pearson Commission listed ten objectives in its report which can be regarded to be the standards of development. The ten objectives are as follows :—

"1. The creation of a framework for free and equitable trade involving the abolition by developed countries of import duties and excessive taxes on those primary commodities which they themselves do not produce.
2. The promotion of private foreign investment with offsetting of special risks for investors.
3. Increases in aid, should be directed at helping the developing countries to reach a path of self-sustained growth.
4. The volume of aid should be increased to a target of 1% of the gross national product of the donor countries.
5. Debt relief should be a legitimate form of aid.
6. Procedural obstacles should be identified and removed.
7. The institutional basis of technical assistance should be strengthened.
8. Control of the growth of population.
9. Greater resources should be devoted to education and research.
10. Development aid should be increasingly multilateralised. Such multilateralisation would contribute to a uniform development of the principles governing the grant and receipt of aid." [13]

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[10] Article 4.

[11] Article 10.

[12] J. G. Starke, Introduction to International Law, Tenth Edition (Butterworths. Singapore, 1989) p. 397.

[13] Ibid. pp. 398-399.

On 24 October, 1970, the General Assembly adopted policy document relating to international Development Strategy and included in it the above-mentioned ten objectives. The said policy document was adopted for the Second Development Decade (1971-1980). It was also stated that by 1972 the developed countries should give 1% of national production as aid to developing countries. It may be noted that this target could not be reached. In August- September 1980, the third Development Decade was announced. In March, 1988, the United Nations Environment Programme (UNEP) adopted Environmental Strategy for 1990-1995. It was decided that in future the United Nations will focus on helping countries to achieve sustainable development, reduce the impact of environmental degradation and pollute and rehabilitate ecosystems already degraded or polluted. It may be noted here that the trend was quite manifest that climatic change—the ominous "greenhouse effect—the Ozone layer," tropical deforestation and toxic wastes will continue to large on U.N.E.F.'s agenda. Further, the concept of sustainable development that does not hurt the environment—runs throughout the whole programme. It was the dominant theme of two ground—breaking documents : 'the Environmental Perspectives to the year 2000 and beyond, which reflected the Government's thinking adopted by the General Assembly in 1987, and our Common Future', the report of the high level, non-governmental world commission on Environment and Development, a major input to the Perspective.

Sustainable development is now the basis for the United Nations environmental philosophy and is already giving a sharper edge to global environmental action.[14]

It may be noted here that the present law relating to right to development is institutional. The institutions such as United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme (UNDP), United Nations Industrial Development Organisation (UNIDO), Organisation of Economic Co-operation and Development Organisation (OECD), European Economic Community etc., are making significant contribution in this respect.

On 22nd December, 1990 the General Assembly of the United Nations announced the Fourth Development Decade (1991-2000) and suggested for vast national and international means for rapid development of developing countries (especially least developed countries). The General Assembly acknowledged that the Third Development Decade failed to achieve most of the objectives. The General Assembly asked the developed countries to invest the money released from disarmament in official aid. Laying stress on industrial development the General Assembly recommended that the rate of development of industrialisation be increased from 8 to 10%.

The advantages of development can be enjoyed in true sense only when it does not cause adverse impact on environment. Unfortunately in the very first year (*i.e.*, 1991) Fourth Development Decade, Gulf War (1991) aggravated the gravity of the problems of environment. The States responsible for causing adverse impact on environment should be compelled to make reparation and the funds thus received should be invested for improving the environment. Last but not the least, the concept of sustainable development should be emphasized and should form the basis in all programmes of U. N. system and all agencies and institutions connected with development and environment.

Population explosion increased urbanisation and unprecedented expansion of science and technology may be said to be the basic causes responsible for the deterioration of the environment. Over much of the world, environmental problems are still those associated with proverty, such as poor housing, bad public health, malnutrition and inadequate employment. Such problems can only be solved through development which is environmentally wise and based upon through evaluation of the potential uses of the different regions of the earth.[15] International collaboration, on a scale not seen in the history of the world, is essential if mankind is to meet basic human needs while safeguarding the environment for future generations. The greatest challenge is to design development so that it satisfies basic needs beginning with the eradication of poverty. The world is not environmentally uniform. Nations differ in their environmental resources. No single solution will work every where. The environmental inequalities in the world are paralleled by economic ones which are major obstacles to satisfaction of basic human needs, especially in developing countries, and a barrier to the harmonious development of mankind.[16] The economic development now enjoyed by the developed countries was sometimes achieved without due regard to the preservation of human environment.[17]

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[14] See "Action To save our Environment", U. N. Chronicle, Vol. XXV, No. 2 (June, 1988) p. 43.

[15] U. N. Monthly Chronicle, Vol. XIII, No. 3 (March 1976), p. 44; See also Mapzi Sinjela, "Developing Countries Perceptions of Environmental Protection and Economic Development", I.J.I.L., Vol. 24 (1984) p. 489 at pp. 499-502

Technological progress has brought enormous numbers of chemicals into everyday life. Five million substances have been identified; about 70,000 of these are marketed, about half of them in quantity. They have brought immense benefit to the society—increased food production, improved health care, eradicated deadly diseases, and bestowed longer life expectancy and a better standard of living. But they have also brought new dangers, largely through the wastes generated in their manufacture. Tens of million of tons of toxic and otherwise hazardous substances enter the environment every year as unwanted wastes. Managing and disposing of these hazardous wastes properly faces mankind with significant problem.[18] It may also be noted that food production can only be sustained if the environment is preserved; conservation is a precondition of long term food-security. But threats to the environment in developing countries are very serious and they are mounting. Genetic resources which should be preserved as sources of future diversity and improvement are shrinking because of pollution, deforestation, and the neglect of traditional species of crops and livestock.[19]

A new expert report has warned that current patterns of energy production and use will not lead to a "sustainable world." This expert report was considered by the Committee on the Development and Utilization of New and Renewable Sources of Energy at its sixth session held at Newyork from 3rd to 14th February, 1992. The report said that our current energy production and use accounts for "at least as many global or regional manmade environmental problems as all other human activities combined." According to the experts, the health of the planet demands a renewed search for energy alternatives. The flow of energy to the Earth's land surface is thousands of times greater than mankind's present rate of total energy use." Yet these sources at present contribute only 14 to 20 per cent of the total world energy supply.

The Committee on the Development and utilization of New and Renewable Sources of Energy has been renamed by the General Assembly as the Committee on New and Renewable Sources of Energy and on Energy and Development. In addition to its current responsibilities, the renamed Committee will assume the energy portion of the mandate of the Committee on Natural Resources.[20]

Corona Virus.—Presently, one of the greatest obstacle to development is the spread of deadly Corona Virus. Emanating from Wuhan of China, it soon spread all over the world. Within a few weeks it spread in large scale to European countries such as Italy, France, Britain, Germany and also to countries like Iran and America. It spread so rapidly that it took 137 days to reach the figure of one million of patients affected by Covid-19 corona virus. But it took only 13 days to double the figure.

India, on the other hand, took early steps to fight corona virus. As early as in January, 2020, India started screening, persons coming from China and a few Western countries. In India, corona virus came through these persons who came from abroad (citizens as well as foreigners). When the figure of 500 corona virus affected persons was reached, Indian Prime Minister announced on 24 March, 2020 a lock down of 14 days. After the figure crossed 1000, Prime Minister announced another lock down of 19 days till May 3, 2020.

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16. U. N. Monthly Chronicle, Vol. XIII, No. 3 (March 1976), p. 44; See also Mapzi Sinjela, "Developing Countries Perceptions of Environmental Protection and Economic Development", I.J.I.L., Vol. 24 (1984) p. 489 at pp. 499-502
17. Mapzi Sinjela, note 15 at p. 489.
18. U. N. Chronicle, Vol. XX, No. 5 of (1983) p. 33.
19. U. N. Chronicle, Vol. XX, No. 1 of (1983) p. 74.
20. U. N. Chronicle, Vol. XXIX, No. 2 (June 1992) p. 71.

The situation became explosive throughout the whole world, including many highly developed countries such as America, Italy, Spain and France. In some countries such as Italy, Spain and America the situation seems to have gone out of control. For example, on 16th April, 2020 total world cases of corona virus were 20,51,029 with 1,32,892 deaths. Out of this America had 6,22,923 cases with 27,586 deaths. Italy had 1,65,155 cases with 21,645 deaths. France had 1,47,863 cases with 17,167 deaths and Germany, had 1,33,209 cases with 3,592 deaths. As compared to this, on the same date *i.e.* 16 April, 2020, India had only 12,324 cases of corona virus with 415 deaths. Thus, as compared to other countries India was in much better position. However, the situation is explosive and India could not be complacent. That is why, a lockdown of 19 days *i.e.* till 3rd May, 2020 was announced. Even in India figure of corona virus affected person is increasing rapidly. On 9th April, 2020, figure of cases was 5,699. It swelled to 12,324 cases within a week.

In may be noted that before lockdown the increase per day in the number of infected persons was 291 but after lockdown the number of infected by corona virus increased to 1526 per day. Since then the number of infected persons has been rapidly increasing. Throughout the whole world corona virus has badly affected the people. The increase in the number of infected persons has been phenomenon. For example, on 15 June, 2020, total infected persons in the world were more than 77 lakhs and the number of deaths on account of Covid-19 were more than four lakhs. The worst affected nation was United States of America. The total number of affected persons in the U.S. is more than 21 lakhs and the number of deaths was more than one lakhs. As compared to this, total number of infected persons in India was more than three lakhs and number of deaths was more than 9 thousands. After five days *i.e.* on 19th June, 2020, the number of infected persons in the entire world was more than 84 lakhs and the number of deaths was nearly four and a half lakhs. As compared to this, in India the number of infected persons increased to more than three and a half lakhs and the number of deaths increased to nearly 12 thousands. Thus Covid-19 virus is affecting the whole world.

As noted, above, the worst affected person on account of Covid-19 virus is United States of America. By 21 June, 2020, there were more than 23 lakhs infected by Covid-19 virus and there were more than one lakh 21 thousand deaths in America. For such huge loss of life and property in America, America holds China and World Health Organization responsible for concealing and delaying the information about Covid-19 virus. America is so much annoyed and hurt that America has warned China again and again. President Trump of America first threatened World Health Organisation (WHO) to withhold its subscription to WHO and subsequently America broke all relations with WHO.

Relevance of General International Law to Environment.—As rightly remarked by an author,[21] "the general principles and prescriptions of International law are not without applicability to problems of transnational pollution or environment degradation. Thus a fundamental principle of international law limits action by one State which would cause injury in the territory of another State.[22]......"there has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interest of other States......"[23] The principle is in turn a reflection of the fundamental doctrine, *Sic utere tuo ut olienum non leades*—'one must use his own rights so as not do injury to another.' This concept underlines the range of State-to-State relations just as it does in personal relations." This principle has also been recognised by Arbitration Tribunals.[24] It is not suggested that general principles of international law provide the degree of specificity that will be required for a framework of international concern for global environmental conservation. These general principles of international law, however, do indicate the duty of State not to engage in or permit conduct within its territory which would result in environmental injury outside its territory.[25] Further, "It seems apparent from the facts of the environmental state among different countries and from the complex and sensitive economic political consideration involved that international co-operation and agreement will be necessary to initiate prompt measures to improve our global environment. The case-by-case development of international law to cope with a myriad of problems would not provide the urgent action needed even if authoritative tribunals were available to claimants." [26]

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[21] Cecil, J. Olmstead, "Prospects for Regulation of Environmental Conservation under International Law" in The Present State of International Law and other Essay's, (1973), p. 245 at p. 246.

[22] Corfu Channel Case, (1949) I.C.J. Rep. 4; see statement at p. 22 to the effect that every State is obliged "not to allow knowingly its territory to be used for acts contrary to the rights of other States."

[23] Survey of International Law, 34 U. N. Doc. A/CN. 4/1 Rev. 1 (1949).

[24] See The Lake Lanoux Arbitration between France and Spain, 24 Int. L. Rep. : 101 (1957) and Trail Smelter Arbitration between the U. S. and Canada decided on March 11, 1941, 3 U. N. Rep. Int. Arb. Awards 1905 (1945), A.J.I.L., Vol. 35 (1941) p. 648.

Reference may be made here to *Trail Smelter Arbitral Award.*[27] This case related to the damage caused to the State of Washington by fumes of Sulphur Dioxide emitted from Trail Smelter on the Canadian territory. It was held by the Tribunal that Canada was responsible in international law for the conduct of Trail Smelter. It was further held by the Tribunal that, apart from the undertakings in the treaty between the two states, the Government of the Dominion of Canada was under duty to ensure that its conduct should be in conformity with the obligations under international law. The Tribunal held : "Under international law, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another state or the properties or persons therein, when the case is of some serious consequence and the injury is established by clear and convincing evidence." [28]

International Co-operation for and Regulation of Environmental Conservation.—Until the 1972 United Nations Conference on the Human Environment held in Stockholm, the subject of environmental conservation had been dealt with by international Conventions in only a fragmentary manner. For example Article IX of the Treaty of 1967 of the Principles Governing the Activities of State in the Exploration and use of Outer Space including the Moon and Celestial Bodies provided, "State parties to the Treaty shall pursue studies of outer space including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse change in the environment of the earth resulting from the introduction of extraterrestrial matter and where necessary shall adopt appropriate measures for this purpose."Article I of the Convention on the Prevention of Marine Pollution By Dumping of Wastes and other Matter, 1972 obliges the contracting parties individually and collectively to promote the effective control of all sources of pollution of the marine environment and to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea. Other Treaties and Conventions which deserve mention in this connection are : The Nuclear Weapons Tests Ban Treaty of 1963 ; the Treaty for the prohibition of Nuclear Weapons in Latin America ; Treaty on the Non-Proliferation of Nuclear Weapons 1968; Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Seabed and Ocean Floor and Subsoil Thereof, 1971; the two Brussels Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties and on Civil Liability for Oil Pollution Damage, 1969.[29] The Convention on Wetlands of International importance especially as waterfowl Habitat, 1971; The Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972 etc. Reference may also be made to the General Assembly Declaration of December 17, 1970 of Principles Governing the Sea-bed and the Ocean Floor and the Subsoil thereof beyond the limits of National Jurisdiction. Principle eleventh of the said Declaration provides for the (a) Prevention of Pollution and contamination and other hazards to the marine environment including the coastal line and of interference with the

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25. Olmstead, note 6, at p. 247.
26. Ibid, at p. 248.
27. *U. S.* v. *Canada*, Vol. 35 A.J.I.L. (1941), p. 684.
28. Ibid at p. 716.
29. Gen. Ass. Resolution 2749 (XXV).

ecological balance of marine environment, and (b) Protection and Conservation of the natural resources of the area and prevention of danger to the flora and fauna of the marine environment. It was a significant development because 'our oceans and sea-vital links in earth's life giving cycles may indeed soon see the day of their 'death'......If the oceans and seas die all humanity perishes with them."[30] Further, "Marine pollution is a global problem in several senses. It affects the health of the ocean in all parts of the world; it affects all countries, both developed and developing; and all countries contribute to some aspects of the problem." [31]

Stockholm Conference of 1972 on the Human Environment*.—The U.N. Conference on the Human Environment held at Stockholm from June 5 to June 16, 1972[32] may rightly be reckoned as the first major attempt to solve the global problems of Conservation and regulation of human environment by international agreement on a Universal level. It mobilized and concentrated the attention of the international co-operation for environmental conservation.[33] The main contributions of the Stockholm Conference of 1972 on the Human Environment comprise of : (i) The Declaration on the Human Environment; (ii) the Action Plan for the Human Environment; (iii) the Resolution on Institutional and Financial Arrangements; (iv) Resolution on Designation of a World Environment Day; (v) Resolution on Nuclear Weapons Tests; (vi) Resolution on the Convening of a second Conference; and (vii) Decision to refer to Governments recommendation for action at the national level. A brief discussion of each of these is being given below :

(i) The Declaration on the Human Environment.—Contained in Section1 of the Report of the United Nations Conference on the Human Environment the Declaration on the Human Environment is one of the most significant achievements of the U. N. Conference on the Human Environment 1972. Starke has compared it with the Universal Declaration of Human Rights, 1948 and says that "it was essentially a manifesto, expressed in the form of an ethical Code intended to govern and influence future action and programmes, both at the national and international levels."[34] The Declaration is divided in two parts—first part proclaims seven truths about man in relation to his environment and part two enunciates 26 principles. The first part contains general observations such as that man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual moral, social and spiritual growth; the protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world it is the urgent desire of the peoples of the whole world and the duty of all governments in the developing countries most of the environmental problems are caused by under-development; the natural growth of population continuously presents problems on the preservation of the environment and adequate policies and measures as appropriate, to face these problems ; and a point has been reached in history when we must shape our actions throughout the world with a more prudent case for their environmental consequences.

Part II of the Declaration contains principles. Principle 1 which is of general nature states that man has the fundamental right to freedom, equality and adequate conditions of life, in environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. Principle 2 states that the natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the present and future generations through careful planning or management, as appropriate. According to Principle 7, States shall take all possible steps to prevent pollution of the seas by substances are liable to create hazards to human health, to harm living resources and marine life to damage amenities or to interfere with other legitimate uses of the sea. Principle 8 recognises that economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life. Principles 21 and 22 are particularly important for they proclaim certain principles of international law respecting environmental preservation. Principle 21 provides : "States have, in accordance with the Charter of the United Nations and the principles of international law the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." According to Principle 22, "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." These two principles represent "the most significant consensus that has been reached in the field of international co-operation among States respecting environmental preservation"...[35] Further, "These principles reflecting the fundamental international responsibility of States regarding enviromental preservation and pollution control were accepted by the 27th General Assembly in a Resolution [G. A. Res. 2996 (XXVII)] which declared that no resolution adopted at that session could affect those principles." [36] Last but not the least, Principle 26 states that man and his environment must be spared of the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement in the relevant international organs, on the elimination and complete destruction of such weapons.

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[30] "Act Now on Pollution Don't Just Talk", The Plain Truth (a monthly Magazine), February, 1970, p. 3 at p. 9.

[31] Oscar Schachter and Daniel Server, "Marine Pollution Problems and Remedies." 65 A.J.I.L. 84 (1971); see also "Marine Pollution Potential for Catastrophe", U. N. Monthly Chronicle, Vol. VIII No. 3 (March 1971) p. 28.

* IAS (2005) Q. 7(b).

[32] See U. N. Doc. A/CONF./48/14 and Corr. 1.

[33] Olmstead, note 14, at p. 253.

[34] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 406.

(ii) The Action Plan for the Human Environment.—The Action Plan for the Human Environment is divided into three parts—(A) Framework for environmental action; (B) Recommendations for action at the international level; and (C) The Action Plan. The broad types of action that make up the plan are—(a) the global environmental assessment programme (Earthwatch) ; (b) Environmental management activities; and (c) International measure to support the national and international actions of assessment and management. The functions of Environmental Assessment (Earthwatch) include evaluation and review—to provide the basis for identification of the knowledge needed and to determine the necessary steps to be taken; research—to create new knowledge of the kinds specifically needed to provide guidance in the making of decisions; monitoring—to gather certain data on specific environmental variables and evaluate such data in order to determine and predict important environmental conditions and trends; and Information exchange—to disseminate knowledge within the scientific and technological communities and to ensure that decision-makers at all levels shall have the benefit of the best knowledge that can be made available in the forms and at the times in which it can be useful. Environmental management covers functions designed to facilitate comprehensive planning that takes into account the side effects of man's activities and thereby to protect and enhance the human environment for present and future generations. Lastly, International measures to support the national and international actions of assessment and management relate to measures required for the activities in the other two categories (*i.e.*, environmental assessment and environmental management) and include Education, training and public information, Organizational arrangements and Financial and other forms of assistance.

(iii) The Resolution on Institutional and Financial Arrangements.—The Resolution on Institutional and Financial Arrangements recommended the establishment of following institutions and financial arrangement :—

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[35] Olmstead : note 21 at p. 252.

[36] Ibid., at p. 253.

(a) **Governing Council For Environmental Programmes (UNEP).**—The Resolution recommended that "the General Assembly establish the Governing Council for Environmental Programmes composed of 54 members, elected for three-year terms on the basis of equitable geographical distribution." Resolution 2997 (XXVII) adopted by the General Assembly on December 15, 1972 relating to institutional and Financial Arrangements for International Environmental Co-operation established a 58 members (instead of 54 as recommended by the Conferene) Governing Council for Environmental Programme and directed it to "keep" under review the world environmental situation in order to ensure that emerging environmental problems of wide international significance receive appropriate and adequate consideration by Governments". To assist the Council in the task, the Executive Director prepares each year a report on the state of the environment.

(b) **Environment Secretariat.**—The Resolution recommended the establishment of a small Secretariat in the United Nations to serve as a focal point for environmental action and co-ordination within the United Nations System in such a way as to ensure a high degree of effective management.

(c) **The Environment Fund.**—In order to provide for additional financing for environmental programmes, the resolution recommended that a voluntary fund be established in acordance with existing United Nations financial procedures.

(d) **An Environmental Co-ordination Board.**—In order to provide for the maximum efficient co-ordinations of United Nations environmental programmes, Resolution recommended the establishment of an Environmental Co-ordinating Board, chaired by the Executive Director under the auspices and within the framework of the Administrative Committee on Co-ordination.

(iv) Resolution on Designation of World Environment Day.—The Resolution on World Environment Day recommended that June 5 be observed as World Environment Day. Subsequently this recommendation was adopted by the General Assembly through a resolution.

(v) Resolution on Nuclear Weapon Tests.—The Resolution on Nuclear Tests condemned nuclear tests, particularly those carried out in the atmosphere and called upon States to refrain from conducting such tests as could contaminate the environment. Principle 26 of the Declaration on the Human Environment, which has been referred earlier, also deserves mention in this connection.

(vi) Resolution on the convening of a Second Conference on Environment.—The Resolution recommended that the General Assembly should take initiative and decide to convene a second United Nations Conference on the Human Environment at the appropriate time.

(vii) Decision to refer to Governments recommendations for action at the national level.—The Stockholm Conference also decided to refer to State Governments recommendations for action at the national level.

In addition to the above-mentioned results of the Stockholm Conference, reference may also be made to the recommendation of the Conference that a Conference be convened in the end of 1972 by the United Kingdom for the adoption of the draft articles of a convention on Ocean Dumping.

Work of UNEP and other Developments in the field of Environment.—Some of the above-mentioned decisions and recommendations of the Stockholm Conference, 1972 were implemented by resolutions of General Assembly in its 27th Sessions in 1972. In this connection, resolution 2997 (xxvii), which has been briefly referred earlier, deserves a special mention. Through this resolution a 58-member Governing Council for the Environmental Programme (UNEP) was set up. The Governing Council held its first Session in Geneva in June 1973. As pointed out by Mr. Maurice Strong, Executive Director of the UNEP, in his address to the UNEP Governing Council which met in Nairobi (Kenya) from 17 April to 2 May, 1975 for its third Session, the concept of UNEP as leader, catalyst stimulator and co-ordinator in effect the hub of the environmental action centres had begun to become a reality.[37] He said that most of the activities which affect the environment are carried out for purposes and by organizations for which environment is not the principal concern. UNEP's task is thus to help assure that environmental factors are given adequate attention in taking decisions concerning such activities and to improve the quality of the decisions by which the environment is affected.[38] The Council reached broad agreement on and over all strategy in environmental policy to put the principles and recommendations endorsed by the Stockholm Conference on the Human Environment and General Assembly into action. It allocated $5 million to the budget of *Habitat* ; the United Nations Conference on Human Settlements; urged the Conference on the Law of the Sea to incorporate in draft treaties effective provisions for the protection of the marine; and provided $500,000 to support the programmes and preparations for the United Nations Conference on Desertification (1977).[39]

The year 1975 proved to be significant from the point of environment for as a result of ratifications by a number of States, seven important global conventions came into force in 1975. They are : (1) The Convention on International Trade in Endangered species of wild Fauna and Flora, 1973; (2) The Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971 (it has been signed and ratified by 168 countries); (3) The Convention concerning the protection of the Wold Cultural and Natural Heritage, 1972 (this convention has 191 countries as parties); (4) The International convention relating to Intervention on the High Seas in cases of Oil Pollution Casualities, 1969 (it has been signed and ratified by 88 countries); (5) The International convention on Civil Liability for Oil Pollution Damage, 1969 (as of 2013 it had 133 countries as parties); (6) The Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircrafts, 1973; and (7) The Convention for the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972 (as of 2013, it had 87 countries as parties).

In his report to the fourth session (from 30 March to 14 April, 1976) of the Governing Council of UNEP, the Executive Director, Mostafa K. Tolba pointed out that international collaboration, on a scale seen in the history of the world is essential if mankind is to meet basic human needs while safeguarding the environment for future generations. The ratification of above-noted important global conventions on matters relating to the environment is an encouraging sign in that respect.[40]

One of the greatest contribution of the Governing Council of U.N.E.P. was the holding of *Habitat Conference in 1976*. Its over-all theme was the formation and maintenance of human settlements. The Conference declared that "Nations must avoid the pollution of the biosphere and the oceans and should join in the effort to end irrational exploitation of all environment resources, wheher non-renewable or renewable in the long term."[41] In 1977, a series of meetings on environmental questions were held in the Caribbean, Tunis and Nairobi under the auspices of the UNEP. A great landmark in the field of environment was the *United Nations Conference on Desertification held in Nairobi, Kenya* from 29th August to 9th September, 1977. The Conference adopted a Plan of Action containing 26 recommendations for action at the national, regional and international levels. The Conference recommended that UNEP, with its Governing Council and the Environment Co-ordination Board, should be responsible for following up and co-ordinating implementation of the Plan and that the U. N. regional commissions would have responsibility for co-ordinating, catalysing and executing intra-regional programmes adopted by Member States.[42]

Habitat II

Preparations for the U. N. Conference on Human Settlements (Habitat II) were launched at the organisational session of its Preparatory Committee held from 3rd to 5th March, 1993 at Newyork. The major objective of Habitat II is to address issues in the context of sustainable development. The Conference is expected to formulate a global plan of action to improve people's living environment for the first two decades of the next century, building on the legacy of the first Habitat Conference held in Vancouver, Canada, in 1976.[43]

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[37] U. N. Monthly Chronicle, Vol. XII, No. 5 (May 1975), p. 34.

[38] Ibid, at p. 19.

[39] U. N. Monthly Chronicle, Vol. XII, No. 5 (June 1975), p. 27.

[40] U. N. Monthly Chronicle, Vol. XIII, No. 3 (March 1976), p. 44.

[41] U. N. Monthly Chronicle, Vol. XIII, No. 7 (July 1976), p. 52.

[42] U. N. Monthly Chronicle, Vol. XIV, No. 9 (October 1977), p. 36.

Nairobi Declaration (1982).—The tenth anniversary of the U.N. Conference on the Human Environment, held in Stockholm in 1972 was celebrated in Nairobi from 10th to 18th May, 1982 by the world community of States. A Declaration called Nairobi Declaration was adopted. It requested Governments and peoples to build on the progress so far achieved, but expressed serious concern about the present state of environment world-wide, and recognized the urgent necessity of intensifying the efforts at the global, regional and national levels to protect and improve it. According to the Declaration, the principles of the Stockholm Declaration are as valid today as they were in 1972. They provide a basic code of environmental conduct for the years to come. The world community of States solemnly reaffirmed its commitment of the Stockholm Declaration and Action Plan, as well as further strengthening and expansion of national efforts and international co-operation in the field of environmental protection. It urged all Governments and peoples of the world to discharge their historical responsibility collectively and individually, to ensure that our small planet is passed over to future generations in a condition which guarantees a life in human dignity for all.

At its Helsinke meeting (25th April to 6th May, 1983), the Commission on Human Settlements called for the immediate launching by all Governments of activities related to the International year of shelter for the Homeless (1987). It also called for increased efforts to ensure that adequate land is made available to the poor and disadvantaged in developing countries to enable them to build and improve their own shelter and neighbourhoods.

Environment and Charter of Economic Rights and Duties, 1974

N.B.—For this please see matter discussed under the heading 'Environment' in chapter on "......... New International Economic Order".

Environment and the U.N. Convention on the Law of the Sea, 1982.—Part XII of the U.N. Convention on the Law of the Sea, 1982 deals with the protection and preservation of marine environment. Part XII begins with the general obligation of States to protect and preserve the marine environment.[44] It deals with measures to prevent, reduce and control pollution of the marine environment[45] and recognises the duty not to transfer damage or hazards or transform one type of pollution into another.[46] It also deals with environmental problems such as pollution from land-based sources,[47] pollution from sea-bed activities,[48] pollution from activities in the International Sea-bed Area,[49] dumping[50] pollution from vessel[51] and pollution from or through the atmosphere.[52]

So far U.N. Convention on the Law of the Sea, 1982 has been ratified by 168 countries (167 U.N. Members plus European Union).

The System—Wide Medium Term Environmental Programme.—A brief reference may be made here to the System Wide Medium Term Environmental Programme (SWMTEP) which was evolved in 1982 and though developed by the Executive Director of the UNEP now represents the environment programme of the United Nations System. Following the pattern of UNEP its programme for the medium term 1984-89 is divided into fifteen items—Environment and Development; Environmental awareness; Atmosphere,

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[43] U. N. Chronicle Vol. XXX, No. 2 (June 1993), p. 65.
[44] Ibid, Article 192.
[45] Ibid, Article 194.
[46] Ibid, Article 195.
[47] Ibid, Article 207.
[48] Ibid, Article 208.
[49] Ibid, Article 209.
[50] Ibid, Article 210.
[51] Ibid, Article 211.
[52] Ibid, Article 212.

Oceans; Waters; Lithosphere; Natural Disasters; Terrestrial Ecosystems; Living Resources; Health and Welfare; Working Environment, Human Settlements; Energy; Industry and Transportation; and Arms Race and Environment. Each of these 15 programmes divided into two or more sub-programmes brings the total to 38 programmes.

Environmental Perspective to the year 2000 and Beyond.—The General Assembly has established a special commission to propose long-term environmental strategies for achieving sustainable development to the year 2000 and beyond.

1994 World Conference on Natural Disaster Reduction[53]

Nuclear Safety and Environment.—Nuclear explosions, accidents etc. adversely affect the environment. It is unfortunate that before accident at Chernobyl Nuclear Plant on 26th April, 1986 sufficient attention was not given to this inadequacy of international law. As a result of the recommendations of the First Review Conference of Non-Proliferation Treaty, 1968, a Convention on the Physical Protection of Nuclear Material was adopted in 1979. Under this Convention, it is the obligation of Parties to the Convention to take action to check theft, sabotage etc. of nuclear material. But the Chernobyl accident proved that there is need to consider this matter seriously.

Accident at Chernobyl Nuclear Plant, 50 Km. away from Kiev, the capital of Ukraine, on 26th April, 1986 caused a wave of shock and fear throughout the world. Due to fire in the Chernobyl Nuclear Plant radio-active dust spread more than 1,600 Km. Several countries including Poland, Sweden, Norway, Denmark and Finland were adversely affected by the said spread of radio-active dust. Much greater area could have been adversely affected if the direction of the winds had not suddenly turned towards the Soviet Union. On 29th April, 1986, Soviet Union announced the happening of the accident at Chernobyl Nuclear Plant and asked several countries such as West Germany and Sweden to render help to extinguish the fire at the Nuclear Plant.

According to Russia, 7 persons were killed and 299 persons were admitted to hospitals for radio activity. But according to the Scientists of Western countries, the number of persons dying in the accident was in thousands. According to an American Defence Official, a study of the informations received from U.S. Spy Satellite, 2000 persons died as a result of the fire in Nuclear Plant at Chernobyl.

The accident at Chernobyl Nuclear Plant was due to human and technical errors. It has been admitted by the Soviet Union that the accident was caused due to "a whole series of gross violations of operating regulations by workers." Whatever be the causes of the accident its adverse effects have been grave and wide spread. India was also affected, though slightly, by the Chernobyl disaster. A radio-active plume originating from Chernobyl in Russia hit India on May 14, 1986 and its impact was recorded at the atomic power stations at Tarapur (near Bombay), Rawatlata (Rajasthan) and Kalpakkam (Madras) until May 26, 1986. According to a source at the Bhabha Atomic Research Centre in Bombay, Tarapur, recorded at the highest level of 7,700 and 7,160 milli beequeral per gramme on May 21 and 22, 1986. The permitted value is 3000 mbq. per gramme. However, it was pointed out that the impact of this radio active plume in India was very small and there was no need to worry about it.

According to Dr. John Gofman, a Professor emeritus of medical physics at the University of California at Berkeley, more than one million people throughout the world could develop cancer due to exposure to the radioactive fall out from the Soviet Union's Chernobyl Nuclear accident and half that number would die from it. On account of Chernobyl accident, 9,50,000 persons were removed from the affected areas. But 15 lakhs including 4,60,000 children remained in the affected areas. Even after five years of the accident, problems created by the accident have not been satisfactorily solved. This information was given by the Health Minister of Ukraine on 11th April, 1991. On 2nd April, 1992, the Ukrainian authorities have finally decided to shut down the Chernobyl Nuclear Power Plant.

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[53] This has been discussed later on in this chapter after the discussion of "Earth Summit".

In his report to the 41st session of the U.N. General Assembly, Secretary-General, Mr. Javier Perez-de-Cuellar has suggested the setting up a "Nuclear Alert Centre" to reduce the risk of an accidental nuclear war and to lessen the 'chilling' possibility of isolated launchings by those who may clandestinely gain access to nuclear devices. It has been rightly pointed out, "The Chernobyl syndrome has rammed the lesson home that no country can remain safe if the nuclear genie manages to escape......... the moral. It is one world or none. The split atom and a sharply divided world cannot co-exist".[54]

It is well established rule of international law that a sovereign State may do anything within its territory provided that its adverse effects do not fall upon another sovereign State.[55] International Law does not permit any sovereign to conduct any activity or to do anything within its territory or elsewhere which may adversely affect other States. In this connection, Nuclear Test case[56] deserves a special mention. In this case, the International Court of Justice directed France not to conduct its planned nuclear tests as the radio-active dust eminating from them caused health hazards to the people of Australia and New Zealand. If, however, the activities conducted by a State within its territory do not adversely affect other States, it will not constitute any violation of international law.[57] For example, when India conducted nuclear test at Pokhran (Rajasthan), no neighbouring country was adversely affected for there was no increase in the level of radio-activity in any of the neighbouring States and as such India was not guilty of any violation of the rules of international law.[58] But the position will be different if what a State does within its territory adversely affects other States. It will constitute international tort and such a State will be liable to make reparation to the aggrieved States. The above discussion makes it clear that accident and fire at Nuclear Plant at Chernobyl adversely affected other States. The former Soviet Union was, therefore, clearly liable to make reparation to States which were adversely affected.

It may be noted here that the accident at Chernobyl Nuclear Plant brought into focus the inadequacies and deficiencies in respect of nuclear safety and environment. Consequently a special session of International Atomic Energy Agency (IAEA) was immediately called and on 26th September, 1986, it adopted two Conventions—(i) Convention on Early Notification of a Nuclear Accident or Radiological Emergency; and (ii) Convention on Assistance in the Event of Nuclear Accident or Radiological Emergency. The first Convention came into force on 27th October, 1986 and the second Convention entered into force on 26th February, 1987. Under the first Convention, it is the obligation of the State parties to the Convention to transmit information of nuclear accident to the States likely to be affected by it. This obligation is for military and non-military activities but will not apply to nuclear weapons. The five nuclear weapon States have indicated that they will transmit the said information. This Convention is a step in the right direction.

The Convention in Early Notification of a Nuclear Accident in Radiological Emergency was signed on 29th September, 1986. It became effective on 27th October, 1986. So far it has been ratified by 118 countries (116 + European Atomic Energy Community and the FAO).

The Convention on the Assistance in the event of a Nuclear Accident of Radiological Emergency was adopted in 1986. It became effective on 26 February, 1987. So far it has been ratified by 111 countries.

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[54] See Editorial Entitled "The Chernobyl Syndrome", The Pioneer, 16 May 1986.

[55] See S.K. Kapoor, "The Legality of Nuclear Testing : the Pokhran Explosion", IJIL, Vol. 14 (1974) p. 452.

[56] See Nuclear Test case (*Australia* v. *France*) Judgment of 20 December, 1974, (1974) I.C.J. Rep. 253; Nuclear Test case (*New Zealand* v. *France*) Judgment of 20 December, 1974, (1974) I.C.J. Rep. 457.

[57] See G. Schwarzenberger, "The Legality of Nuclear War (1958) p. 49 : M.S. Mc Dougal, The Hydrogen Bomb Tests and International Law of the Sea, AJIL Vol. 49 (1955) p. 356 ; M.S. Mc Dougal and Nobert, A Schhin in Yale Law Journal, Vol. 14 (1955) p. 629.

[58] See S. K. Kapoor, note 55, at p. 485.

Under the above-mentioned Conventions, nuclear weapons have not been included. Endeavours should, therefore, be made to include nuclear weapons also in respect of transmission of nuclear accidents.

Reference may also be made here to the International Convention on Nuclear Safety which was opened for signature on 20th September, 1994 at the thirty eighth session (held from 13 to 23rd Sept, 1994) of the General Conference of International Atomic Energy Agency (IAEA). This is the first legal instrument, which addresses the issue of nuclear power plants safety world-wide. The convention applies to land-based civil nuclear plants, and obliges the parties to establish and maintain proper legislative and regulatory framework to govern safety. Through the convention, States commit themselves to fundamental safety principles for nuclear installations and agree to participate in periodic pre-review meetings on implementation of their obligations.

On 20th September, 1994, the convention was signed by 38 countries including Canada, France, India, Pakistan, Republic of Korea, Russian Federation, South Africa, United Kingdom and the United States.

It is clear from the foregoing that nuclear safety and environment are inter-related to each other. With a view to ensure pollution free environment, special attention should be given to nuclear safety. States making peaceful and other uses of nuclear energy have some obligations towards international community. The progress made so far in this connection is far from satisfactory.

It has been rightly pointed out, "The right of private individuals to be guaranteed a decent and safe environment is one of the newer rubrics of human rights law."[59] Further, "Proposals have been advanced to include the rights of individuals and non-governmental entities to a pure and decent environment within the ambit of present day human rights Conventions, *i.e.*, United Nations Human Rights Covenants and the European Convention on Human Rights............Fortunately, the foundations are in place. When coupled with existing regional and international Conventions, such as those relating to Ocean pollution, it becomes clear that a massive corpus of law does in fact exist. It is becoming necessary to bring together this body of law in order to deal effectively with the growing destruction of environment. Secondly, additional treaty instruments are required, as an immediate solution."[60]

Terrorist activities have also posed a serious threat to nuclear establishments. Several conventions have been concluded to face this challenge. In this connection, International Convention for the Suppression of Terrorist Bombings, 1997, International Convention for the Suppression of the Financing of Terrorism 1999 and International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 deserve special mention.

International Convention for Suppression of Terrorist Bombings, 1997 entered into force on 23 May, 2001. As of 5/10/2011, 164 countries had become parties to this convention. International Convention in Suppression for Financing of Terrorism, 1999, it entered into force on 10 April, 2002. As of June 2013, 182 countries had become parties to this convention.

Reference may be made here to the Convention on Early Notification of a Nuclear Accident of Radiological Emergency was adopted in 1986. It entered into force on 27 October, 1986. Moreover, Convention on Assistance in the Event of Nuclear Accident or Radiological Emergency was also adopted in 1986. It entered into force on 26 February, 1987. So far 86 countries have ratified this convention.

Legality of the use by a State of Nuclear Weapons in Armed Conflict and its effects on Health and Environment.—On 27th August, 1993, the World Health Organization (WHO) requested the International Court of Justice to give an advisory opinions on the following question :

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[59] W. Paul Gormley, "The Right to a Safe and Decent Environment", I.J.I.L., Vol. 28 (1988) p. 1.

[60] Ibid, at pp. 31-32.

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under International law including the WHO Constitution?"

Before the World Court, it was contended by some states, specially America, that the Court should decline to give advisory opinion because the question before the Court is an essentially political one and is beyond the scope of the WHO's proper activities.

On 8th July 1996, the International Court of Justice held that the request for an advisory opinion submitted by WHO does not relate to a question which arises within the scope of activities of that organisation in accordance with Article 96, paragraph 2, of this Charter and as such an essential condition of founding its jurisdiction in the case is absent. The Court, therefore, refused to give the advisory opinion. The Court arrived at this decision by a majority of 11 votes to 3.

However, it may be noted here that earlier the General Assembly *vide* its resolution 49/75-K dated December 15, 1994 had requested the International Court of Justice to give its advisory opinion on the following question.

"Is the threat or use of nuclear weapons in any circumstance permitted under International Law ?"

The General Assembly had made this request in pursuance of Article 96, paragraph 1 of the Charter of the United Nations. Acceding to the request of the General Assembly, the World Court gave its advisory opinion on 8th July, 1996, i.e. the same day on which it refused to give advisory opinion at the request of WHO. The Court unanimously held that neither under customary nor conventional international law, there is specific authorisation for the threat or use of nuclear weapons. Moreover, a threat or use of nuclear weapons which is contrary to Article 2(4) of the U.N. Charter and which fails to meet the requirements of Article 51 is unlawful. The Court further held that a threat or use of nuclear weapons ought to be compatible with the requirements of international law applicable in armed conflict, especially, those of the principles and rules of internal humanitarian law, as well as with specific obligations under treaties and undertakings which expressly deal with nuclear weapons. Though the Court conceded that the use of nuclear weapons seems scarcely reconciliable with respect to the requirements of the principles and rules applicable in armed conflict, nevertheless the Court expressed the view that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in *any circumstance*.

It was rather unfortunate that the World Court did not accept the request of the WHO to give advisory opinion. If the Court had accepted the request the matters relating to health and environment arising out of the use of nuclear weapons would have been clarified. Since the Court gave its advisory opinion on a similar question submitted by the General Assembly, it shows that the Court did not consider the question as political. As regards the opinion of the Court that the question is not within the scope of activities of WHO, serious doubts have been expressed. Since the use of nuclear weapons even in limited scale jeopardises health and affects adversely the environment which in its turn again causes adverse effects on health, it does not seem to be plausiable that the question referred by the WHO is beyond the scope of its activities.

Global Warming, Depletion of Ozone layer etc. : 'Global Warming : Global Warning'

Probably more dangerous than the danger of the use of nuclear weapons is the warming of the earth and depletion of ozone layer. According to the scientists, as a result of the warming up of the earth, water of the seas will rise 6 feet from its present level. If the glaciers of the Arctic and Antarctic melt, water of seas will rise more than 3 feet and as a result of this, major cities of the world and all the ports will submerge in water. In second half of December, 2002, the scientists reported that in past summer (before 2002), the melting of Greenland glaciers and Arctic Ocean Sea ice reached levels not seen in decades. It is feared that if the present trend of shrinking continues at current rates year round average sea ice coverage may drop by 20 per cent by 2050 and the Arctic may be almost ice free during summer months. By the year 2030, temperature of earth will increase by 4.5 Degree centigrade. The gravity of this situation is evident from the fact that during last 10,000 years temperature of the earth has varied not more than 2 Degree centigrade and in the Ice Age temperature of the earth was only five Degree centigrade less than the present temperature.

The main reason for the warming up of earth is the emission of carbondioxide from the burning of coal, oil fossil fuels and industrial gases. The earth is warming up as if it were a green-house. Since the industrial revolutions, the emission of carbondioxide has increased by 25% and in the next 50 years it is likely to increase by 50 per cent more. Nibous oxide, methan chlorifloro carbons (CFCs) and other green-house gases are warming up the earth. The only practical way to solve green-house problems is to reduce the production of energy. But the countries of the world are not prepared for this.

In the upper atmosphere, ozone layer protects earth from ultraviolet rays of the sun. Ultraviolet rays cause cancers, especially skin cancers, cataracts, destruction of aquatic life and vegetation and loss of immunity. The ozone layer shields the earth from deadly ultraviolet rays of the sun. One per cent depletion of the ozone layer may be responsible for reaching of 2 to 3 per cent more of ultraviolet rays on earth. In 1983 British Scientists witnessed for the first time a hole in ozone layer in South Pole. Two years after that *i.e.* in 1985, a Treaty was signed in Vienna on conservations of ozone layer. This was followed by signing of the Montreal Protocol on 16 September, 1987 by 56 countries stipulating a 50 per cent reduction of CFCs by 1998. This was followed by Helisinki meeting which stipulated total elimination of CFCs by the end of this century. It is based on the estimates that one per cent of the ozone layer has already been damaged. The hole in ozone layer is moving towards densely populated areas of America and its area is as big as the size of America. Montreal Protocol has come into force since January 1989 as more than one thirds of its signatories have ratified it. India has, however, yet not ratified it. India has claimed that for ending the CFCs causing deletion of ozone layer, she should be given the compensation of 2 billion dollars. Moreover, India does not see any rationale of ratifying the protocol because its release of CFCs is just 6,000 tons a year which is equal to one and a half day's of world total release. India's per capital consumption is. 03 Kg. as compared to developed countries per capita consumption of one Kg. The developed countries release 95% of CFC's. The developing countries share is only 5% yet the treaty stipulates each developing country will be allowed a maximum 300 gms. per capita per year consumption of CFCs until 1989. Then CFC consumption must be frozen at the level reached by 1989 if it is well below the maximum limit. On the other hand industrialized countries are allowed a per capita CFC consumption of 500 gms. per year until 1989. Thereafter it will be reduced to half that amount by 1993. The countries which do not sign the protocol will not be allowed to import certain CFCs and halons from the signatory countries. They will also not be able to import technology or obtain financial aid to produce such chemicals. So far, 17 countries have ratified the protocol. In the last week of February 1992, India indicated that she might sign the Montreal Protocol in March 1992. On 7th April 1992, the Minister of State for Parliamentary Affairs told that Government has decided to join the Montreal Protocol after the amendments to protocol adopted at London in June, 1990 come into force.

The Montreal Protocol came into force on 1st January, 1989 as more than one-third of signatory states have ratified it. The fourth meeting of the State Parties of Montreal Protocol concluded on 25th November, 1992 at Copenhagen.

It need not be overemphasized that the developed countries have capacity to discover alternative sources of energy. The developing countries are not in a position to give up or reduce consumption of coal, oil, fossil fuels and other CFCs. Therefore, India's claim for compensation is reasonable and justified. An Ozone Fund should be established so that countries such as India be compensated. The idea of financial assistance to developing countries to help them to change over to CFC free substitute was first mooted by the Executive Director of the U.N. Environment Programme (UNEP), Dr. Mostafa Tolba, at the Helisinki meeting. Since the problem is worldwide, its solution should also be found on a world scale keeping in view the interests of developing countries. Since developed nations release 95 per cent of CFCs, they have special and more obligations in this connection. On 11th March, 1989, 24 countries including Hungary, India, Italy, Norway, Japan, Netherlands, Spain, and France signed Hague Declaration. The Declaration adopted the principle, *inter alia,* that countries to which decisions taken to protect the atmosphere shall prove to be an abnormal or special burden, in view, *inter alia*, of the level of their development and actual responsibility for the deterioration of the atmosphere, shall receive fair and equitable assistance to compensate them, for bearing such burden. To this end mechanisms will have to be developed.

In view of the gravity of the situation U.N. Environment Programme (UNEP) chose *"Global Warming: Global Warning"* as a slogan for environment day of this year (*i.e.* 5th June, 1989). The problem is really very serious and soft options will not solve it. It requires strong measures, will and determination of states to implement it. Though the international community has awakened to the gravity of the problem, measures taken so far and progress achieved is far from satisfactory.

While inaugurating the ministerial meeting of the small states conference on sea level rise being held in the island resort of Kurumlia (Maldives), President Gayoom called on the affluent nations and the international community to help the fight of small island nations against the threat of being submerged by the rise of sea level. The conference was being held in the Maldives because according to predictions, it would be the first to go under water. As a first step, President Gyoom called for agreement by the world community for stabilising and subsequently restricting the green-house gases released into the atmosphere.

The seminar organised by the Malaysian forum of environmental journalists and the Asian Institute for Development Communication called for setting for establishing a research centre to prevent degradation of the earth's environment by finding substitutes for existing chemicals such as CFCs used in various industrial applications.

On 21st September, 1989, the Soviet Deputy Foreign Minister proposed that a U.N. Conference on the Environment in 1992 should be held at the summit level. He was speaking at a press conference at the United Nations Headquarters. As regards the preparations being made for an international conference on environmental problems, he said that in order to give a strong push to the practical deeds in the field of environment, the proposed international conference of 1992 should adopt some kind of a code of environmental behaviour. Though it is a good idea, the problem has assumed such serious magnitude that world community cannot afford to remain inactive and complacent till then. Continuous and determined efforts are required to check the degradation of the earth's environment.

It may be noted here that in September 1991, delegates from 116 countries attended the ten-day warming at Naircbi with a view to enter into an international pact to slow global warming by controlling man-made emissions of carbon dioxide which trap heat, and are believed to be the main cause for gradual warming of the earth's atmosphere while the experts of most of the countries supported the idea of stablising carbon-dioxide emission at 1990 levels by the year 2000, America, which is the world's biggest emitter of carbon dioxide, refused to set a specific target on reducing the emissions, saying scientific data on the issue is uncertain and the costs of implementing an emissions reductions policy are unpredictable. Thus the U.S. was accused of 'delaying' the pact. The U.S. is the world's worst polluter besides consuming the most resources and giving out 21 per cent of the Chloro Fluro Carbons (CFC's) in the atmosphere.

The problem of global warming and consequences thereof is becoming more and more serious day by day. Recently scientists have detected cases of sheep becoming blind and children suffering allergies and sunburns in southern Chile because of ozone depletion. The Scientists have also detected a new ozone hole in the earth's stratospheric layer. Being alarmed by this, the U.S. and British Governments have now decided to hasten the process of phasing out chloroflurocarbuns (CFCs), the main agents of ozone destruction they have revised the target to halt production of CFCs altogether by 1995 instead of earlier target of doing this by 2000.

The developed countries have succeeded in evolving appropriate ozone-friendly substitutes and are now in a position to hasten the phasing out CFCs earlier than the anticipated deadline. The Third-world countries cannot afford the costs of using such advanced technologies. It was on account of this reason India and China refused to sign Montreal Protocol. India therefore insisted on the "polluter must pay"[61] principle and succeeded in the creation of a special 240 million fund to be financed by the developed countries to help country like India to phase out chlorfluro carbons. Later on, it was agreed that the size of the Montreal Protocol Fund would be increased to U.S. $ 500 million for the three year period 1994-96. The developed countries have agreed on a minimum level of funding of $113 million annually during 1993-1994. Despite all these efforts the situation is still grim and complacency in respect may shell disaster.

It has been reported that condition of the Ozone layer over the Central Antarctic deteriorated at the beginning of October 1993 to a new all time low with 60 per cent of the earth's protective sheath there having been destroyed. The World Meterological Organisation (WMO) said at Geneva that at a height of between 14 and 19 km. the Ozone over the Antarctic, a continent bigger than Europe, almost disappeared.

In 1999, the ozone hole seen on Antarctic is reported to be the largest seen so far. It was greater than one crore square miles and lasted for 100 days. It became visible 15 days prior to the last year and its period also increased from two three weeks. According to a recent study, by the middle of next century short radio waves, which are essential for long distance communication, may be destroyed. According to the study of a scientific panel a world-wide rise in temperature at the Earth's surface is "undoubtedly real". The Panel has pointed out in January, 2000 that the increase in temperatures over the past century between 0.7 and 1.4 degrees Fahrenheit—a 30 per cent increase from earlier projections that reflects record shattering high temperatures in the late 1990s. The Panel warned that further warming could disrupt agriculture and cause sea levels to rise swamping coastal cities. The 11 member panel was organized by the Academy of Sciences National Research Council (NRC). In the first week of December, 1999, the U.N. said that planet's protective ozone layer would start to heal in the next few years but the non-government organisations disagreed with this and slammed the U.N. for not moving faster.

The conclusion of Kyoto Protocol on Global Warming (1997) is a great land-mark, for preventing global warming. The Protocol fixed the target for reducing greenhouse gase. According to the Protocol, European Union, Bulgaria, Czechoslovakia, Estonia, Latvia, Liechtenstein, Luchania, Monaco, Romania, Slovakia, Slovenia and Switzerland were to reduce 8%. America was required to reduce emissions by 7%. Iceland and Austraila were to reduce 10% and 8% respectively. The target covered emissions of six main greenhouse gases - carbon di oxide (CO_2), Methane (CH_4), Nitrous oxide (N_2O), Hydro-fluro carbons (HHCs), Perfluoro-carbons (PFCs) and sulphur-hexca fluoroide (SF_6).

America, however indicated its intention not to ratify and withdrew itself from the Treaty in March, 2001.

Forty-eight States Parties classified as least developed countries by the U.N. were given special consideration under the convention on account of their limited capacity to respond to climate changes and adopt to adverse effects.

Kyoto Protocol entered into force on 16 February, 2005 because on 18 November, 2004 Russia deposited its instruments of ratification with the U.N. thus marking the start of the ninety day count to the entry into force of the Protocol, an international legal finding agreement to reduce greenhouse gases emissions worldwide.

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[61] It may be desirable to note here that total per capita use of the C.F.Cs (used in refrigeration, airconditioning etc.) is 1.22 kilogrammes highest in the U.S. Japan and Europe are not far behind. In the rest of the world, consumption rates are far lower.

The Kyoto Global Warming Treaty entered into force on 16 February, 2005. As of November, 2009, 187 countries had signed and ratified the treaty. but a boycott by the biggest polluter of the world, the U.S. has caused a great upset. America refused to ratify the treaty because according to it it would harm the economy and is flawed by the lack of restrictions by emerging economies. China, India and Australia, the other developed nations not to join the treaty stated that were on tract to cut emissions by 30%.

The U.N. Intergovernmental Panel on Climate Change (IPCC) submitted a report forecasting that in coming years famine, hot winds, floods etc. will occur frequently and will gradually increase sea level. The Panel also clarified that more than 90% global warming is due to human activities. The said Panel comprises of 2,300 scientists of 130 countries. According to Panel the temperature increase would be more than what was forecasted in 2001. According to panel by 2100, the rise in temperature is likely to be between 1.1 to 6.4 degrees. As the forecast of 2001, the rise in temperature was expected to be between 2 to 4.5 degrees. As per report of the Panel (IPCC), by the end of this century the sea level is expected to rise from 18 to 59 cm. If the snow of the poles continues to melt at the current speed, there will be additional increase of 10 to 20 cms.

In May 2007, a U.N. report has said that Brazil, China and India have reduced emission of gases as was expect of developed countries. On 17 May, 2007 Clinton Foundation and Microsoft Corporation disclosed to have developed a technique (new software) which would watch global warming of prominent cities. On 17 May, 2007 in order to solve the problem of 16 cities including Mumbai a five billion dollar initiative was signed.

In the meantime a new warning has been made that climate change has weakened the capacity of Antartic sea to absorb the excessive carbon-di-oxide of the world. This has been reported in U.N. Report published in June, 2007. More than 150 crore people of Asia may be affected by it.

The facts of dangerous forecasts about global warming have ultimately influenced even countries like America, on June 7, 2008, the leaders of Group-8 undertook to reduce emissions upto 50%. Alongwith this voluntary act America asked India and China to reduce emission of greenhouse gases. In fact, America desires to present India and China as examples to other States.

On 27 September, 2007 under United Nations Framework Convention on Climate Change summoned a meeting of prominent nations of the world to call a conference in December, 2007. These nations included America, India, China and Brazil. The conference was called on 14 December, 2007 at Bali (Indonesia) following of the main decisions of the United Nations Framework Convention on Climate Change Revised Draft Decision, 14 December, 2007, Bali, Indonesia—

(1) Decided to launch a comprehensive process to enable the full, effective and sustained implementation of the convention through long-term cooperative action, now, upto and beyond 2012 in order to reach an agreed outcome and adopt a decision at its fifteenth session.

(2) Decided that the process shall be conducted under a subsidiary body under the convention hereby establish and known as the Ad Hoc Working Grants on long-term Cooperative Action under the convention that shall complete its work in 2009 and present the outcome of the work to the conference of the parties for adoption at its fifteenth session.

(3) Decided that the first session of the group shall be held as soon as is feasible and not later than April, 2008.

Under the above convention (*i.e.*, UNFCCC), it is also under consideration that in order to solve the problem of global warming, an additional tax be imposed on air tickets. This proposal was brought before the meeting of International Civil Aviation Organisation (ICAO) on September, 2007.

America has for the first time accepted that the developing countries have made endeavours to reduce the emission of gases.

It may be noted that India is the world's fourth greatest country to obtain energy from air (*i.e.*, winds). America is the greatest producer of greenhouse gases. It produces 6.9 billion tons carbon-di-oxide every year. China emits 4.1 billion tons of greenhouse gases. Japan emits 1.9 billion tons of greenhouse gases every year. According to America, it has spent 37 billion dollars on activities relating to climate change. America also contended that it is developing hydrogen and clean coal.

According to scientists, Arctic summer snow is lessening slowly and gradually. A Mexican scientist has, however, raised a hope that by increasing growth of Plankton in seas. Plankton D.M.S. or Dimethyl Sulfide will produce clouds and this would help to reduce the global warming.

On the basis of global warming and its effects all over the world, it is now said that 2° rise temperature of planet earth is likely to take place sooner than estimated earlier.

Copenhagen Summit Conference on Climate Change (December, 2009).—Copenhagen Summit Conference, held in the third week of December, 2009, is generally regarded as a failed conference. Realizing that the Copenhagen was moving towards a failure, the leaders of U.S., India, Brazil and South Africa entered into an agreement to save Summit Conference of 194 countries. Thus after the negotiations of two weeks, a positive agreement came before the conference. Thus as per Chinese leader, the conference achieved a significant success. China warmly welcomed the move because with small concessions great benefit was obtained. Thus, according to Chinese leader, the conference achieved significant success.

A great success of the conference was the establishment of Green Fund. In order to help and save the poor countries from global warming, a Green Fund of 100 billion dollars was promised. For the years, 2010 to 2012, the U.S. of America promised 3.6 billion dollars, Japan 11 billion dollars, and 10.6 billion dollars. According to Secretary-General of the United Nations, Ben-Ki-Moon, this agreement lacks consensus and cannot be said to be ambitious. In order to protect themselves, people expected strict action and were greatly disappointed. However, as opined by the Secretary-General of the U.N. some achievements were indeed obtained. According to Rajendra Pachauri, Chairman of International Panel for Climate Change (IPCC), on the basis of the agreement, efforts ought to be made for entering into a binding agreement.

The Copenhagen Conference aimed to reduce global warming by two degrees but no target was fixed for reducing global emissions for the year 2020 or 2050. Probably this was the greatest failure. Rajendra Pachauri, the Chairman of IPCC, said that the increase in global warming and the dangers emanating thereof were becoming visible and in a near future, the situation was likely to become dangerous and grave. Therefore, if the planet earth is to be saved from global warming and climate changes the nations of the world will have to take hard decisions.

Durban Conference on Climate Change 28th November-11 December, 2011.—United Nations Climate Change Conference was held in Durban (South Africa) from 28th November, 2011 to establish a new treaty to limit carbon emissions. The conference agreed to a legally binding deal comprising all countries. The deal will be prepared by 2015 and will come into effect in 2020.

It may be noted that while the President of the Conference, Maita Nekoana Mashabane declared the Conference a success, scientists and environmental groups warned that the deal was not sufficient to avoid global warming beyond 2°C as more urgent act was needed. Similarly, International Panel on climate change warned in November, 2011 that extreme weather will strike as climate change will take hold. Moreover rainfall, droughts can cost billions of dollars and destroy lives. Estimates suggest that every dollar invested in adaptation to climate change could save $60 million damage.

After two weeks of negotiation a deal was reached only the last day i.e. Sunday, 11th December, 2011 after a 60 hour marathon negotiation. Negotiations agreed to be a part of a legally binding treaty to address global warning. The terms of the future treaty were to be defined by 2015 and to become effective in 2020.

The agreement referred as the "Durban Platform" is notable in that for the first time it included developing countries such as India and China as well as the U.S. which refused to sign the Kyoto Protocol.

It is important to note that the agreement entailed the continuation of the Kyoto Protocol, although only some countries including members of the European community were likely to commit.

The warning and predictions of the scientists and environmentalists were proving to be correct. The World Meteorological Organisation (WMO) said in Geneva on 06/04/11 that the record loss of the ozone, the atmosphere layer that shields life from the Sun's harmful rays had been observed over the Arctic in the last few months. The WMO said : "Depletion of the unprecedented level over the Arctic this spring because of presence of ozone depleting substances in the atmosphere and a very cold winter in the atmosphere".

Ultraviolet (UV) rays, which have been linked to skin cancer, cataracts and damage to human in immune system. Some crops and crops and forms of marine life can also suffer adverse effects. Indeed adverse effects have already been witnessed. Last but not the least, according to a leaked UN draft report in summer months in ice-free Arctic can licence a reality if global temperature rises by more than 2 degree celsius over current levels. The draft copy of the UN's Inter-governmental Panel on climate change report said there is a 90-100% chance that Arctic shrink through the 21st century with rising green house emissions. According to a study by US National Snow and Ice Data Centre, an irreversible climate "tipping point" could occur within next 20 years as a result of the release of huge quantities of organic carbon locked away as frozen plant matter in the vast permafrost region of the Arctic. The results of the study showed that as the Arctic warms up, frozen carbon will thaw out, releasing carbon in to the atmosphere.

Leaders of the world are discussing the U.S. President Obama's new promise under the clean Air Act to cut emissions by 30% (from 2005 levels by 2030) in power plants. In Bonn, in the first weak of June 2014 leaders were discussing under the UN Framework convention on climate change. In September, 2014, leaders discussed in Newyork city in the action on climate change in the meeting convened by U.N. Secretary-General to take the discussion forward. Meanwhile, in Mexico city at the Legislative place of San Lazaro, 250 legislators from over 80 countries participated in a three day 2nd world summit of Legislators in June 6 to 8 of 2014 organized by London based GLOBE International which has its office in India as well.

Lima Conference on Climate Change.—At the Lima Climate Meet on 14th December, 2014, a compromise draft on national pledges to cut global carbon emissions saved the U.N. Climate Change. After a marathon 13-day Conference of Parties (COP), negotiators on Sunday, i.e. 14th December, 2014, adopted the draft that addressed India's concerns also and set the road-map for a new binding deal. As pointed out by India's Environment Minister, Prakash Javadekar, all of India's concerns were addressed.

It may be noted here that while the outcome was not along expected lines, it some how managed to keep red lines for all countries-developed and developing. Thus the agreement—Lima call for Climate Action—paved the way for all nations, to submit their 'nationally determined' pledge for emission cuts and adaptation measures by October 2015—and not by June 2015 as was expected after last year's warsaw talks.

Though the Lima Agreement did not give an ambitious road-map for climate finance, it, to a great extent, addressed concerns of developing countries by keeping the 'adaptation' clause intact without diluting principles-CBDRs of the UN Framework convention on climate change and its Kyoto Protocol. It may be noted that the contentious issues will come up again during the Paris talks ahead of the final agreement. According to Indian Environment Minister, Prakash Javedkar, the delegates approved a blue print for talks leading up to a deal in 2015 that will come into effect after 2020.

At the Lima Meet, nations concluded that by elaborating the elements of the new agreement, scheduled to be stamped in Paris in late 2015, while also agreeing to the ground rules on how all countries can submit contributions to the new pact during the first quarter of 2015. These intended Nationally Determined contributions will form the foundation for climate action post-2050 when the new pact will be set for reducing emissions.

It is important to note here that the session of the United Nations Framework convention on climate change headquarters is the last formal discussion before the meeting of 196 countries in Paris to sign a pact to curb global warming. Negotiators from developing countries—who are concerned the draft aims to push the responsibility of fighting climate change to them-sought a fresh text for Paris discussions. Thus climate negotiations in Bonn got off to a rocky start on Monday i.e. 19th October, 2015 with India and other developing countries opposing the first draft for a landmark climate deal to be signed in Paris in December, 2015, terming the text an example of "climate apartheid".

It was felt that the draft fails to raise climate finance commitments from rich nations and there was concern about the year by when global emissions will peak which could have developmental implications for countries such as India. A climate negotiator from a developing country said, "We want a total overhaul of the lop-sided draft which does not meet the aspirations of the developing world and climate vulnerability". The negotiators from the developing world said, cannot turn the bedrock of convention upside down. Further, the differentiation of action between the rich and the developing world cannot be undone by the new deal".

Thus, it is hoped, that the first draft will change dramatically and the co-chairs will have to present a reworked draft by Tuesday, 20th October 2015.

1994 World Conference on Natural Disaster Reduction

The World Conference on Natural Disaster Reduction was held at Yakohama (Japan) from 23 to 27 May, 1994, at the mid-point of International Decade for Natural Disaster Reduction (1990-2000). It was attended by 1,000 delegates, including the representatives of 147 countries. It called for development of a global culture of prevention and improved risk assessment, broader monitoring and communication of warnings. The conference adopted the Yakohama strategy for a Safer World : Guidelines for Natural Disaster Prevention, Preparedness and Mitigation. The documents include : an assessment of disaster reduction since the beginning of the Decade a strategy for the year 2000 and beyond; a plan of action of activities at the community and national levels, at the regional and sub-regional levels, and at the international level, and recommendations for follow up action.

As pointed out by the U.N. Under-Secretary-General for Humanitarian Affairs at the opening session of the conference on 23 May, 1974, "Earthquakes and cyclones will happen. There is nothing we can do about that, but we can be prepared for them when they do strike". Further, "Disaster reduction can take place at any point in the process which we call disaster. It can comprise prevention and preparedness, relief and development as well as measures to reduce the effects of such disasters".

Summarising the outcome of the conference, "Yakohama Message" affirms that the impact of natural disasters in terms of human and economic losses has risen and society has become more vulnerable to such disasters over the past two decades, earthquakes, volcanoes, landslides, tidal waves, droughts and other natural events had killed some 3 million people and inflicted injury, displacement and misery on countless more. The number of people affected had increased by 6 per cent per year, three times the global population growth rate.

It was pointed out that environmental protection as a component of sustainable development consistent with powerly alleviation is imperative in the prevention and mitigation of natural disasters.[62]

1994 Desertification Convention

The convention on desertification was called for at the 1992 Earth Summit in Rio de Janeiro and mandated by the General Assembly in resolution 47/188 for completion by June, 1994. The Convention was concluded at Paris on 18th June, 1994. More than 100 Governments concluded negotiations on the said date. It is a concerted effort to help over 900 million people around the world fight life and death battle against the degradation of their fragile dry lands *i.e.* the process of desertification. The Convention was to enter into force 90 days after it has been ratified by 50 countries. By 18 December, 2010, 193 countries had become parties to the convention.

It may be noted that a previous U.N. Plan of Action to combat Desertification, adopted in 1977, fell short of expectations because of inadequate funding and a too narrow, technical focus. It failed to give enough recognition to the Socio-economic causes of the problem and did not involve local populations in the process.

Having learnt from the past experiences and with a view to improve the effectiveness of existing international finance, the convention has established a "Global Mechanism" to identify and coordinate available funding sources. The governments have been urged to pursue the possibility of financing anti-desertification action through the Global Environmental Facility (GEF), in cases where curbing desertification can be linked with the GEF's four mandated funding areas : preventing climate change, ensuring conservation of biological diversity; protecting international waterways; and reducing depletion of Ozone layer. The GEF is the interim financing channel for the legal agreements the convention on Biological Diversity and Framework Convention on Climate change signed at the Earth Summit.[63]

Earth Summit (1992)*

The Earth Summit or United Nations Conference on Environment and Development (UNCED) began at Rio de Janeiro, Capital of Brazil, on 3rd June 1992. It was the largest international conference in the history of international relations and international law. It was attended by 178 nations and more than 20,000 participants attended the conference. The plenary session was attended by 130 heads of State and Government. UNCED Chief Maurice Strong described it "parliament of the planet." According to environmental experts, this was probably the last chance to save our dear planet Earth. The success of the conference depended on the reconciliation of the interests of North and South. As remarked by Maurice Strong, Secretary-General of UNCED, "If we fail at Rio, it will be one of the greatest breakdowns ever in international relations especially concerning North and South." Indeed "This is our last chance".

The Earth Summit is the culmination of a series of UN conferences beginning with the Stockholm conference on Human Environment in 1972. In 1983, the General Assembly of the United Nations set up a commission, headed by Norway's Prime Minister, Gro Harlem Brindtland, to examine the state of world environment and development, beyond 2000. The report of the commission entitled "Our Common Future", highlighted the risks of human future if we continue the current modes of unsustainable development. Consequently, General Assembly decided to hold a special conference on safeguarding environment against further degradation beyond repair, and sustainable development for the future of the mankind on earth. Even after the decision to hold the Earth Summit was taken it took more than two years to prepare for the Earth Summit held in Rio de Janeiro (Brazil). There was growing awareness and common concern in the world about the constantly increasing degradation of global environment. It need not be overemphasized that much of this degradation is due to patterns of production and consumption in industrialized countries. But from the point of environment the world, nay the entire planet Earth, is one and indivisible. Hence the consequences of degradation of global environment are also shared by nearly 80 per cent of the world population which resides in developing countries. The Rio conference therefore had before it topics such as global warming, ozone depletion, climatic changes, biological diversity and management of forests.

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[62] See U.N. Chronicle, Vol. XXXI No. 3 (September, 1994) pp. 70-71.

[63] See U.N. Chronicle, Vol. XXXI No. 3 (September, 1994) at p. 74.

* See also for (1995) C.S.E. Q. 5(c).

On 22 December 1989, 159 States Members of the U.N. General Assembly passed two resolutions (44/228 and 44/207) expressing their resolve to draft as soon as possible a convention to protect the earth's climate and to convene a world conference in Brazil in 1992 on ways to encourage environmentally sound development. The Preparatory Committee of UNCED held its first substantive session at Nairobi from 6 to 31 August, 1990 and recommended that UNCED scheduled to be held in Brazil in 1992 should be convened at highest political level that of Heads of States or Governments, Maurice Strong, Secretary-General of the UNCED proposed that the world meeting agree on an *Earth Charter* to be known as Agenda 21—a set of principles for the conduct of peoples and nations towards each other and the Earth.[64]

On 21 December 1990, the General Assembly created (vide resolution 45/212) the Inter-governmental Negotiating Committee to conduct "a single inter-governmental negotiating process" on a framework convention on climate change. Assembly also decided that the convention and related instruments should be open for signature at the UNCED in June 1992. The Inter-governmental Negotiating Committee held its first session at the Westfields International Conference Centre at Washington D.C.[65] on 4 Feb. 1991. It held its second session from June, 1991 at Geneva. It was attended by the representative of 127 states.[66] Proposals to achieve environmentally sound, sustainable economic development in all countries known collectively as "Agenda 21" were thoroughly discussed by the Preparatory Committee for the UNCED from 12th August to 4 September 1992. During the session, the Preparatory Committee agreed on a framework for "Agenda 21" which was to be adopted in Rio de Janeiro, as a comprehensive blue print for action into the twenty-first century. Agreement was also reached on a text, the "Earth Charter" or "Rio Declaration on Sustainable Development" that will form the basis for commitment by states to conference goals. While it will not establish any strict obligations, it will be morally binding on signatory States.[67]

Industrialized countries degrade the environment by insatiable consumption of resources and intense production of wastes, while high fertility, and rapid population growth in many developing countries put damaging pressure on the planet. Combined, such human demands are undermining the world's natural resource base-land, water and air upon which all development depends. These issues are, therefore, not only environmental but also economic. With a view to highlight these links, the U.N. conference on Environment and Development, which was originally scheduled to be held from 1 to 12 June, 1992, was held from 3rd June to 12 June 1992 at Rio de Janerio (Brazil). The conference was funded by the UN and voluntary contributions.[68]

Some of the main issues confronting the Earth Summit or UNCED were Finances (*i.e.* who will pay for the cleaning of the world) ; technology transfer ; institutional framework, climate change ; forests; biological diversity; and sustainable development. Six issues on which North and South expressed divergent views were : Greenhouse gas emissions; Forests ; Population; Technology transfer ; Finance; and Degradation. Thus on account of several reasons a great uncertainty was haunting.

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[64] See U.N.C., Vol. XXVII, No. 4 (December, 1990), p. 63.

[65] See U.N.C., Vol. XXVIII, No. 2 (June, 1991), p. 56.

[66] U.N.C. Vol. XXVIII, No. 3 (September 1991), p. 66.

[67] U.N.C., Vol. XXVIII, No. 4 (December 1991), p. 65.

[68] U.N.C., Vol. XXIX, No. 1 (March 1992), p. 81.

Besides the main issue of funding environmental programmes outlined in Agenda 21, other major achievements of the UNCED include *a convention on Bio-diversity, a convention on climate change, a convention on Forestry, and Earth Charter or Bio Declaration*. As regards Bio-diversity convention, America took a very rigid stand from the beginning that it will not sign the convention. The aim of the Bio-diversity convention is to preserve the vast gene pool of flora and fauna and make developed countries pay for exploiting it. America took such a rigid stand that even countries like Britain, Germany, Japan and European Community distanced themselves from American stand with the result that America found itself isolated in this respect. On 7th June 1992, Japan indicated that it will join Britain and the 11 other members of the European Community in breaking with the U.S. to sign the Bio-diversity treaty. India also signed the treaty on bio-diversity. There was however controversy about the ambiguous clause relating to transfer of technology. According to first clause of Article 16 of the Convention, the contracting parties are to facilitate access to technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources. The second clause further adds that the technologies are to be provided 'under fair and most favourable terms, including on concessional and preferential terms were mutually agreed'. The third and fourth clause of Article 16 add that irrespective of Intellectual Property Rights (IPR) and patent protection, developing countries which provide genetic resources should be given access to all technology making use of these resources and even private sector companies will 'facilitate transfer of technology for the benefit of both government institutions and private sector of developing countries. The fifth clause of Article 16, however, recognized that patents and other IPR may have an influence on the implementation of the convention, because it provided that contracting parties shall cooperate to ensure that such rights are supportive of and do not run counter to its objectives. The controversy revolved on a sentence in the second clause which says that "in the case of technology subject to patents and other IPR, such access or transfer shall be provided on terms consistent with adequate and effective protection of IPR". This was probably added to please the US who had refused to sign the convention. But as remarked by Muchkund Dubey, India's former foreign Secretary, "Despite the apparent contradiction in the clauses this is a significant improvement over the Dunkel Draft". Further, "In just two years the bio-diversity convention has achieved what could not be done in six years of GATT negotiations". Experts of developed countries, however, interpret it differently. Thus divergent interpretations are being given in respect of the said vague clause. The convention on Biological Diversity had been signed by as many as 167 countries. Mongolia was the thirtieth country to ratify the convention. The prescribed number of countries (*i.e.* 30) having ratified the convention, three months after Mongolia ratified the convention has come into force as part of international law on 29th December, 1993.

As of 20 June 2013, 193 countries had become parties to the U.N. Convention on Biological Diversity. However, Andorra Holy See, Sumalia and the United States of America have not ratified the Convention. The U.S.A. has signed the Convention but has not ratified it.

It may be noted here that in the Fifty-third year of the Republic Indian Parliament has enacted the Biological Diversity Act, 2002. As per preamble of the Act, this Act has been enacted to provide for conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.

As regards convention on climate change or Green-house Gas Emission, there was a wide gulf between the views of the North and South. While the North wanted a 20 per cent cut in green-house gas emissions like carbon dioxide and methane by 2005 and a major shift from the use of coal and wood for energy, the South blamed developed countries for excessive emissions over last 50 years and wanted them to reduce it considerably. The South was opposed to any cut in its own emission as it hindered development. As pointed out by Deng Nan, China's Deputy Minister for Science and Technology "Developed Countries are the biggest polluters. They have to take moral responsibility for it and make financial commitments for cleaning up the mess." But due to pressures from the US and OPEC countries the convention on climate change was watered down. Originally, the convention aimed to reduce carbon dioxide (Co) emissions to their 1990 levels by the year 2000 but the treaty now simply requires signatories to formulate plans "with the aim" of returning emission to 1990 levels. The developed countries have agreed to provide financial help and technology to third world nations to help them deal with global warming. They have, however, not accepted any specific obligations in this respect. When the Treaty on climate change was opened for signature, Mr. Fernando Collor, Brazil's President, was the first to sign it. Subsequently 150 countries signed U. N. Convention on Climate change. After having been ratified by 50 countries (*i.e.* prescribed number of countries), climate change convention came into force on 21st March, 1994. The conference of the State Parties of the convention met in March, 1995.

As noted above, the convention commits developed countries to take measures aimed at returning their emissions of carbon di-oxide and other green-house gases to 1990 levels by the year 2000. The convention has now come into force on 21st March, 1994. By 24th May, 2004, the convention had been ratified by 189 States. So far 195 countries have become parties to the convention. These 195 parties include all U. N. Members except South Sudan. In addition to the U. N. Members (193), Nine and European Union have also become parties to the convention.

The convention on Forests also generated a lot of controversy from the very beginning. While the rich nations wanted to control massive deforestation through a convention, the developing countries regarded it as infringement on their sovereignty. Developing countries including India had serious reservations on forest principles contained in the draft. These countries led by India succeeded in getting the said provisions changed. Thus consensus was reached on provisions relating to sustained development of forests. It was recognized that forests are essential to economic development and the maintenance of all forms of life. In committing themselves to the prompt implementation of the principles agreed, countries decided to keep them under assessment for their adequacy with regard to their further international cooperation on forest issues. Thus the provisions agreed are persuasive and weak.

In addition to the above conventions, one of the major achievements of the Earth Summit *i.e.* UNCED is the adoption of Earth Charter or Rio Declaration. America had reservations about some of the provisions of the Declaration yet it ultimately decided to sign it. According to Indian Prime Minister, Mr. Narasimha Rao, Rio Declaration is 'balanced'. Rio Declaration contains 27 principles or points concerning almost all countries of the global community, and enlisting general rights and obligations on environmental protection. The more important of the principles of Rio Declaration are as follows :—

Principle 1 : Human beings are at the centre of concerns for sustainable development. They are entitled to healthy and productive life in harmony with nature.

2. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.

3. The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

4. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

5. All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development.

6. The special situation and needs of developing countries, particularly the least development and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

7. States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystems. In view of the different contributions to global environment degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

8. To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

9. States should cooperate to strengthen indigenous capacity—building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

10. Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

11. States shall enact effective environmental legislation, environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

12. States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

13. States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damages. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

14. State should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause several environmental degradation or are found to be harmful to human health.

15. In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

16. National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

17. Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

18. States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

19. States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect.

Yet another accomplishment of the Earth Summit was the agreement to create a new U.N. body to monitor compliance with environmental treaties and review progress towards the goals of the Earth Summit. Further, to salvage some of the prestige lost due to adoption of rigid attitude in respect of Bio-diversity treaty and consequent U.S. isolation in the Summit President George Bush proposed on 31 June 1992 a follow up conference to the Earth Summit. Probably taking cue from this proposal, Mr. Maurice Strong, Secretary-General of UNCED, announced a follow-up Summit in two to four years to make nations accountable for decisions taken at the Earth Summit.

As regards the final outcome of the Earth Summit, divergent views have been expressed. Even before the summit had begun, chances of the complete success were dampened because of rigid attitude of the U.S. over Bio-diversity treaty and other issues. As regards the crucial issue of funding environmental programmes all hopes of developing countries were belied. While developing countries wanted a special fund of $ 250 billion, developed countries insisted that existing Global Environment Facility (GEF) will serve the purpose. Finally in a closed door meeting the G-77 had no option but to drop its demand for a separate Green Fund and agreed to accept a "restructured" GEF as one of the financial mechanisms. The restructured GEF implies greater 'transparency' in the decision-making process and also a more universal membership of the GEF. According to some critics, the Earth Summit has been anything but a success. While the hopes of the people of industrialized countries that it would take first steps towards making the world safe for future generations have been belied the net outcome of the Summit was hardly satisfying in any concrete measure to the developing countries, including India. But to say that the Earth Summit has failed or not achieved anything would not be correct. Despite the opposition of the U.S., many nations signed the Bio-diversity treaty. Climate change convention to date has been ratified by 195 countries (*i.e.* all the member of the U.N. + Nine and European Union). Is it not a matter of great satisfaction that even the rigid, almost intransigent, attitude of the U.S. could not thwart the Summit's outcome ? Is it not a remarkable achievement in the present unipolar world ? Further, the U.S. was almost isolated because of its intransigent attitude and a number of developed countries including Britain, Japan, Germany, and European Community distanced themselves from the U.S. stand and shifted their position on crucial issues and participated in evolving consensus which finally took shape as Earth charter or Rio Declaration. As pointed out by Indian Prime Minister, Mr. P.V. Narasimha Rao, the net outcome of the Summit was "satisfactory" and "a step in the right direction". According to Maurice Strong, Secretary-General of the UNCED or Earth Summit, the Summit was a success but regretted that developed countries had made no generous financial commitment to the environment protection programmes. He added that though not all the problems discussed found solutions, the conference served as a starting point and that the road from Rio was a fast track to a better future for the world. Thus the road from Rio is pointing in the direction of hope, it is for the nations—both the developed and the developing—to bring it to fruition so as to ensure the world, rather the planet Earth, safe for the present and future generations.

Commission on Sustainable Development*.—On 22nd December, 1992, the General Assembly of the U.N. approved the creation of a new high-level Commission on Sustainable Development to oversee the implementation of "Agenda 21". The Commission consists of 53 members. On 12th February, 1993, the Economic and Social Council Commission formally established the 53-member Commission on Sustainable Development to monitor progress in implementing "Agenda 21", the comprehensive action programme adopted by the U.N. Conference on Environment and Development (UNCED) in June, 1992 in Rio de Janeiro. The Commission, a functional body of the Economic and Social Council, will also oversee activities related to the integration of environmental and developmental goals throughout the United Nations system. The Commission began its work in May, 1993 to consider holding high level ministerial meetings to provide 'political impetus' to the commitments and decisions of the Earth Summit.

Johannesburg Declaration on Sustainable Development.—The world Summit on Sustainable Development was held in Johannesburg (Sough Africa) from 2 to 4 September 2002. The representatives of the peoples of the world reaffirmed their commitment to Sustainable Development. They recognized that the global environment continues to suffer, loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile lands, the adverse effects of climatic change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable, and air, water and marine pollution continues to rob millions of a decent life.

They expressed their determination to ensure that their rich diversity which is their collective strength will be used for constructive partnership for change and for the achievement of common goal of sustainable development.

They recognized that sustainable development requires a long term perspective and broad based participation in policy formulation, decision making and implementation at all levels. As social partners, they will continue to work for stable partnerships with all major groups, respecting the independent, important roles of each of them.

The world Summit also prepared a plan of implementation of the World Summit on Sustainable Development. It dealt with such matters as poverty eradication, changing unsustainable patterns of consumption and production, protecting and managing the natural base of economic and social development, sustainable development in a globalizing world, health and sustainable development, sustainable development for Africa, means of implementation and institutional frame work for sustainable development.

Even though not much can be expected from such world Summits yet they serve a significant object of highlighting the gravity and urgency of the problems. Due to great differences in attitudes and their way of fulfilling their commitments, the results of the Summit cannot at all be said to be encouraging.[69] The developed countries are not serious about fulfilling their obligations. On the other hand developing countries do not have enough funds to give up their conventional modes of energy and adopt those which may ensure sustainable development.

First Ministerial Conference of the Forestry Forum for Developing Countries (FFDC).—The three day first Ministerial Conference of the Forestry Forum for Developing Countries concluded at New Delhi on 3rd September, 1993 after adopting the Delhi Declaration on Forests. 'It was attended by the representatives of 40 countries apart from observers from nine advanced countries and seven international organisations such as World Bank and Asian Development Bank. The Conference is a direct follow up to the U.N. Conference on Environment and Development (UNCED). The Delhi Declaration has called upon the Commission on Sustainable Development to identify at its next session "an appropriate mechanism within the U.N. system".

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* IAS (2003) Q. 7(a)

[69] See also Mohammed Hussain K.S., "World Summit on Sustainable Development, Johannesburg. An Appraisal", I JIL Vol. 2 No. 3 (2002), p. 348.

The Delhi Declaration has asserted that forests are inalienable national resource and has called for a U.N. mechanism on forests. The Delhi Declaration has reiterated the right of the sovereign countries to choose between the various multiple "uses of their forest resources in accordance with their national policies, promises and strategies. According to the Declaration, the right of the Development must be fulfilled so as to equitably meet developmental and environmental needs of the present and future generations." The Declaration also calls upon the international community to seek and adopt options for sustainable alternative forms of employment opportunities to people dependent on forests. Further the Declaration has asked the international community "to work for determining methodologies for the economic valuation of goods and services provided by forests including *inter alia* traditional knowledge and technologies, biological diversities, sequestration of carbon and other ecological processes and the forgone opportunity costs." The Declaration has also called for "increasing financial assistance provided by the developed countries and international organisations including a restructured Global Environmental Facility (GEF) to sustain investment in the Forestry sector in developing countries within a given time frame through transparent mechanisms to assist and meet the incremental costs incurred to implement sustainable development" and for "facilitating open and free international trade in forest products through the removal of unilateral and discriminatory measures that impede market access, while ensuring that the sustainability criteria on forest management is equitably applied to all types of timber."

Landmark International Agreement on Forests.—On 17 December, 2007, the General Assembly adopted a landmark agreement on international forest policy and cooperation. It sets a new standard in forest management. After two weeks of intense negotiations among delegates to the United Nations Forum on Forests, the agreement was reached in April 2007. Though the new agreement is "non-legally Binding instrument in all types of forests", it calls for greater international cooperation and national action to reduce deforestation, reverse the loss of forest cover, present forest degradation, promote sustainable livelihood and reduce poverty for all forest dependent peoples.

Conference to review the implementation of the decisions taken at Rio Earth Summit (1992).—A U.N. conference to review the implementation of the decision taken was held in June 1997. Nearly 160 member states participated in the Conference. The Conference renewed its commitments and set goals for future. It was generally agreed that major and crucial part of the recommendations of the Rio Summit remained unimplemented. One of the main causes for this was that the differences between developing and developed nations over several matters still persisted. Yet another reason for the same was the reluctance of the developed nations to bear the cost of providing finances or technology at affordable rates to the developing nations to meet the environment standards fixed for them.

Kyoto Environmental Summit on Global Warming (December 1997)—

N.B. : For this please see Appendix II

Conclusion.—As remarked by Maurice F-Strong, Secretary-General of the United Nations Conference on the Human Environment, "The concept of respecting and protecting the human environment has its objective the fulfilment of the legitimate, immediate ambitions of individuals and nations as well as the interests of future generations. The rectification of past errors, wherever possible, has as its object the provision of better opportunities for development and progress".[70] "Environmental and Ecological Constraints have symbolized our thinking towards new goals, or goals which have been neglected under the influence of a culture of mass production and consumption." [71] In this sense, the Stockholm Conference on the Human Environment was neither a beginning nor an end but an unprecedented opportunity to break new ground in the management of a world in which all of us live.[72] It cannot be denied that the Stockholm Conference has been successful in breaking the new ground. The Conference "has served to identify those areas in which rules of international environmental law, acceptable to the international community as a whole, can be laid down, and as well as those areas in which the formation of environmental rules must encounter insurmountable obstacles. To that extent it has provided foundations for the development of international environmental law.[73] Stockholm Conference, Habitat Conference and Conference on Desertification and several other conventions relating to environment which have been referred earlier not only provide foundation for the development of international environmental law but make it clear that a real beginning has been made in the management of the world in which all of us live in the right directions. The Stockholm Conference on Human Environment is also remarkable for creating institutions (as discussed above) for the protection and preservation of human environment but it must be noted that "their vitality will obviously depend on the behaviour of governments. Will the members of the U.N. devote the necessary resources to national and international environmental efforts? Will they accept limitations on their traditional freedom of action in the interest of preserving the common biosphere ? Many leaders now use the rhetoric of 'spaceship earth' but are they really prepared to accept the political and economic costs of self-denial that this rhetoric implies."[74] It is clear from above discussion that protection and preservation of environment are necessarily related to development. A major topic that of inter-relationship between environment and development is now-supported by both developed and developing countries. In the end it may be noted that for economic development use of energy is indispensable. But increasing use of energy adversely affects nature's balance. It has, therefore, been rightly suggested that we should take a global view of the energy problem based on ecological considerations.[75]

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[70] "The United Nations and the Environment", Int. Orgn., Vol. 26 (1972), p. 169 at p. 172.

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71. B.D. Nag Chaudhary and S. Bhatt, "Energy, Environment and World Order, India Quarterly, Vol. XXXVI, Nos. 3 and 4 (July-Dec. 1980), p. 336 at p. 344.
72. See note 54.
73. J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 409.
74. Richard N. Gardner, "The Role of the U.N. in Environmental Problems", Int. Orign Vol. 26 (1972), p. 237 at 254.
75. See note 55.

Part III

INTERNATIONAL TRANSACTIONS

CHAPTER 28

DIPLOMATIC AGENTS*

Introduction.—The allegation of Oppenheim and other Western Jurists that international law originated in Europe and its credit is to Western civilisation is not correct. The study of the original text books of Ramayana and Mahabharata falsifies the contention of Western Jurists.[1] In his view, during the Ramayana and Mahabharata period some aspects of International law were in their developed stage. Examples of International law relating to diplomatic agents may be cited in this connection.[2] "Consequent on a development over some hundreds of years the Institution of Diplomatic Representatives has come to be the principal machinery by which the intercourse between States is conducted".[3] The permanent appointment of diplomatic envoys began from the seventeenth century. The rights, duties, immunities and privileges etc., of the diplomatic agents in eighteenth and nineteenth centuries were mostly in the form of customary rules of International law. The first great land mark, therefore, was the Congress of Vienna, 1815 wherein the customary law regarding diplomatic agents was clarified and codified. After 1815 also, the law relating to diplomatic agents continued to develop and finally a convention was adopted in 1961. This Convention is called Vienna Convention on Diplomatic Relations. However, the Preamble of the Vienna Convention makes it clear that those matters for which there is no express provision in the Vienna Convention will still be governed by the customary rules of International law. Vienna Convention on Diplomatic Relations, 1961 was adopted on 18 April, 1961. It entered into force on 24 April, 1964. Vienna Convention on Diplomatic Relations was concluded on 18 April, 1961 and came into force on 24 April, 1964. As of October 2018, 192 countries had become parties to the convention. Its articles are considered a cornerstone of modern international relations. Alongwith it an Optional Protocol concerning the compulsory settlement of disputes was also concluded on 18 April, 1961. Article-I of the Additional Protocol provided that disputes arising out of the interpretation and applications of the convention shall lie within the compulsory jurisdiction of the International Court and may accordingly be brought before the court by an application made by any party to the dispute being a party to the present Protocol.

Further, Article-II provides that the parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists to resort not to the International Court of Justice but to an arbitral Tribunal after the expiry of the said period, either party may bring the dispute before the court by an application. Article III further provides that within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to International Court of Justice. The Conciliation Commission shall make its recommendation within five months after its appointment. If its recommendations are not accepted by the parties to the dispute then within two months after they have been delivered, either party may bring the dispute before the Court by an application. It may be noted here that the Indian Parliament passed the Diplomatic Relations (Vienna Convention) Act, 1972, to give effect to the Vienna Convention on Diplomatic Relations, 1961, and to provide for matters connected therewith.[4] Other States have also passed similar Acts. "The law relating to the diplomatic and consular affairs remains the strongest section of international law".[5]

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* See also for I.A.S. (1958), Q. No. 6.

[1] S. S. Dhawan, "The Ramayana—International Law, in the Age of the Ramayana", National Herald Magazine, Sunday, January 28, 1973, p. 1.

[2] See also Dr. Nagendra Singh, India and International Law (1969), p. 12.

[3] J. G. Starke, Introduction to International Law, Tenth Edition (Butterworths, Singapore, 1989) p. 421.

[4] For text of the Act see I.J.I.L., Vol. 12 (1972), pp. 637-46.

Classification of Diplomatic Agents*.—The diplomatic agents have been classified according to their status and functions. The first classification of diplomatic agent was made in the Congress of Vienna, 1815. The Congress of Vienna, 1815, classified the diplomatic agents under following categories : (1) Ambassadors and Legates ; (2) Ministers Pleni-potentiary and Envoys extraordinary; and (3) Charge-d' affaires. Some changes brought about in the above classification by Congress of Aix-la-Chappele, 1818. In the Congress fourth category of diplomatic agents namely Ministers Resident was added and was kept on the third place in order of priority. But it was again dropped by 1961 Convention on Deplomatic Relations. Thus, at present, the classification of diplomatic envoys is as follows—

(1) *Ambassadors and Legates.*—Ambassadors and Legates are the diplomatic agents of first category. They are the representatives of the completely Sovereign States. They are either appointed as Ambassadors or Permanent Representatives of their respective countries in the United Nations. The representatives appointed by Pope are called Legates.

(2) *Ministers Pleni-potentiary and Envoys Extraordinary.*—Minister Pleni-potentiary and Envoys Extraordinary are the diplomatic agents of second category and as compared to the diplomatic agents of the first category, they enjoy less privilege and immunities.

(3) *Charge-d'Affaires.***—Charge-d' Affaires are the diplomatic agents of the last category. The main reason for this is that they are not appointed by the head of the State. They are appointed by the Foreign Ministers of States. In rights and status they are considered below the Minister Resident.

It was made clear in Article 14 (2) of the Vienna Convention on Diplomatic Relation that apart from precedence and etiquette, there is hardly any difference between the diplomatic agents of above-mentioned categories. Obviously, there is no difference so far as their privilege and immunities are concerned.

Functions of Diplomatic Agents***

According to Article 3 of Vienna Convention, the functions of a diplomatic mission consist *inter alia* in : (a) representing the sending State in the receiving State; (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) negotiating with the government of the receiving State; (d) ascertainment by all lawful means conditions and developments in the receiving State; and reporting thereon to the government of the sending State ; (e) promoting friendly relations between the sending State and the receiving State, and developing their economic cultural and scientific relations. In addition to these functions diplomatic agents have also to perform any special functions which are allotted to them from time to time. Diplomatic agents which are appointed only for specific functions, perform only those functions.

The Basis of Immunities and Privileges of Diplomatic Agents.—Before discussing the immunities and privileges of the diplomatic agents it will be necessary and desirable to know as to what is the basis of these immunities and privileges. To put it more precisely, why diplomatic agents are given certain immunities and privileges ? There are two theories prevalent in this connection (i) Theory of Extra-territoriality; and (ii) Functional Theory.

Theory of Extra-territoriality.—According to this theory, the diplomatic agents enjoy immunities and privileges because they are deemed to be outside the jurisdiction of the State in which they are appointed.

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[5] Rahamatullah Khan, "International Law—Old and New", I.J.I.L., 5 (1975) p. 371 at p. 373.

* See also for P.C.S. (1991) Q. 9(a).

** See also for C.S.E. (1994) Q. 8(d).

*** See also for P.C.S. (1975), Q. No. 6 ; P.C.S. (1970), Q. No. 7.

Criticism.—The theory of extra-territoriality was very much prevalent up to the past and a number of jurists supported it. But this theory has now been discarded. A number of jurists have severely criticized it. In the view of Prof. Oppenheim the theory of extra-territoriality is not the correct basis of the immunities and privileges which the diplomatic agents enjoy. In his view, it is wrong to contend that they enjoy these privileges and immunities because they are deemed to be outside the territorial jurisdiction of the receiving State.[6] Fenwick has also criticized the theory of extra-territoriality and has expressed the view that this theory cannot be the basis of immunity and privileges enjoyed by the diplomatic agents. It has finally been abandoned in the Vienna Convention which offers no theoretical basis for the privileges and immunities it grants.[7] In *Bergman* v. *De Sieyes,*[8] the District Court of New York held "......that a Foreign Minister is immune from the jurisdiction, both criminal and civil of the courts in the country to which he is accredited, on the grounds that he is the representative, the *alter ego,* of his sovereign who is, of course, entitled to such immunity, and *that subjection to the jurisdiction of the courts, would interfere with the performance of the duties as such minister......*"

Reference may also be made here to *Ex party Petroff* (1971) wherein the Supreme Court of Australia criticized and discarded the theory of extra-territoriality and expressed the view in unambiguous terms that this cannot be regarded the true basis of the immunities and privileges enjoyed by the diplomatic agents in the present period. In this case two citizens of Australia had thrown some explosive substances on the Soviet Chancery situated in Canberra. The proceedings were started against these two accused, according to the criminal law of Australia. These two persons argued that on the basis of the theory of extra-territoriality, the Chancery of Soviet Union is outside the territorial jurisdicion of Australia and therefore they cannot be prosecuted under the law of Australia. The Court had, therefore, to decide whether or not the Chancery will be deemed to be out of the territorial jurisdiction of Australia. The Supreme Court of Australia reveiwed the earlier law on the point and ruled that it is wrong to say that Chancery is not within the territorial jurisdictions of Australia and that the accused cannot be punished under the local laws. Thus the Supreme Court of Australia condemned and discarded theory of extra-territoriality and upheld the conviction of the said two accused persons.

Functional Theory.—In fact, the true basis of the immunities and privileges enjoyed by the diplomatic agents is not the theory of extra-territoriality but the special functions which these agents perform. That is to say, diplomatic agents are given certain immunities and privileges because of the special functions which they perform. It is thought necessary and expedient to grant these immunities and privileges to them otherwise they would be greatly handicapped in the performance of their functions. Thus Diplomatic Missions are accorded privileges and immunities for functional reasons as is clearly brought out in the Vienna Convention on Diplomatic Relations.[9]

Immunities and privileges of Diplomatic agents*.—As observed by the International Court of Justice on 15 December, 1979 in *Case concerning United States Diplomatic and Consular Staff in Tehran* (Provisional Measures), "....... .the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems to achieve mutual understanding and to resolve their differences by peaceful means :......"Further, while no state is under any obligation to maintain diplomatic or consular relations with another, yet cannot fail to recognize the imperative obligations inherent therein, now codified in the Vienna Convention of 1961 and 1963......" "One of the Pillars of modern International Law is the diplomatic immunities of the Ambassadors."[10]

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[6] L. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 793.

[7] Charles G. Fenwick, International Law, (Third Indian Reprint, 1971), p. 552.

[8] (1946) 71F Supp. 334, Facts of this case have been mentioned in this chapter under the heading "Immunity from Civil Jurisdiction."

[9] See Statement of Dr. Sayid Mohammad (the then Central Minister of State for Law and Justice) in the Sixth Committee on the item concerning Diplomatic Asylum appearing in I.J.I.L., Vol. 15 (1975), pp. 534-536 at p. 537.

* See also for I.A.S. (1954), Q. No. 5 ; P.C.S. (1975), Q. Nos. 2 (e) and 9 ; P.C.S. (1969), Q. No. 3(c) ; P.C.S. (1971), Q. No. 9 ; P.C.S. (1983), Q. 10(a) ; P.C.S. (1985) Q. 6(a) ; C.S.E. (1987), Q. 5(c) ; P.C.S. (1995) Q. 8(b) ; UPPCS (2005) Q.6.

(*1*) *Inviolability of Persons of Envoys.*—It is a well-recognised principle of international law that the person of Envoys is regarded inviolable. It may be noted here that International law relating to inviolability of the persons of envoys was recognized in India from a very early time. "In the Ramayana this very principle—the inviolability of the person of the envoy is affirmed and enforced on several occasions—sometimes even against the wishes of sovereign who in a fit of anger wanted to slay the envoy for having delivered a rude ultimatum on behalf of his sovereign."[11] In this connection the example of Hanuman who went as a messenger to the Court of Ravana may be cited. On the basis of inviolability of persons of envoys, diplomatic agents cannot be arrested for debts, etc. If a diplomatic agent is attacked and insulted, it is deemed to be an attack on and the insult of the State whose representative he is. On this basis, all the cases against him are invalidated. In the present period this immunity has been incorporated in Article 29 of the Vienna Convention on the Diplomatic Relations, 1961. Article 29 provides : "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take appropriate steps to prevent any attack on his person, freedom or dignity." But the diplomatic agents have a duty not to interfere in the internal affairs of that State. Moreover, the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present convention or by other rules of general international law or by any special arrangements in force between the sending and the receiving State.[12] "The right of inviolability extends to the person of diplomatic officials as well as diplomatic agents, their premises, archives, papers, documents and correspondence, and the receiving State must take appropriate steps to prevent any attack on their person, freedom of dignity as violation of any fraction of this right constitutes a serious breach. However, this is not to say that any abuse, such as, committing acts of violence, sabotage, or espionage against the receiving State will go unnoticed and indeed unpunished. Indeed such acts have invariably resulted in the receiving State requesting the recall of such offending officials, and in extreme cases the receiving State has found it necessary to expel and declare them *persona non-gratia.*[13] Further, "To be sure, the right which the principle for inviolability confers on the sending State is believed to be limited by such overwhelming national security considerations, such as, when diplomatic mission engages in fostering a civil war within the territory of the receiving State or uses its premises for espionage activities."[14] For example, a few years back Pakistan declared Iraqi Ambassadors as *persona non-gratia* because arms and ammunitions were recovered in the Iraqi Embassy. Arms and ammunitions were being collected in the Embassy, Pakistan contended, to supply to certain factions in Pakistan to foment civil strife in Pakistan.

In the case of the *United States Diplomatic and Consular Staff in Tehran,* the International Court of Justice reaffirmed the principle of the inviolability of the person of diplomatic envoys and of the premises of diplomatic mission. This case was brought before the world court by United States following the occupation of its embassy in Tehran by Iranian militants on 4 November, 1979, and the capture and holding as hostages of its diplomatic and consular staff. On a request by the United States for the indication of provisional measures, the court held :

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[10] See supra note 1.

[11] Ibid.

[12] Article 41 of the Vienna Convention on Diplomatic Relations, 1961.

[13] A. Akvnsanya, "The New Nations and Diplomatic Immunity : Nigeria and the Diplomatic Pouch", I.J.I.L., Vol. 14 (1974), p. 400 at p. 401.

[14] Ibid., at p. 401.

"There is no more fundamental prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose, and......the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution *are essential unqualified, and inherent in their representative character and their diplomatic function.*" The world court indicated provisional measures for ensuring the immediate restoration to the United States of the Embassy premises and the release of the hostages.

In its decision on the Merits of the case,[15] at a time when the situation complained of still persisted the court in its judgment of 24 May, 1980, found that Iran had violated was still violating obligations owed by it to the United States under conventions in force between the two countries and rules of general international law, that the violaion of those obligations engaged its responsibility, and that the Iranian Government was bound to secure the immediate release of the hostages, to restore the Embassy premises, and to make reparation for the injury caused to the United States Government. The world court reaffirmed the cardinal importance of the principles of international law governing diplomatic and consular relations.

Reference may also be made here to 1984 incident in England wherein shots were fired from the Libyan People's Bureau situated in London at demonstrators outside the Bureau as a result of which a woman police officer was killed. Despite this, the British Government did not authorise the police to enter the premises of the Bureau. Thus the British Government strictly complied with the principle of inviolability of the premises of diplomatic mission as laid down by the world court. However, as permitted under international law, the British Government insisted on the recall of the Bureau's staff.

Torture of Indian Diplomat in Pakistan.—On 24th May, 1992, an Indian diplomat, Rajesh Mittal, was tortured and interrogated for nearly seven hours. Later on, he was expelled on charges of obtaining secret documents. It may be noted here that a month prior to this incident, a Pakistani diplomat was expelled from India on espionage charges. Mr. Mittal's torture was probably in retaliations of the said Indian action. Probably in retaliation, the next day, *i.e.*, 25th May, 1992, India declared two Pakistani diplomats, Counsellors Zafarul Hassan and Sayed Fayaz Mahmood Endrabi *persona non gratia, i.e.*, undesirable persons and asked Pakistani High Commission to withdraw them within 48 hours.

When prior to Mittal's incident, India declared Pakistani diplomat *persona non gratia*, it was in conformity with Vienna Convention and rules of international law. But the torture of Indian diplomat by Pakistani intelligence officials is a flagrant violation of the principle of inviolability of the person of diplomatic envoy as enshrined in Article 29 of the Vienna Convention on Diplomatic Relations, 1961. The principle of the inviolability of the person of the diplomatic envoy and the obligation of the receiving State to protect the personnel of the mission has been upheld and reaffirmed by the International Court of Justice in the case of the *United States Diplomatic and Consular Staff in Tehran* (1980).

Subsequent Indian action in retaliation to declare two Pakistani diplomats *persona non gratia* was also in conformity with Vienna Convention on Diplomatic Relations, 1961. On the other hand, Pakistani action torturing Indian diplomat was a flagrant violation of the rules of international law including Vienna

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[15] See Case Concerning Untied States Diplomatic and Consular Staff in Tehran, I.C.J. Reports (1980) p. 3.

Convention on Diplomatic Relations, 1961 and established norms of international relations.

Time and again such incidents in violation of the Vienna Convention on Diplomatic Relations, 1961 has occurred in Pakistan despite India's protests and condemnation of such acts, there has been no abatement of the number of such cases.

(2) *Immunity from criminal jurisdiction of the courts.*—The diplomatic agents also enjoy immunities from criminal jurisdiction of courts.[16] However it is generally believed that they will not violate the provisions of the law of the State where they are appointed. Beside this it may also be noted that there are conditions under which the diplomatic agents may lose their immunities. For example, they may lose the immunity if they are guilty of conspiracy against the State. The example of George Gyllenborg 1712 may be cited in this connection. He was an Ambassador of Sweden in England and he was arrested on the charge of conspiracy against George I, the King of England. If a case is filed in a court against a diplomatic agent, then it is not necessary for him to present himself personally in the court. It is sufficient for him to send the message that he is a representative of a sovereign State and is outside the jurisdiction of the court. But if he does not take this ground and presents himself personally and unconditionally in the court then it will be deemed that he has waived his immunity and he will then be deemed to be within the jurisdiction of the court.

On 6 June, 1986, the Defence Secretary of the U.S. said that the U.S. and other countries should consider ending criminal immunity for diplomats who plan or take part in terrorist activities. This suggestion merits serious consideration.

Illustration 1.—The divorced daughter of the Hungarian diplomatic agent in India comes to India as a tourist. She causes a car accident and thereby a person is killed. A case is filed against her in India. She claims immunity in her defence.*

In this case her defence will fail because she comes to India as a tourist and not as a member of the family of Hungarian diplomatic agent. Moreover, she cannot successfully claim immunity on the ground of being a member of envoy's family because she has not been living with him and does not belong to his retinue. As pointed out by Oppenheim, "Now-a-days the exemption from civil and criminal jurisdiction of such members of an envoy's family *as live under his roof* is always granted."[17] Only "the wife of the envoy, his children, such as of his near relations as *live within his family and under his roof belong to his retinue.*"[18]

It may also be noted that according to Indian practice members of their families enjoy immunity from jurisdiction only in those cases of acts which are related to their official functions of the mission only.[19] "The mere possession of a diplomatic passport or visa, without actual membership of a diplomatic accredited to the territorial or any other State, is insufficient to confer immunity.........."[20]

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[16] See Article 31 of the Vienna Convention.

* P.C.S. (1985) Q. 6 (b).

[17] Oppenheim, note 6, at p. 812; emphasis added.

[18] Ibid.

[19] See also Arun Chaturvedi, "Diplomatic Laws and Indian State Practice", I.J.I.L., Vol. 25 (1985) p. 50 at pp. 64-65.

[20] See Starke, note 3, p. 283, note 1.

Illustration 2.—An international conference is being held in State *C* for settlement of a dispute which had led to armed conflict. During the conference the diplomatic envoy *AX* of State *D* shoots and kills the foreign Minister *BY* of State *C*. Will *AX* be entitled to any diplomatic immunity from prosecution in State *C* for murder of *BY*?*

The diplomatic envoy *AX* of State *D* will be entitled to diplomatic immunity from prosecution in State *C* for murder of *BY*. According to Article 31, a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. As pointed out by Edward Collins,[21] "If a foreign diplomat violates the laws of the receiving State, the only recourse is to register a diplomatic complaint to his government or in an extreme case to demand his withdrawal as *persona non gratia*."

Illustration 3.—An Indian *K* is a high official in the French embassy in India. He causes physical injuries to a Frenchman who has come to the embassy for personal work. Will *K* be entitled to diplomatic immunity in Indian Courts against criminal prosecution ?**

K will be entitled to diplomatic immunity in Indian Courts. As held by the International Court of Justice in the *case concerning United States Diplomatic and Consular Staff in Tehran*, "......... the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function........."

Since the ambassador possesses jurisdiction upon his officials and the premises of the mission, he can take necessary action in the matter and *K* can be tried in French Courts in accordance with French law. The utmost what the Indian Government can do is to insist on the recall of *K*.

Reference may also be made here to the case of *Arrest Warrant of 11 April, 2000 (Democratic Republic of Congo* v. *Belgium) [2002/04]*—This case related to an international arrest warrant in absentia issued in April, 2000 by an investigating Judge of the Brussels Tribunal against Mr. Abdonlaye Yerodia Md mbasi of having made certain speeches in the Congo in August, 1998 causing an incitement to racial hatred. He charged the Minister who was a Belgium national and was neither a resident of Belgium nor present in that capacity with (i) grave breaches of the 1949 Geneva Convention and of the Additional Protocols thereto, and (ii) crimes against humanity. The International Court of Justice decided by 13 to 3 that the issue and the international circulation of the disputed arrest warrant had failed to respect the immunity from criminal jurisdiction and inviolability which Mr. Yerodia enjoyed under International Law.

The World Court clarified the scope of immunity enjoyed by Minister of Foreign Affairs. The Court ruled that throughout the duration of his or her office, a Minister of Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability. This was the case whether the Minister is present in foreign territory is an official or private capacity whether the acts in question were performed before he or she assumed office as Minister or during the period of office, and finally whether, the acts were performed in an official in private capacity.

(3) *Immunity from civil jurisdiction.*—The diplomatic agents enjoy immunities from the jurisdiction of civil courts.[22] Suits for recovery of debt or breach of contract cannot be filed against diplomatic agents. However, there are certain exceptions to this rule. Article 31 of the Vienna Convention which recognises this immunity also provides three exceptions. That is to say the rules of immunity from civil and administrative jurisdiction will not apply in the following three cases : A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the

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* Asked in C.S.E. (1989), Q. 7(b).

[21] International Law in a Changing World, p. 228.

** P.C.S. (1990) Q. 7(c).

[22] See Article 31 of the Vienna Convention.

sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; and (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

A distinction is made between members of the diplomatic staff, members of the administrative and technical staff and the members of the service staff for the purposes of privileges and immunities. It is also seen whether an act committed by a member of diplomatic mission was performed in the performance of his duties. For example, if an embassy chauffeur has committed a traffic accident, he will have the immunity only if he was acting in the course of his employment.

Illustration.—(1) Differences arose between the Belgian Military Attache in London and his wife concerning the ownership of the yacht *Amazone*. The wife issued a writ *in rem* for possession, claiming that the yacht had been purchased with her money and that the defendant husband was acting as her agent in respect of the yacht. The husband put in conditional appearance and moved the court to set aside the writ on the ground that he enjoyed diplomatic immunity and that the yacht was owned by him and was in his possession and control.* In this case the husband being a diplomatic agent is entitled to claim immunity and the court cannot exercise jurisdiction over him.

Illustration.—(2) *X*, a foreign diplomat in Delhi has taken a private house on lease. On his failure to pay the rent, the landlord filed a suit to recover the rent as well as possession of his house. *X* pleads diplomatic immunity.** The exemption from the civil jurisdiction of the country is complete in so far as is necessary to secure to the fullest freedom in the performance of their official duties.[23] But it must be stressed that the immunity is for official functions only. So is the case with residence. Immunity is in respect of official residence and not for private residence. According to Article 31 of the Vienna Convention on Diplomatic Relations, the immunity is not available in respect of a real action relating to the private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State.

In the instant problem *X*'s plea for diplomatic immunity will fail because it is no where stated that he holds the house on behalf of the sending State for the purposes of the mission. Moreover, the immunity will not be available to *X* because it is a real action relating to private immovable property situated within the territory of the receiving State, *i.e.*, India. Lastly, under Article 34 (b) of the Vienna Convention, a diplomatic agent is not immune in respect of dues and taxes on private immovable property situated in the territory of the receiving State unless he holds it on behalf of the sending State.

In India suits against foreign states and diplomatic agents are governed by Section 86 of the Civil Procedure Code, 1908. According to this section, for filing of such suits consent of the Central Government is a condition precedent. Immunity conferred by section 86 is not limited to any particular class of suits. A person is 'sued' not only when the plaint is filed but also when the suit remains pending against him. The word 'sued' covers the entire proceeding in an action. Though section 86 is not retrospective yet it refers to all stages of a suit and bars the further progress of a pending suit in absence of sanction even if no sanction was necessary at the time of its institution. A pertinent question, however, arises, are the Indian citizens without remedy when the Central Government refuses to give sanction ? In *Century Twenty One (P) Ltd.* v. *Union of India*,[24] a private party gave his residential premises to the Ambassador of Afghanistan under a lease. The Government refused to give consent for filing of the suit. The petitioner filed a writ in the High Court of Delhi under Article 226 of the Constitution for the enforcement of his fundamental right to hold and dispose of property. After making a distinction between liabilities arising out of sovereign acts of foreign states and liabilities arising out of commercial activities, the court directed the Central Government to accord sanction to the petitioner to sue the Afghan Ambassador for the recovery of arrears of rent.

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* Asked in I.A.S. (1971), Q. No. 6(b).

** C.S.E. (1985) Q. 6 (b).

[23] See Fenwick, note 7, at p. 563.

[24] A.I.R. 1987 Delhi 124.

But in *Harbhajan Singh* v. *Union of India*,[25] the Supreme Court's orders were persuasive and not peremptory. In this case, the petitioner claimed recovery of his dues from the Ambassador of Algeria in New Delhi for the building maintenance, reconditioning and renovation work at the Embassy of Algeria in New Delhi. His representation for the recovery of dues having failed to produce the desired result, he requested the Ministry of External Affairs to grant sanction for suing the Algerian Embassy. The Ministry rejected his request in November 1983 saying that it regretted that "permission to the State of Algeria cannot be given on political grounds". Against this, the petitioner filed a writ petition in the Supreme Court under Article 32 of the Constitution. In reply the Government changed its stand and said that "no *prima facie* case was made out and the case was not squarely covered under Section 86, paras (1) and (2) of the Code of Civil Procedure". It was also argued on behalf of the Government that under Section 86, paras (1) and (2) of Code of Civil Procedure the Central Government has "discretion to refuse consent as required under that section". The court noticed the apparent contradiction in the Government's stand and held that it was for the judiciary to adjudicate whether there was a *prima facie* case or not. As regards the refusal of sanction on 'political grounds' the Supreme Court observed that "the political relationship between two countries would be better served and the image of a foreign state be better established if citizen's grievances are judicially investigated. This would be in consonance with human rights."[26]

The Supreme Court further observed : "In this case, the petitioner had a right to carry on the work of maintenance and repairs in this country. The right is granted to him under the Constitution and he trades within the local limits of the courts in India and the foreign state which he wants to sue has immovable property in India situate within the limits of this country. There is a dispute about the petitioner's claim. That dispute has not been judicially determined. It has not been held that the claim of the petitioner is frivolous. In that view of the matter, it appears to us that a foreign state in this country if it fulfils the conditions stipulated in sub-section (2) of Section 86 of the Code would be liable to be sued in this country. That would be in conformity with the principles of international law as recognized as part of our domestic law and in accordance with our Constitution and human rights."[27]

Further, "It is well to bear in mind the two principles on the Sovereign immunity rests. So far as the principle expressed in maxim *par in parem non habet jurisdictionem* is concerned with the status of equality. The other principle on which immunity is based is that of non-intervention in the internal affairs of other states............ In the days of international trade and commerce, international interdependence and international opening of embassies, in granting sanction the growth of a national law in this respect has to be borne in mind. The interpretation of the provisions of the Code of Civil Procedure must be in consonance with the basic principles of the Indian Constitution."[28]

Sabyasachi J. of the Supreme Court delivering the judgment set aside order dated 26 November 1983 and directed the Union of India to reconsider the matter and "explore the possibilities with Algerian authority of mutual settlement either by arbitration or by other accepted legal norms." Further, "The Union of India should pass reasoned order in accordance with the development of international law......"[29]

It has been aptly remarked,[30] "To frustrate their (*i.e.* Indian Citizens) grievances in the name of diplomatic immunities hardly contributes to the dignity of foreign missions.

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[25] A.I.R. 1987 S.C. 9.

[26] Ibid, at p. 14; per Sabyasachi Mukharji, J (as then he was and who later on became the Chief Justice).

[27] Ibid, pp. 13-14.

[28] Ibid, pp. 14-15.

[29] Ibid, at p. 15.

[30] K. Narayana Rao, "Foreign Embassies in India; Claims for Recovery of Rents and Repair Charges" I.J.I.L., Vol. 27 No. 4 (Oct.-December 1987), p. 483 at p. 486.

The Government of India is therefore well advised to evolve a code of conduct to resolve just claims of Indian citizens in this regard and the foreign missions be persuaded to adhere to such a course of action. This course will be in harmony with the conventional obligation on the part of the host country to 'facilitate the acquisition on its territory in accordance with its laws, by the sending state of premises for its mission to assist the latter, in obtaining accommodation in some other ways' and, where necessary it shall also 'assist missions in obtaining accommodation for their members.'[31] Implicit in this provision is the concomitant reciprocal obligation on the part of foreign mission in India to pay promptly the rents and other charges relative to the accommodation occupied by them and the members of their staff. Any claim of immunity in this area is definitely derogatory to diplomatic decency."

The fact, however, remains that in the absence of consent of the Central Government as required under Section 86 of the Code of Civil Procedure, suit cannot be filed against the ambassador of a foreign state. Even after obtaining the consent, if a suit has been filed, the ambassador can claim immunity from the jurisdiction of the court and the courts will then be precluded from proceeding against him.

In *Bergman* v. *De Sieys,*[32] the respondent was the French Minister for Bolivia. When he was passing through New York, the appellant started civil process against him. The respondent contended that being a diplomatic representative, he was immune from civil process. Dismissing the appeal the court held, "that a Foreign Minister *en route* either to or from his post in another country, is entitled to innocent passage through a third country, and is also entitled, on the same grounds, whether as a matter of right or of discretion, to the same immunity from the jurisdiction of the courts of the third country that he would have if he were resident therein........." This rule has been adopted in Article 40 of the Vienna Convention which adds that the same shall apply in the case of any members of his family enjoying privileges of immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

It should be remembered that the immunity belongs to the diplomatic envoy and ultimately the State. It is only he or his State who is entitled to claim immunity. For example, *P*, the plaintiff was injured in London by the car of *D*, the defendant (a secretary in the Peruvian Legation), who did not plead his diplomatic immunity in the suit but called on his insurance company to indemnify him against the claim. The insurance company repudiated liability contending that *D* himself was, as a diplomat, under no liability to *P*.* Here the contention of insurance company is not maintainable because the immunity belonged to *D* and he did not claim it and asked insurance company to indemnify *P*. This amounts to waiver of his immunity, since the immunity has been waived by *D*, it cannot be claimed by anyone else on his behalf.

(4) *Immunity regarding residence.*—Yet another immunity enjoyed by the diplomatic agents is regarding their residence. Ordinarily, their residences are regarded inviolable. This immunity has been reaffirmed by the International Court of Justice in *case concerning the United States Diplomatic and Consular Staff in Tehran*[33] which has been discussed earlier [I.C.J. Reports (1980) p. 3). If a person is wanted by police and he is not enjoying any immunity of arrest then the proper course is that the diplomatic agents should hand over such person to the police. Ordinarily, the diplomatic agents resort to such a behaviour.

(5) *Immunity from being presented as witness.*—Diplomatic agents enjoy the immunity from being presented as a witness in the court. They cannot be compelled to come to the court and give evidence in a case howsoever grave the case may be. But if any diplomatic agent himself waives this immunity then he may personally present himself and give evidence. In that case he will be deemed to be within the jurisdiction of the court for it will be considered that he had waived his immunity in this connection.

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[31] Vienna Convention on Diplomatic Relations, 1961, Art. 21.

[32] (1946) 71 F. supp. 334.

* Asked in I.A.S. (1965), Q. No. 6 (a).

[33] I.C.J. Reports (1980) p. 3.

Illustration.—A Canadian is charged for conspiring with some Soviet spies to commit offence under Official Secret Act.

(i) Can certain files of the Military Attache of Soviet Embassy be summoned in Canadian Court ?

(ii) Can an employee of the Soviet Embassy be asked to prove the contents of the files.*

Certain files of the Military Attache of Soviet Embassy cannot be summoned in Canadian Court. Article 22 of the Vienna Convention on Diplomatic Relations, 1961 provides, "The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission". Article 27, paragraph 2, further provides, "The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions."

The employee of the Soviet Embassy cannot be asked to prove the contents of files. Article 31, paragraph 2 of the Vienna Convention provides, "A diplomatic agent is not obliged to give evidence as a witness." Article 37, paragraph 2, further provides that the members of the administrative and technical staff of the mission, together with members of their family of a diplomatic agent forming part of his house hold shall, *if they are not nationals of the receiving state,* enjoy the privileges and immunities specified in Articles 29 to 36. Thus if the said employee is not a national of Canada and the acts performed are not outside the course of his duties,[34] he cannot be asked to prove the contents of files.

(6) *Immunity from taxes dues, etc.*—Under International law the diplomatic agents are immune from the payment of taxes, etc. These immunities are incorporated in Articles 34 and 36 of the Vienna Convention on Diplomatic Relations, 1961. Article 34 provides that a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, *except,* (a) indirect taxes of a kind which are normally incorporated in the price of goods or services; (b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (c) estate, succession or inheritance duties, levied by the receiving State, subject to the provisions of para 4 of Article 39; (d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State; (e) charges levied for specific services rendered; registration, Court or record fees, mortgages dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23. Article 36 (1) further provides that the receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services on : (a) articles for official use of the mission; (b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

(7) *Immunity from police rules.*—The diplomatic agents are immune from the police rules of the States which they are appointed. However, by courtesy and for the sake of good relations with the receiving State, they generally follow such rules.

(8) *Right to worship.*—The diplomatic agents enjoy right to worship and no interference can be made in this respect. They are free to follow any religion or perform the religious rituals, ceremonies, etc. in their own way.

(9) *Right to exercise control and jurisdiction over their officers and families.*—The diplomatic agents have right to exercise control and jurisdiction over their officers and families.

(10) *Right to travel freely in territory of the receiving State.*—This new right has, for the first time, been introduced in Art. 26 of the Vienna Convention on Diplomatic Relations,

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* P.C.S. (1988), Q. 4(b).

[34] Article 37, paragraph 2 of Vienna Convention on Diplomatic Relations, 1961.

1961. Article 26 provides that diplomatic agents can travel in the territory of the receiving State subject, of course, to the condition that they cannot go to the prohibited places or the places which are important from the point of view of the security of the receiving State.

(11) *Freedom of communication for official purpose.*—This freedom has been conferred upon by Art. 27 of the Vienna Convention on the Diplomatic Relations, 1961. This article provides that they have freedom to communicate with their home-State in connection with their functions and duties.

(12) *Immunity from local and military obligations.*—Diplomatic agents are also exempt from local and military obligations. This provision has been incorporated in Art. 35 of the Vienna Convention.

(13) *Immunity from Inspection of Personal baggage.*—Article 36 (2) of the Vienna Convention provides that the personal baggage of a diplomatic agent be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. State inspection shall be conducted only in the presence of the diplomatic agent or of his authorized agent.

(14) *Immunity from Social Security Provisions.*—According to Article 33, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

Duties of Diplomatic Agents etc.

(1) *Duty to respect laws and regulations of the receiving state.*—According to the Vienna Convention on Diplomatic Relations, 1961, without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state.[35]

(2) *Duty not to interfere in the Internal Affairs of the State.*—They have a duty not to interfere in the internal affairs of that state.[36]

(3) *Official business to be conducted with or through the Ministry of Foreign Affairs of Receiving State or such other Ministry as may be agreed.*—All official business with the receiving state entrusted to the mission by the sending state shall be conducted with or through the Ministry for Foreign Affairs of the receiving state or such ministry as may be agreed.[37]

(4) *Premises of Mission not to be used in any matter incompatible with the function of the Mission.*—Article 41, paragraph 3 provides, the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the Vienna Convention, 1961 or by other rules of general international law or by special agreements in force between the sending and the receiving state.

(5) *Diplomatic agent not to practise for personal profit any professional or commercial activity.*—According to Article 42 of the Vienna Convention, a diplomatic agent shall not in the receiving state practise for personal profit any professional or commercial activity.

Immunities of the Servants of Diplomatic Agents.—Servants of diplomatic agents also enjoy some immunities. But these immunities are not so vast and important as those of the diplomatic agents. The servants of the diplomatic agents include officials of the embassies, their women, children and other personal servants, messengers, *etc.* These immunities are enjoyed only by those servants who are in some way or the other connected with the office of embassy. The messengers of the embassies are also immune from civil and criminal jurisdiction of the courts. The immunities of these servants depend much upon their functions. Moreover, they are based upon the principles of recirpocity. That is to say, if a State provides certain immunities and rights to certain classes of officials of the embassies then the other State, on the basis of reciprocity, also grants those facilities and immunities to the officials of the embassy of the other State.

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[35] Article 41, paragraph 1.

[36] Ibid.

[37] Article 41, paragraph 2.

The exemption in respect of social security provisions referred above also applies to private servants who are in the sole employment of diplomatic agent if they fulfil two conditions (a) that they are not nationals of or permanently resident in the receiving State; and (b) that they are covered by the social security provisions which may be in force in the sending State or a third State. This exemption does not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State. According to Article 37, private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by that receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

The privileges and immunities are of the diplomatic representatives and if they waive them, the immunities of their servants also come to an end. In *R.* v. *Kent*,[38] Kent was a code clerk in American embassy in England. He was dismissed from service on the charge of stealing two documents. On the same day, the American Ambassador waived immunities in this respect. Kent was arrested and tried. Kent argued that being a servant of a diplomatic envoy he was immune from the jurisdiction of the court. The court dismissed his contention and sentenced him seven years of imprisonment. The court observed that the privileges and immunities are of the diplomatic envoys and finally of the State concerned which has accredited him. The privileges and immunities end when the diplomatic envoy waives them.

Reference may be made here to Section 5 of the Diplomatic Relations (Vienna Convention) Act, 1972, which was passed by the Parliament of India to give effect to the Vienna Convention on Diplomatic Relations, 1961 and to provide for matters connected therewith. Section 5 provides : "For the purposes of Article 32 of the Convention set out in the schedule, a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to be a waiver by that State".

Can Diplomatic Agent waive or lose his immunity?—As pointed out earlier, the diplomatic agents enjoy a number of immunities and privileges. The question, however, may arise whether a diplomatic agent may waive his immunity or he may lose these immunities under certain circumstances. There are certain circumstances under which a diplomatic agent may lose his immunities. For example, if a case is filed against a diplomatic agent, he is entitled to refuse to go to the court and may simply send the message that he enjoys the immunity from the jurisdiction of the court. But if he does not do so and presents himself unconditionally in the court and allows the case to proceed, he may lose his immunity. Similarly, if a diplomatic agent files a suit in a court it will mean that he has waived his immunity and has accepted to be under the jurisdiction of the court. Thus he automatically loses his immunities. The diplomatic agents enjoy the immunity from being presented as a witness in any court. But if a diplomatic agent waives this immunity and presents himself as a witness then he will lose his immunity. Similarly, the diplomatic agents enjoy the immunity from payment of taxes.

Article 32 of the Vienna Convention requires that waiver must always be express. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from involving immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim. It is, however, provided that the waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary. Thus at the time of the execution of the judgment of court, the diplomatic agent may successfully claim his immunity.

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[38] (1941) 1 K.B. 454.

Consuls.*—Consuls are the representatives of their States but they are not deemed to be diplomatic agent.[39] The function of these Consuls is generally to look after the commercial and trade interests of their countries. Since their main function is to look after the commercial interests of their countries, they are certainly treated to be far below in status than the diplomatic agents. But these Consuls perform very important functions so far as trade and commerce between States are concerned. In the modern period, the importance of trade and commerce is constantly increasing because of the inter-dependence of the States and because of the specialisation of certain States in certain goods and things. The activities of the Consuls have increased manifold during the last 50 years. It was, therefore, thought desirable to modify the law relating to Consuls. A convention was, therefore, adopted at Vienna on 24th April, 1963. The convention is known as Vienna Convention on Counsular Relations. As of March 2018, 180 countries had become parties to the convention. In this convention it has been made clear that the matters in which there is no express provision in the convention, will continue to be determined by the customary rules of International law. Thus at present the bulk of International law relating to Consuls has been incorporated in Vienna Convention, 1963, and the remaining is still in the form of customs.

An Optional Protocol to the Vienna Convention was also adopted on 18 April, 1961. It was implemented. In March 2006, U.S. pulled out of Optional Protocol to the Convention which allows International Court of Justice (ICJ) to have compulsory jurisdiction over dispute arising under the convention. In June, 2006 the U.S. Supreme Court ruled that foreign nationals who were not notified of their right to consular notification and access after arrest may not use the treaty violation to support evidence obtained in police interrogation or belatedly raise legal challenge after that. In March, 2008 the Supreme Court further ruled that the decision of the ICJ directing the U.S. to give series and reconsideration to the cases of 51 Mexicans convicts in death row was not a binding domestic law and could not be used to overcome state procedural default rule that barred further post conviction challenged. As of March 2018, 180 countries had become parties to the optional Protocol to the Vienna Convention on Consular Relations, 1963.

Classification of Consuls.—(1) *Consul-General.*—Consul-General is of the first category of Consuls and is generally appointed in main commercial cities and generally heads the Consul office.

(2) *Consuls.*—Consuls occupy the second place, that is, below Consul-General and are either appointed at small cities or they assist the work of Consul-General.

(3) *Vice-Consuls.*—Vice-Consuls are below the Consuls and in some States they are appointed by Consul-General.

(4) *Consul Agents.*—They are of the last category and are appointed either by Consul-General or in some States even by Consul.

The Consuls are often appointed by the head of the States and the receiving State accepts them by issuing a "Letter of Premission", namely, 'Exequator'.

Functions of Consuls.—Following are the four functions of Consuls : (1) They protect commercial interests of their States, (2) They supervise and look after the shipping, *etc.*of their country, (3) They also look after the interests of their citizens and assist them in cases and for getting passport, etc. (4) They also perform certain other functions for the citizens of their States, such as, to testify signatures, registration of marriage, birth, death, etc.

Rights and immunities of Consuls.—As pointed out earlier, Consuls are not regarded as diplomatic agents hence they do not enjoy those immunities and privileges which are enjoyed by the diplomatic agents. But ordinarily they are conferred upon special immunities and privileges by bilateral treaty which generally grants them immunity from the jurisdiction of the local courts. It is also generally agreed that they perform the functions on behalf of their States and, therefore, the local courts cannot proceed against them unless and until they seek prior permission from the Government. Hence it is clear that although the Consuls are as a matter of right not entitled to enjoy those immunities and privileges which the diplomatic agents enjoy, yet by bilateral treaties and on the reciprocal basis, they are conferred upon almost the similar privileges and immunities. "The modern tendency of States is to amalgamate their diplomatic and cosular services and it is a matter of frequent occurrence to find representatives of States occupying, interchangeably or concurrently diplomatic and consular posts. Under the impact of this tendency, the present difference between diplomatic and consul privileges may gradually be narrowed."[40]

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* See also for P.C.S. (1988), Q. 4 (a) ; UPPCS (2006) Q. 6(b).

[39] See J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 429.

Reference may be made here to a recent case, namely, *Legrand case (Germany* v. *United States of America)* decided by the International Court of Justice on 27th June, 2001. The facts of this case are as follows :

On 7th January, 1982, Karl La Grand and Walter La Grand were arrested in the United States by law enforcement officers on suspicion of having been involved the same day in an attempted armed bank robbery in Marana, Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. They were subsequently tried before the Superior Court of Pima County, Arizona, which on 17th February, 1984, convicted them both of murder in the first degree, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping on 14th December, 1984, each was sentenced to death for first degree murder and to concurrent sentences of imprisonment for the other charges.

Walter La Grand and Karl La Grand both were born in Germany in 1962 and 1963 respectively and were German nationals. In 1967, when they were still young children, they with their mother to take up permanent residence in the United States. They returned to Germany only once, for a period of about six months in 1974. Although they lived in the U.S. for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States. However, the U. S. emphasized that both had the demeanour and speech of Americans rather than Germans that neither was known to have spoken German and that they appeared in all respects to be native citizens of the U.S.

Germany claimed that the U.S., by not informing Karl and Walter La Grand without delay following their arrest of their rights under Article 36, sub-paragraph 1(b) of the Vienna Convention on consular relations, and by depriving Germany of the possibility of rendering of consular assistance, which ultimately resulted in the execution of Karl and Walter La Grand, violated its international legal obligations to Germany in its own right and in its right of diplomatic protection of its nationals under Articles 5 and 36 paragraph of the said convention. Germany further contended that the criminal liability imposed on Karl and Walter La Grand in violation of international legal obligations is void, and claimed that Germany is entitled to reparation.

At all material times, Germany as well as the United States were parties to both the Vienna Convention on consular relations and the optional Protocol to the convention. Article 36, paragraph 1(b) of the Vienna Convention provides that :

"if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of the rights under this sub-paragraph.

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[40] J.G. Starke, Introduction to International Law, Tenth Edition (1989), at p. 432; For detailed study see Satyadeva Bedi, "Inviolability of Consular Premises," I.J.I.L., Vol. 15 (1975), p. 93; Daniel D. Nsereko, "The Concept as a Defendant : His Amenability to the Jurisdiction of the Receiving State", I.J.I.L., Vol. 15 (1975), p. 333.

It was not disputed that at the time the La Grands were convicted and sentenced the competent United States authorities had failed to provide the La Grands with the information required by this provision of the Vienna Convention, and had not been informed the relevant German Consular post of the La Grand's arrest. The U.S. conceded that the competent authorities failed to do so, even after becoming aware that the La Grands were German nationals and not United States Nationals and admitted that the U.S. had therefore violated its obligations under this provision of the Vienna Convention. However there was some dispute between the parties as to the time at which the competent authorities in the U.S. became aware of the fact that the La Grands were German nationals.

On 24th February, 1999 certain last-minute Federal Court proceedings brought by Karl La Grand ultimately proved to be unsuccessful. In the course of these proceedings the U. S. Court of Appeals, Ninth circuit, held again that the issue of failure of consular notification to be procedurally defaulted, Karl La Grand was executed later the same day.

On 2nd March, 1999, the day before the scheduled date of execution of Walter La Grand, at 7.30 P.M. (the Hague time), Germany filed in the Registry of the world court the application instituting the present proceedings against the U.S. accompanied by a request for the following measures :

"The United States should take all measures at its disposal to ensure that Walter La Grand is not executed pending the final decision in these proceedings, and should inform the court of all the measures which it has taken in implementation of that order."

In an order on 3rd March, 1999 the International Court of Justice found that the circumstances required it to indicate, as a matter of greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its statute and with Article 75, paragraph of its Rules (I.C.J. Reports 1999, p. 9, para 26) it indicated provisional measures in the following terms :

"(a) The United States of America should take all measures at its disposal to ensure that Walter La Grand is not executed pending the final decision in these proceedings and should inform the court of all the measures which it has taken in implementation of this order.

(b) The Government of the United States of America should transmit this order to the Governor of the State of Arizona."

Earlier, *i.e.* on 2nd March, 1999, the Arizona Board of Executive Clemency met to consider the case of Walter La Grand. It recommended against a commutation of his death sentence, but recommended that the Governor of Arizona granted a 60-day reprieve having regard to the application filed by Germany in the International Court of Justice. Nevertheless, the Governor of Arizona decided, "in the interest of justice and both the victims in mind", to allow the execution of Walter La Grand to go forward as scheduled.

On 3rd March, 1999, *i.e.* the date on which the world court indicated provisional measures, the proceedings were also instituted in the United States Supreme Court by Walter La Grand. These proceedings, were decided against him. Later that Walter La Grand was executed.

The U.S. acknowledged that there was a breach of the U.S. obligation to inform the La Grand brothers that they could ask that a German consular post be notified of their arrest and detention.

After hearing the case on merits, the International Court of Justice held :

"that, by not informing Karl and Walter La Grand without delay following their arrest of their rights under Article 36, paragraph 1(b), of the convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the La Grand brothers under Article 36, paragraph 1,"

The world court also found "that, by not permitting the review and reconsideration, in the light of the rights set forth in the convention, of the convictions and sentences of La Grand brothers after the violations referred to above had been established, the United

States of America breached its obligation to the Federal Republic of Germany and to the La Grand brothers under Article 36, paragraph 2, of the convention".

The court also found that "....... by failing to take all measures at its disposal to ensure that Walter La Grand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under order indicating provisional measures issued by the court on 3rd March, 1999".

The Court unanimously took "note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), of the convention and finds that this commitment must be regarded as meeting the Federal Republic of Germany request for a general assurance of non-repetition.

Finally, the Court found "that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b), of the Convention having been respected, the United States of America by means of its own choosing shall allow the review and reconsideration of the conviction sentence by taking account of the violation of the rights set forth in that convention".

Slashing of strength of Indian Consulate-General at Karachi from 62 to 20.—On 29th December, 1992, Pakistan asked the Government of India to reduce to 20 the strength of its 62 member Consulate-General in Karachi. According to Pakistan, this has been done with a view to make the number of staff same in Consulate-General Office of both the countries. Pakistani action may be unfriendly but is not violative of rules of international law. Later on, *i.e*, on 19th October, 1993, Pakistan declared a diplomat and three staff-members of the Indian Consulate-General in Karachi as *persona non gratia* and asked them to leave Pakistan within two weeks, thus bringing down virtually the number of diplomats and staff members to 16.

Closure of Pakistani Consulate Office in Bombay.—On 20th March, 1994, Pakistan announced closure of its Consulate Office in Bombay. According to Pakistani Government spokesman, this action was taken due to "non-cooperative and negative attitude of the Indian authorities". It is significant to note that this decision came close on the heels of Islamabad's move to "defer" the resolution on Kashmir for a year before the United Nations Human Rights Commission (UNHRC) in Geneva at the request of China, Iran and 15 other countries. One of the bone of contentions between two countries has been the question of procurement of Jinnah House on lease for the use of the Consulate-General. Nevertheless, Pakistani action is in line with its general attitude towards India and its sustained efforts to build barriers that can prevent communication with India. In a near future, Pakistan may ask India to close its Karachi Consulate as a balancing measure. Even in such a case it may be an unfriendly act but in no way will be violative of international law.[41]

Termination of Diplomatic Mission.—A diplomatic mission may be terminated through any of the following ways :

(1) *Recall of Envoy.*—If the appointing State recalls the envoy, the diplomatic mission comes to an end. Such a step is taken only when relations between the States deteriorate and there are very remote chances of their improving.

(2) *Notification in regard to the end of Envoys functions.*—As provided under Art. 43 of the Vienna Convention, the appointing State may end the functions of envoy through a notification.[42]

(3) *On the request of the receiving State.*—The termination of diplomatic mission may also take place on the request of receiving State. This step is also taken when on account of some reasons the relations between the States are strained.

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[41] See also Naulilaa Incident, RIAA, 1012, 1019 referred below under the heading 'Persona non-gratia'.

[42] Article 43 provides: The function of a diplomatic agent comes to an end, inter alia: (a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end; (b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

(4) *By delivery of passport.*—Delivery of passport is yet another way of the termination of the diplomatic mission. If a diplomatic envoy is handed over the passport it means that he has become an undesirable person in the receiving State and should go back to his country immediately. Such a step is taken only when either war has broken out in between the two States or some very grave situation has arisen.

(5) *Persona non-gratia.*—The receiving State is entitled to declare at any time that a diplomatic agent has become *persona non-gratia,* i.e., undesirable person. This declaration terminates the diplomatic mission immediately. This provision finds mention in Articles 9 and 43 of the Vienna Convention. Thus International law permits a State to declare any diplomatic agent *persona non-gratia* at any time even without giving reasons for the same. Article 9 of the Vienna Convention provides the following :

> "1. The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic mission is *persona non-gratia* or that any other member of the staff of the mission is not acceptable. In any such case the sending state shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non gratia* or not acceptable before arriving in the territory of the receiving state.
>
> 2. If the sending state refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving state may refuse to recognize the person concerned as a member of the mission."

Reference may be made here to the *Naulilaa Incident,*[43] wherein the Tribunal held, "the expulsion of a consular agent, of whom a State has cause to complain, might constitute an 'unfriendly' act, giving rise to diplomatic representations, but it cannot, when done in the exercise of the sovereignty of a neutral State, constitute an act contrary to International law justifying, under the title of reprisals, an attack accompanied by all the rigours of war".

(6) *End of the object of mission.*—The diplomatic mission comes to an end when the object of the mission has been achieved.

(7) *Expiration of Letter of Credence.*—When a diplomatic agent has been appointed for a fixed period then his mission comes to an end after the expiration of that fixed period.

In addition to the above conditions and circumstances diplomatic mission may also end on account of the following reasons :

(1) By death; (2) Removal from post ; (3) Breaking of diplomatic relations ; (4) Constitutional changes; (5) Revolutionary changes in Government ; (6) End of the work of mission by some Conference ; (7) War ; and (8) Change in the post of diplomatic agent.

Can a State refuse to accept a Diplomatic Agent ?—The receiving State may refuse to accept a diplomatic agent on the following grounds:—

(1) If the appointment of a particular person as diplomatic agent in a particular State is harmful for the receiving State.

(2) If the diplomatic agent has by his declaration or conduct done some enemical thing.

(3) Yet another reason for the refusal of the acceptance of a particular person as a diplomatic agent is his being a citizen of the receiving State. The reason for this is quite obvious. No State will like that its own citizen should be given certain privileges and immunities over and above other citizens.

(4) If he is not acceptable to the receiving state as provided under Article 9 as stated above.

Ordinarily the above reasons may be for the refusal of the acceptance of diplomatic agent by the receiving State. It may, however, be noted that it is not necessary that the receiving State should give reasons for its refusal to accept a particular person as a diplomatic agent. The practice of the States shows that in this connection the States are completely independent and everything depends upon their discretion. International law does not impose any obligation in this connection. Ordinarily the practice of the States is that before appointing a particular person as diplomatic envoy in any State its receiving State is first consulted and only when the receiving State gives its consent to accept that person, then the appointment is made. So, ordinarily, the question of refusal does not arise. Such a question may arise only when certain special circumstances take place or when prior consultation in regard to the appointment of a particular person as a diplomatic envoy has not been made.

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[43] 2 R.I.A.A., 1012, 1019.

Special missions of permanent nature.—In addition to the permanent embassies and Consuls, sometimes States appoint diplomatic agents for special missions. The appointment of such agents is always after the prior consent of the receiving State. In this connection a Convention was adopted by the General Assembly of the United Nations in 1969. This convention is called the *Convention on Special Missions,* 1969. This Convention is mainly based on the Convention on Diplomatic Relations, 1961 and Convention of Consuls, 1963. The diplomatic agents appointed on special missions enjoy almost the same immunities and privileges which the diplomatic agents in general enjoy subject, however to the following changes :

(1) Two or more States may send a special mission in another State. The functions of these agents is connected with the common interest of those States.

(2) The prior consent of the receiving State is necessary for the appointment of special mission.

(3) Prior consent in regard to the situation of the special mission is also necessary.

(4) The diplomatic agents appointed for special missions also enjoy limited freedom to travel in the receiving State, that is, they have freedom to travel in the receiving State only those areas in which their functions warrant.

(5) If such agents are involved in accidents, such accidents, etc. are not deemed to be outside the civil and criminal jurisdiction of the receiving State. The receiving State permits certain immunities to them in respect of travelling to certain areas, but for this they have to give prior intimation to the Government of the receiving State.

In other matters their immunities and privileges are almost the same as those of the diplomatic agents.[44] The Convention on Special Missions, 1969 will come into force after 22 States have ratified or acceded to it. This convention entered into force on 21 June, 1985. So far the convention has 39 parties as of 30-05-2018.

Representatives appointed in International Organisations.—After the establishment of the United Nations the establishment of permanent missions of the member-States to the United Nations has also become a normal feature. It was, therefore, desirable and expedient to have definite rules of international law regarding them. Keeping in view, the need for having definite rules of international law in this connection, the General Assembly of the United Nations requested the International Law Commission in 1959 to study and consider this matter. The International Law Commission considered and studied this matter for several years and after much labour had suggested the incorporation of certain rules of International law in this connection. The suggestions of the International Law Commission were based on the Vienna Convention on the Diplomatic Relations, 1961. These rules are mainly for three types of representatives in international organisations—(1) Permanent representatives in international organisation; (2) Observers of non-members of international organisation ; and (3) Representatives attending conferences called by International Organisations. These representatives enjoy more or less the same privileges and immunities as are enjoyed by diplomatic agents.

The United Nations Conference on the Representation of States in their Relations of International Organisations was held in Vienna from 4 February to 14th March, 1975. It adopted a new International convention to govern the status of functions of Governments missions and delegations to international organizations as well as their representation at conferences convened by such organization.[45] The adoption of the convention on the Representation of States in their Relations with International organization of a Universal Character completes a cycle of treaties that have resulted from the work of the International Law Commission in codifying principles of diplomatic relations. Those efforts have led to the Vienna Convention on Diplomatic Relations and on Consular Relations and to the Convention on Special Missions 1975.[46] Vienna Convention on the Representations of State in Their Relation with International Organisation of a Universal Character will enter into force after 35 States have ratified or acceded to it. So far there are 34 parties to this convention. Besides this there are 20 signatories.

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[44] See also Franciszek Przetacznik, "Jurisdictional Immunity of the Members of Special Mission", I.J.I.L., Vol. 11 (1971), p. 593.

International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973*.—The question of special protection for diplomatic agents and other internationally protected persons assumed urgency because of the many cases of kidnapping of officials of foreign States and even of their assassination by private persons.[47] Hence through Resolution (XXVI) the General Assembly requested the International Law Commission to study the protection, inviolability of diplomatic agents and other persons entitled to special protection under International Law and prepare a set of draft articles dealing with offences committed against such persons. Thereupon the International Law Commission adopted certain draft articles.[48] The report of the Commission formed the basis of the United Nations Conference in 1973 wherein the Convention on the prevention and punishment of crimes against internationally Protected Persons, including Diplomatic Agents. After having received requisite ratifications, the Convention entered into force on 20th February, 1977. The Convention will go a long way to deter the commission of offences against internationally protected persons.

It entered into force on 20 February, 1977. So far 180 countries have ratified the Convention.

For the purposes of the convention, "an Internationally protected person" means : (a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the Convention of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him ; (b) any representative or official of a State or any official cr other agent of an international organization of an inter-governmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.[49]

The more important other provisions of the convention are following :

(1) The International Commission of : (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person ; (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty ; (c) a threat to commit any such attack; (d) an attempt to commit any such attack; and (e) an act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law. Each

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[45] U.N. Monthly Chronicle, Vol. XII, No. 4 (April 1976), p. 41.

[46] U.N. Monthly Chronicle, Vol. XII, No. 4 (April 1976), at p. 42.

* See also for P.C.S. (1980) Q. 6(a).

[47] See Franciszek Prazetacznik, "Prevention and Punishment of Crimes Against Internationally Protected Persons", I.J.I.L., Vol. 3 (1973), p. 65.

[48] See U.N. Report of the International Law Commission on the Work of its Twenty-fourth Session, 1972 Doc. A/8710, pp. 232-257.

[49] Article 1 of the Convention.

State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature. It is further provided that these provisions in no way derogate from the obligations of States Parties under international law to take all appropriate measures to prevent other attack on the person, freedom or dignity of an internationally protected person.[50]

(2) Each State Party shall take such measures as (may be necessary) to establish its jurisdiction over the crimes mentioned above in the following cases : (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State ; (b) when the alleged offender is national of that State; and (c) when the crime is committed against an internationally protected person who enjoys his status by virtue of functions which he exercises on behalf of that State. Further, each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him (pursuant to provisions of this convention) to any of the States mentioned above.[51]

(3) Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition.[52]

(4) The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.[53]

(5) To the extent that the crimes set forth in Article 2 (*i.e.* mentioned above in point No. 1) are not listed as extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them. Further, each of the crimes shall be treated, for the purpose of extradition between State Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of Article 3 (*i.e.* as noted above in point No. 2).[54]

(6) States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the crimes set forth in Article 2, including the supply of all evidence at their disposal necessary for the proceedings. However this provision shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.[55]

(7) The State Party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other State Parties.[56]

(8) The provisions of this Convention shall not affect the application of the treaties on Asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those Treaties; but a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a party to those Treaties.[57]

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[50] Article 2.
[51] Article 3.
[52] Article 6.
[53] Article 7.
[54] Article 8.
[55] Article 10.
[56] Article 11.
[57] Article 12.

CHAPTER 29

INTERNATIONAL TREATIES

Definition and meaning of the term "International Treaties".—In the modern period International treaties have been the first and foremost source of International law. Whenever, an International Court has to decide an international dispute, its first endeavour is to find out whether there is an International treaty on the point or not. In case there is an international treaty governing the matter under dispute, the decision of the court is based on the provisions of the treaty. International treaties occupy the same significant position in the field of International law as the legislation occupies in the municipal law.

In the view of Prof. Oppenheim, "International treaties are agreements of a contractual character between States or Organisations of States creating legal rights and treaties".[1] According to Prof. Schwarzenberger, "Treaties are agreements between subjects of International law creating a binding obligation in International law". According to Starke, "In nearly all the cases the object of the treaty is to impose binding obligations on the States who are parties to it."[2] The term "treaty" has also been defined in the Vienna Convention on the Law of Treaties, 1969. Article 2(1)(a) of the Convention defines treaty as "an International agreement concluded between States in written form and governed by international law". This definition can be criticised on the ground that it does include international organisation.[2] The definition given by Prof. Schwarzenberger as noted above much better and more exhaustive.[3] Vienna Convention on Law of Treaties, 1969 entered into force on 27 January, 1980. As of January, 2018, 116 countries had ratified the Convention on the Law of Treaties, 1969. Even those that have not signed may still recognise it as binding upon them inasmuch as it is a restatement of customary law. The United States of America is one of them.

It may be noted here that in 1982 the International Commission has adopted draft articles on a Convention on the Law of Treaties between States and International Organizations. In 1982, the General Assembly requested the Secretary General to submit a report. Later on the General Assembly decided that an International Convention should be concluded on the basis of draft articles adopted by the International Commission.

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[1] L. Oppenheim, International Law, Vol. I, Eighth Edition p. 877 : see also J.E.S. Fawcett, The Law of Nations (London, 1968), p. 89.

[2] J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 438; *See* also K.I. Igweike, "The Definition and Scope of the Treaty under International Law", I.J.I.L., Vol. 28 (1988) p. 249 at pp. 250-251.

[3] This definition seems to be narrow (as compared to the definition of Schwarzenberger noted above) because it is conspicuous by its absence of any reference to International Organizations. It is now generally agreed that International Organizations are legal persons and can enter into agreements with other International Organizations, States or private individually. Probably due to this Article 5 of the Vienna Convention on the Law of Treaties, 1969 provides that the present Convention applies to any treaty which is the constituent of an International Organization and to any treaty adopted within an International Organization without prejudice to any relevant rules of the organization. Article 3 further provides that the fact that present Convention does not apply to International Agreements concluded between States and other subjects of International Law or between such other subjects of International law or to International agreements not in the written form shall not affect—(a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under International law independently of the Convention; and (c) the application of the Convention to the relations of States between themselves under international agreements to which other subjects of International law are parties.

Subsequently, Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations was concluded on 21 March, 1986. To come into force, the Convention requires ratification by 41 parties to the Convention. So far 32 countries have ratified the Convention. Article 6 of this convention provides that the capacity of an International Organisations to conclude treaties is governed by the rules of that organisations. Article 18 provides that every party to the treaty has obligation not to defeat the object and purpose of a treaty prior to its entry into force. Further Article 26 reiterates the principle of *pacta sunt servanda.* It provides every treaty in force is binding upon the parties to it and must be performed in good faith.

Basis of the binding force of the International Treaties : Pacta Sunt Servanda.*—There is a great controversy amongst the jurists in regard to the binding force of International treaty. In the view of Italian jurist, Anzilotti, the binding force of International treaty is on account of the fundamental principle known as *Pacta Sunt Servanda.* According to this principle, States are bound to fulfil in good faith the obligations assumed by them under treaties. In this connection Prof. Oppenheim has remarked, "The question why international treaties have binding force always was and is still much disputed. Many writers find the binding force of treaties in the law of the nature, others in religious and moral principles; others again in the self-restraint exercised by States in becoming a party to the treaty. Some assert that it is a will of the contracting parties which gives binding force to their treaties. The correct answer is probably that the treaties are legally binding because there exists a customary rule of International law, that treaties are binding. The binding effect of that rule rests in the last resort on the fundamental assumption which is neither consensual nor necessarily legal, of the objective binding force of International law.[4] This assumption is frequently expressed by the form of principle, *pacta sunt servanda.* "The norm *pacta sunt servanda* which constituted since times immemorial the axiom postulate and categorical imperative of the science of International law and thus has very rarely been denied on principle, is undoubtedly a positive norm of international law."[5] Few rules for the ordinary society have such a deep moral and religious influence as the principle of the sanctity of contracts : *pacta sunt servanda."* [6] "The principle of sanctity of contracts is an essential condition of life of any social community. The life of international community is based not only on relations between States but also to an ever-increasing degree of relations between States and foreign corporations or foreign individuals. No economic relations between States and foreign corporations can exist without the principle of *pacta sunt servanda."* [7]

In his dissenting opinion in 1958 *case concerning the application of the Convention of 1902 governing the Guardianship of Infants (Netherland* v. *Sweden*) the Maxican Judge Cardova of the International Court of Justice referred the rule as "a time honoured and basic principle." In its advisory opinion in 1922 *on the Designation of Workers Delegates to the International Labour Conference,* the Permanent Court of International Justice emphasized that the contractual obligation was not merely "moral obligation", but was "an obligation by which, in law, the parties are bound to one another." Later on the International Court of Justice in *its Advisory opinion of 1951 on the Reservation to the Genocide Convention*[8] stated that, "None of the contracting parties is entitled to frustrate or impair by means of unilateral decisions or particular agreements, the object and *raison de etre* of the Convention."

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* See also for I.A.S. (1974), Q. No. 5, (a) ; I.A.S. (1967), Q. No. 6(b).

[4] Oppenheim, see supra note 1, at pp. 880-81.

[5] Josef L. Kunz, "The Meaning and the Range of the Norm Pacta Sunt Servanda", A.J.I.L., Vol. 39 (1945), p. 181.

[6] Hans Wehberg, "Pacta Sunt Servanda", A.J.I.L., Vol. 35 (1959), p. 775.

[7] Ibid., at p. 786.

[8] I.C.J. Rep. (1951), p. 15.

Thus "perhaps the most fundamental principle of International law and surely the basic principle of treaties is *pacta sunt servanda*."[9] The principle of *pacta sunt servanda* has also been incorporated in the Vienna Convention on the law of Treaties, 1969. Preamble of the Vienna Convention notes that the principle of *pacta sunt servanda* rule is universally recognized. Article 26 of the said Convention provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.[10] But "It (*i.e. pacta sunt servanda*) means nothing more than that the basis for the validity of International agreements and therefore for international law itself is the postulate that international agreements are binding, and it may seem as if little had been gained in this way. The realization that international customary law does not rest on agreements and that the text *pacta sunt servanda* is itself a rule of customary law, led to new formulations of the basic norm.[11] Kelsen himself has now decided on a formulation which takes account of usage as the fact which is origin of the rules of International law. 'States ought to behave as they have customarily behaved."[12] Moreover, as pointed out by a Soviet author[13] the maxim *pacta sunt servanda* does not have an absolute importance and hence it cannot be applied to every treaty. For example, it will not apply to unequal treaties. Thus. "......... *pacta sunt servanda* embraces only lawfully concluded treaties, and only in relation to them can it play a progressive role."[14] One may not accept the view expressed above by the Soviet author for the concept of unequal treaties is still fluid and has not been finally adopted but it must be admitted that *pacta sunt servanda* is not an absolute principle for it fails to explain the binding force of customary rules of international law.

Vienna Convention on the Law of Treaties, 1969.—In view of the significance of the Law of Treaties, the International Law Commission decided in 1945 to attempt its codification in Draft Convention on the Law of Treaties. The Commission completed its work in 1966. On 23rd May, 1969, the United Nations Conference on the Law of Treaties adopted the Vienna Convention on the Law of Treaties. By 2018, 116 countries have ratified the Convention, had become parties to the Vienna Convention on the Law of Treaties. As remarked by I.M. Sinclair,[15] "The Convention without question, a major work of codification of progressive development comparable in most to the Geneva Convention on the Law of Sea and augurs well for the movements towards the progressive development of International law and codification."[16] Article 84 of the Convention provided that the Convention shall enter into force on the thirtieth day following the deposit of the thirty-fifth instrument of ratification or accession. This requirement was fulfilled on 27th January, 1980 and consequently the Convention is in force since then.

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[9] Edward Collins, International Law in a Changing World (1969), p. 289.

[10] Article 27 further provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46. According to Article 46, a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provisions of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

[11] Torsten Gihl, The Legal Charter and Sources of International Law (Stockholm 1957) p. 62.

[12] Kelsen, Theory of Law and State, p. 369.

[13] V.M. Shurshalov, "Juridical content of the Principle Pacta Sunt Servanda and its Realization in International Relations", Soviet Year book of International Law (1958), p. 166, reprinted in Edward Collins (Ed.), International Law in a Changing World, pp. 323-25.

[14] In view of these reasons Shurshalov has defined the content of the principle in the following words : "The State in accordance with the principle pacta sunt servanda, is obliged scrupulously and in full measure to carry out international treaties lawfully concluded and which do not contradict existing international law. Rejection of treaty obligations can be justified only in the following exceptional cases : (a) when a revolution or a national liberation struggle gives rise to new social structure and a new State authority, which is entitled to denounce the humiliating and unacceptable treaties of the deposed government; (b) when one of counter agents is no longer an international law subject, as a result of merging of several States into a single State or the division of one State into two or three ; (c) when the obligations are associated with the territory over which the corresponding State has lost territorial supremacy."

[15] I.M. Sinclair, "Vienna Convention on the Law of Treaties", I.C.L.Q., Vol. 19 (1970), p. 47.

Classification of Treaties.—McNair has classified the treaties under the following categories : (1) Treaties having the character of conveyances ; (2) Treaty contracts ; (3) Law-making treaties; and (4) other treaties, such as, the treaty of Universal Postal Union. The famous jurist Vattel has also classified treaties into four categories. But Prof. Oppenheim[17] has classified treaties into the two categories : (1) Law-making treaties ; and (2) The Treaties for their purposes.

Parties competent to make a treaty.—Generally, only Sovereign States are competent to make a treaty. In accordance with the principle of sovereignty sovereign States have unlimited powers to make treaties. Those States which are not completely sovereign are not competent to make it. Mostly the representatives of the sovereign States first sign the treaties but the treaties do not bind their Governments or States until they ratify it. In view of the developing and changing character of International law, International organisations may also make treaties. Thus, "Generally only States which fulfil the requirements of Statehood, or International organisations can be parties to treaties."[18]

Requirement of Free Consent in respect of International Treaties.—It is a fundamental principle of law of contracts that there should be free consent of the parties. Consent procured by coercion or fraud makes the contract viodable. In International treaties also, ordinarily free consent is required. But this rule has not been strictly applied in the field of International law. In case of international treaties this rule is very flexible. In past a number of International treaties were made through coercion or fear yet they were considered binding. For example, the conquered State imposed its conditions on the vanquished State and compelled it to sign it. Treaties entered into after the First and Second World War are glaring examples of such types of treaties. According to Grotius, such treaties shall be valid. In view of another jurist (Hall) such treaty shall be valid only when its object is valid.

The Vienna Convention on the Law of Treaties, 1969, has ended all ambiguities in this connection and has provided definite rules. Preamble of the convention notes that the principles of free consent and good faith are universally recognized. Article 48 provides that a State may involve an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. But this provision will not apply if the State in question constituted by its own conduct to the error or "if the circumstances were such as to put that State on notice of a possible error. However an error relating to the wording of the text of a treaty does not apply its validity. As regards fraud, Article 49 provides that if a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State the State may involve the fraud as invalidating its consent to be bound by the treaty. So will be the case regarding corruption of a representative of a State. Article 50 provides that if the expression of a State's consent to be bound by a treaty has been procured through the corruption of representative directly or indirectly by another negotiating State, that State may invoke such corruption as invalidating its consent to be bound by the treaty. As regards coercion of a representative of a State, Article 51 of the Convention provides that the expression of a State's consent to be bound by treaty which has been procured by the coercion of its representatives through acts or threats directed against him shall be without any legal effect. Article 52 further provides : A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations. In the *Fisheries Jurisdiction* case[19] the International Court of Justice had also occasion to consider the validity of treaties concluded under coercion. The opinion of the court in this connection has been aptly summarised by a writer[20] in the following words :

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[16] For detailed study of the Vienna Convention on the Law of Treaties, see Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", A.J.I.L., Vol. 64 (1970), pp. 495-561.

[17] Oppenheim, see supra note 1, at pp. 878-879.

[18] Starke, see supra note 2, at p. 444.

> "1. Under the principles of contemporary International law, which found their expression in the Charter of the United Nations and the Vienna Convention on the Law of Treaties, a treaty concluded under the threat or use of force is void.
>
> 2. The allegation that a given treaty is concluded under coercion is an accusation of a very serious nature, and it cannot be based on the grounds of a vague general charge, unfortified by evidence in its support.
>
> 3. By reason of the seriousness of this accusation, the question whether a given treaty is vitiated by coercion should be decided by an International body, preferably the International Court of Justice.".

Various modes by which a State may express its consent to be bound by a treaty.*—The consent of a State to be bound by a treaty may be expressed by following means[21] :

(1) **By Signature.**—The consent of a State to be bound by a treaty is expressed by the signature of its representative when : (a) the treaty provides that the signature shall have that effect; (b) it is otherwise established that the negotiating states were agreed that signatures should have that effect; or (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.[22]

(2) **By an Exchange of Instruments constituting a treaty.**—The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when : (a) the instruments provide that their exchange shall have that effect ; or (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.[23]

(3) **By Ratification, acceptance or approval.**—The consent of a state to be bound is expressed by ratification when : (a) the treaty so provides for such consent to be expressed by means of ratification ; (b) it is otherwise established that the negotiating States were agreed that ratification should be required ; (c) the representative of the State has signed the treaty subject to

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[19] I.C.J. Reports (1973), pp. 13 and 49. In this case the court rejected the charge of coercion or duress.

[20] Franciszek Przetacznik. "The validity of Treaties concluded under Coercion". I.J.I.L., Vol. 15 (1975), p. 173 at p. 194.

* C.S.F. (1980), Q. 7(b) ; P.C.S. (1983), Q. 4(a).

[21] Article 11 of the Vienna Convention on the Law of Treaties, 1969.

[22] Article 12.

[23] Article 13.

ratification ; or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.[24]

(4) **By Accession.**—The consent of a State to be bound by a treaty is expressed by accession when : (a) the treaty provides that such consent may be expressed by that State by means of accession ; (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by means of accession ; or (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.[25]

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon : (a) their exchange between the contracting States ; (b) their deposit with the depositary ; or (c) their notification to the contracting States or to the depositary, if so agreed.[26]

(5) **By any other means if so agreed.**—In addition to the above means, the consent of a State to be bound by a treaty may also be expressed by any other means if so agreed. But such a consent will be effective only if it is made clear to which of the provisions the consent relates.[27]

It may be noted at the end, as provided by Article 18 of the Vienna Convention, 1969, that a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when : (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty ; or (b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Invalidity of Treaties : Can provisions of International law regarding competence to conclude treaties be invoked ?*—Article 46 of the Vienna Convention on the Law of Treaties provides that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance. It is further provided that a violation is manifest if it would be objectively evident to any State conducting itself in the matters in accordance with normal practice and in good faith. Article 47 further provides that if the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to specific restriction his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

As regards observation of treaties, Article 27 provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.

Formation of Treaties.**—Following are the main steps in the formation of treaty :

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[24] Article 14.
[25] Article 15.
[26] Article 16.
[27] Article 17.
* See also for I.A.S. (1978), Q. 3 ; C.S.E. (1982), Q. (a) and (b).
** See also for P.C.S. (1987), Q. 5 ; See also matter discussed below under the heading "Reservation".

(1) *Accrediting of persons on behalf of contracting parties.*—The first step in the formation of treaty is the accrediting of persons on behalf of the contracting parties. States authorise some representatives to represent them for the negotiation, adoption and signature, etc. of a treaty. Unless these representatives are accredited or authorised, they cannot participate in the Conference.

(2) *Negotiation and adoption.*—The accredited persons of contracting parties enter into negotiations for the adoption of the treaty. After the matters are settled, the treaty is adopted.

(3) *Signatures.*—After negotiation, next important step is the signature of the accredited representatives of the contracting parties. The authorized representatives of the State parties sign the treaty on behalf of their States. It may, however, be noted that the treaty does not become binding until it is ratified by the respective States.

(4) *Ratification.*—Ratification is a very important step in the formation of a treaty. Ordinarily, unless and until a treaty is ratified it does not bind the States concerned. By ratification we mean that the head of State or the State Government by conforming to the provisions of the Constitution confirms or approves the signature made by their authorised representatives on the treaty. The State parties become bound by the treaty after ratification.[28]

(5) *Accession or Adhesion.*—The practice of the States shows that those States which have not signed the treaties may also accept it later on. This is called accession. A treaty becomes a law only after it has been ratified by the prescribed number of State parties. Even after the prescribed number of State parties have signed, the other States may also accept or adhere to that treaty. This is called adhesion.

(6) *Entry into force.*—The entry into force depends upon the provisions of the treaty. Some treaties enter into force immediately after the signature. But the treaty in which ratification is necessary enter into force only after they have been ratified by the prescribed number of State parties. Thus treaty becomes binding law only among the States which have signed and ratified. It is a fundamental principle of International law that only parties to a treaty are bound by that treaty. This is often expressed by the maxim *'pacta terties nec nocent nec prosunt'*.[29]

(7) *Registration and Publication**.—After a treaty comes into force its registration and publication are also ordinarily considered essential. Article 102 of the United Nations Charter provides that the registration and publication of every International treaty entered into by the members is essential. It is made clear in this Article that if an International treaty or agreement is not registered, it cannot be invoked before any organ of the United Nations. Thus International treaties or agreements should be got registered and published. This provision, however, does not mean that if the treaty is not registered and published it will not come into force or become invalid. In fact Art. 102 means that if treaty is not registered in the United Nations, it cannot be invoked before any organ of the United Nations. "The object of Article 102 was to prevent the practice of secret agreements between States, and to make it possible for the people of democratic States to repudiate such treaties when publicly disclosed."[30]

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[28] The Law Relating to Ratification of a Treaty has been discussed in a little greater detail later on in this Chapter.

[29] This maxim has also been explained in detail later on in this Chapter.

* See also C.S.E. (1986) Q 6 (a) (ii).

[30] Starke, see supra note 2 at p. 487. He further adds : It has been suggested that Article 102 gives Member States a discretion in deciding whether or not to register treaties, by electing not to register, voluntarily to incur the penalty of unenforceability of the instrument, but the better view, adopted by the Sixth Committee (Legal) of the United Nations General Assembly in 1947, is that it imposes a binding obligation to effect registration," Ibid ; See also R.B. Lillich, "The obligation to Register Treaties and International Agreements with United Nations," A.J.I.L. (1971), p. 771.

(8) *Application and Enforcement.*—The last step of the formation of treaty is its application and enforcement. After a treaty is ratified, published and registered, it is applied and enforced.

Ratification : Principles of Ratification of Treaty.*—As pointed out earlier ratification is important step in the formation of a treaty. Ordinarily, without ratification a treaty cannot become binding. Ratification means that the head of the State or its Government approves (or ratifies) the signatures of its authorised representative.[31] Article 2 of the Vienna Convention on the Law of Treaty, 1969, says : "Ratification is the International act. .... whereby a State establishes on the International plain its consent to be bound by a treaty." It is generally agreed that ratification becomes effective from the day when it is made. It has no retroactive effect. Some jurists are of the view that without ratification a treaty has no value in law.[32] This view might have been correct in past, but in the present period this view has undergone significant changes. In the modern period, it depends upon the intentions of the parties as to whether or not the treaty will have the force of law. According to Article 14 of the Vienna Convention on the Law of Treaties, 1969, a State becomes bound by treaty when it ratifies it positively or it becomes bound by the treaty under the following circumstances :

(1) When there is a provision in the treaty to this effect.

(2) When the parties express the view that the ratification is necessary. In such a condition treaty becomes enforceable as a law only after ratification.

(3) When the treaty signed under the condition that ratification is necessary.

(4) When the intention of ratification is evident from the circumstances and talks during negotiations.

Following are the reasons for ratification of treaty :

(1) Through the process of ratification, the States get an opportunity to consider in detail the treaties which have been signed by their representatives.

(2) On the basis of the principle of sovereignty each State is entitled to keep itself away from the treaty or repudiate it if it so desires.

(3) Sometimes the provisions of treaties require some change in the State law. Hence the time between the signature and ratification is utilized for bringing about changes in the State law.

(4) Lastly, on the basis of democratic principles, the Government of the States get opportunity to respect public opinion in respect of treaties or to get the consent of the Parliament.[33]

It has been pointed out earlier in the Chapter relating to Relationship between State Law and International Law that some treaties require the consent of Parliament before they are enforced in State law. For example, in Britain there is no such rule that all the treaties should be ratified before they are enforced. But some treaties require the consent of the Parliament before they are enforced.

Is there a duty to ratify ?—On the basis of the principle of sovereignty, sovereign States possess unlimited powers in respect of treaties. If a treaty has been signed by the authorised representative of State, it does not create binding obligations on the State concerned nor the State concerned is bound to ratify such a treaty. In other words, we may say international law does not impose any duty upon the States to ratify those treaties which have been signed by their representatives. Nor it is necessary for the

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* See also for P.C.S. (1974) Q. No. 7; P.C.S. (1964), Q. No. 5; P.C.S. (1994) Q. 7 (b) ; UPPCS (2002) Q. 6(b).

[31] Starke, see supra note 2 at p. 460.

[32] The Soviet Union held the view that without ratification a treaty can create no legal effects. See for example, Kazimierz Grezybowski, Soviet Public International Law (1970), p. 422.

[33] Starke, see supra note 2 at p. 455.

States to explain the reason for not ratifying the treaty. In fact, it depends upon the sweet-will of the State concerned whether or not to ratify a treaty.

Consequences of non-ratification of a treaty.**—Ordinarily State parties are not bound by treaties until they ratify them. Hence ratification of a treaty is very important. However, it may be noted that it is not necessary in all cases for a treaty to be binding without ratification. As pointed out earlier, much depends upon the intention of the State parties. If a State party has intended that the ratification was essential then the treaty becomes enforceable in law only after ratification. But if ratification is not essential then under some special circumstances, the provision of treaty may create binding force. In *Mavrommatis Palestine Concession case,*[34] Judge J.B. Moore, made it clear that the principle that a treaty becomes effective only after ratification has become very old. It may, therefore, be concluded that so far as the binding effect of a treaty is concerned, much depends upon the intention of the parties. Ordinarily, practice of States shows that they do not regard themselves bound by a treaty unless and until they ratify it. So far as the application of an international treaty in the municipal field is concerned, it is applied only after it is ratified by the State concerned.

Reservation*.—There is a great controversy in regard to the reservation in the modern period. "There are few aspects of the Law of Treaties which have generated greater controversy in past 20 years than the question of Reservation to multilateral conventions".[35] The term "reservation" has been defined in Article 2(1) of the Vienna Convention on the Law of Treaties, 1969. It runs as follows:—"Reservations means a unilateral statement ...... made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby, it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to the State".

So far as bilateral treaties are concerned, there are no difficulties because if either party refuses to accept the reservation, the treaty comes to an end. But the same is not true in case of multi-lateral treaties. Multi-lateral treaties present conflicting legal problems. At one time it was generally agreed that reservation could be allowed only when the treaty expressly made a provision in this regard. But the modern practice of States shows that a State is entitled to make reservation in a treaty and the relations of those States which do not oppose the said reservation are governed by the treaty. In the advisory opinion given in 1951, on the *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*[36] the International Court of Justice held :

(a) that a State which has made and maintained a reservation which has been objected by one or more of the parties to the convention but not by others can be regarded as a party to the convention if the Reservation is compatible with the object and purpose of the Convention ;

(b) that if a party to the treaty objects to a Reservation which it considers to be incompatible with the object and purpose of treaty, it can consider that the reserving State is not a party to the treaty ; and

(c) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the treaty it could consider that the Reserving State is a party to the treaty.

The Court was asked by the General Assembly in November 1950, a series of questions as to the position of a State which attached reservations to the signature of the multilateral convention on Genocide if other States, signatories of the same convention objected to these reservations. In its advisory opinion of 28 May, 1951, the Court said that even if a convention contained no article on the subject of reservation, it did not follow that they were prohibited. The character of the convention, its purposes and its provisions must be taken into account. It was the compatibility of the reservation with the purpose of the convention which must furnish the criterion of the attitude of the State making the reservation, and the State which objected thereto. It may be noted here that the court was adjudicating only on the specific case referred to it, namely, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

** UPPCS (2002) Q. 6(b).

[34] Pub. P.C.I.J., (1924) Series A No. 2.

* I.A.S. (1976), Q. No. 2 ; I.A.S. (1974), Q. No. 5 (b) ; I.A.S. (1970), Q. No. 10(b) ; I.A.S. (1969), Q. No. 6 ; I.A.S. (1966), Q. No. 6 ; I.A.S. (1973), Q. No. 10, P.C.S. (1987), Q. 5.

[35] I.M. Sinclair, "Vienna Conference on the Law of Treaties", I.C.L.Q., Vol. 19, (1970), p. 47 at p. 53 ; See also G.G. Fenwick, "Reservations to Multilateral Treaties", A.J.I.L. (1951), p. 145.

[36] I.C.J. Rep. (1951) p. 10.

"Although the opinion of the International Court of Justice was limited to the case of the Genocide Convention it must be considered as having a distinct bearing upon the question of reservation in general".[37] Further, "While the opinion fails to give a working legal rule, it gives expression to the view, which is gaining ground that the principle of the universal consent to reservation is not well suited to the requirements of international intercourse characterised by multi-lateral conventions of a general character, and that it is impracticable and unwarranted to give one State the right to prevent another State from becoming a party to the convention although all or most contracting parties considered the reservation appended to it be compatible with the object of convention".[38] "The fact that the International Community of States has more than doubled in the past 20 years (now it has trebled in the last 20 years) has made increasingly difficult to draft the general multilateral convention which will re-concile all interests and view points. This fact alone argue in favour of some degree of liberality with respect to the making of reservations. The flexibility of Convention Regime does accordingly have some advantages for the future".[39] "The position of the Soviet members of the International Law Commission, which debated the law of treaties, was that reservations were necessary institution because treaties should be the expression of the will of the parties".[40]

The Vienna Convention adopts the view that modern practice along with the compatibility doctrine expressed by International Court of Justice should be generally accepted. The two basic provisions on reservations are Article 19 on formulation and Article 20 on acceptance of and objection to reservations. The former incorporates the rule in the Genocide case ; the latter the flexible approach endorsed by the General Assembly.[41] Article 19, which deals with formulation of reservations provides : A State may, when signing, ratifying, accepting, approving or acceding to the treaty, formulate a reservation unless, (a) the reservation is prohibited by the treaty ; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made ; or (c) in cases not falling under (a) and (b) noted above, the reservation is incompatible with the object and purpose of the treaty. As regards acceptance and objection to reservations, Article 20 provides the following :

1. "A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

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[37] Oppenheim, see supra note 1, at p. 915.

[38] Ibid, at pp. 915-916; Oppenheim has suggested : "A more rational solution would seem to be to confer the power to decide on the admissibility of a reservation either upon some international, judicial or administrative authority or upon the contracting parties themselves. These could act either through an organ created by them or by arriving at a decision themselves in the sense that a reservation should be regarded as admissible unless rejected by a substantial majority of the contracting parties", Ibid.

[39] I.M. Sinclair, See Supra note 35, at p. 60 ; The International Law Commission had come to the conclusion that frequently a number of States have found it possible to participate in the treaty subject to one or more reservations. It added, "when today the number of negotiating States may be upwards of one hundred States (now 159) with very diverse cultural, economic and political conditions, it seems necessary to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties." [I.L.C. Report U.N. General Assembly, 21st Session, official Records, Supp. 9 at 38, para 12 of the Commentary].

[40] Kazimierz Grzybowski, Soviet Public International Law (A.W. Sijthoff, Leyden, 1970), p. 427.

[41] Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", A.J.I.L., Vol. 64 (1970) p. 495 at p. 511 ; For General Assembly approach see Schachter, "The Question of Treaty Reservations at the 1959 General Assembly", A.J.I.L., Vol. 54 (1960) p. 372.

2. When it appears from the limited number of negotiating States and the object and purpose of a treaty that the application of the treaty is in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides—

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to the other State if or when the treaty is in force for those States ;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State ;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

As regards the legal effects of reservations and of objections to reservations, Article 21 provides that a reservation established with regard to another party in accordance with Articles 19, 20 and 23[42] : (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation ; and (b) modifies those provisions to the same extent for that other party in its relations with reserving State. The reservation does not modify the provisions of the treaty for other parties to the treaty *inter se.* Further, when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation. The Vienna Convention also provides for the withdrawal of reservations as well as of objections to reservations. Article 22 provides that unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of State which has not accepted the reservation is not required for its withdrawal. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

"Although the difficulty of defining 'compatibility among other problems will cause the matter of reservation to multi-lateral treaties to remain a source of doctrinal controversy, it would seem that, on the whole, the Commissions' approach serves the International community need for wide acceptance of norms contained in the increasing number of law-making treaties".[43] "The convention regime constitutes a half-way house between the traditional unanimity rule (which the U.K. upheld in the past) and the absolute sovereignty doctrine supported by the Soviet Union. The traditional unanimity rule is acknowledged for the category of restricted multi-lateral treaties, that is to say, treaties concluded between a limited number of States. But for the rest, the convention regime incorporates by and large the flexible Pan-American doctrine on reservation".[44]

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[42] Article 23 provides procedure regarding reservations.

[43] International Law in a Changing World (1969) p. 289.

[44] I.M. Sinclair, see supra note 35, at p. 60.

Interpretation of treaties.*—Following are the general principles of interpretation of treaties :—

(1) *Grammatical interpretation.*—In the first instance, the words and phrases are considered according to their plain and natural meaning. This is called grammatical interpretation of treaty.

(2) *Object and content of treaty.*—In case the words and phrases are ambiguous, they are considered keeping in view the general object of the treaty and its context.

(3) *Reasonable and consistent.*—It is a general principle of law of the treaties that treaties should be interpreted so as to give reasonable and consistent meaning of the phrases and words.

(4) *Principle of effectiveness.*—Yet another general principle of the law of treaties is that the treaties are interpreted in such a way as may prove to be most effective and useful.

(5) *Recourse to extrinsic material.*—There is a controversy in regard to the recourse of extrinsic material. International Law Commission proposed that resort may be had to extrinsic material for interpretation of the treaty. Hence it was of the view that recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion. According to Article 31(1) of the Vienna Convention of the Law of Treaties, 1969, treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the term of treaty in their context and in the light of its object and purpose". Article 31(2) further provides : The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes : (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty ; and (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. According to Article 31 (3), following shall be taken into account, together with context : (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions ; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of International law applicable in the relations between the parties. Finally sub-section (4) of section 31 adds that a special meaning shall be given to a term if it is established that the parties so intended.

The famous jurist Bynkershoek has aptly remarked, "The Civil law protects the contracts of individual ; good faith the contracts of princes. If you destroy good faith you destroy the mutual intercourse of princes and destroy even international law itself".[45] It seems reasonable and appropriate that the treaties should be performed in good faith. But as remarked by Mc Dougal, the basic approach of the International Law Commission in placing prime emphasis on the text was, "exercise in primitive and potentially destructive formalism".[46]

Even after the completion of the treaty, the practice of the States may make evident the intention to amend the treaty. If it is clear from the practice of the State or if the provisions of the treaties are applied in a different way then such a behaviour or practice may become basis for the interpretation of the treaties. Consequently, it becomes necessary to take into consideration these facts while interpreting the treaty. Thus, "when a treaty has been commonly applied by the parties in a manner different from that contemplated at the time of its conclusion, such subsequent practice and the new expectations connected with it may properly form the basis of interpretation".[47] However, in assessing the significance of the decisions taken by the Conference in relation to Treaty Interpretation, attention should be fixed on the fact that all the three Articles (that is, Articles 31, 32 and 33 in the text of the Convention) were adopted by an unanimous vote. This represents a clear affirmation by the International Community that, for the purpose of treaty interpretation, prime emphasis must be placed on the text of a treaty as representing the authentic expression of the will of the parties".[48] But as provided in Article 32, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application to Article 31, or to determine the meaning when the interpretation according to Article 31 : (a) leaves the meaning ambiguous or obscure ; or (b) leads to a result which is manifestly absurd or unreasonable. As remarked by eminent writers,[49] "The adoption by the Conference of two articles (*i.e.,* Articles 31 and 32) which the United States viewed as somewhat archaic and unduly rigid does not seriously weaken the value of the convention. It seems unlikely that foreign offices will cease to take into consideration the preparatory work and the circumstances of the conclusion of treaties.when faced with problems of treaty interpretation, or that international tribunal will be less disposed to consult Article 32 sources in determining questions of treaty interpretation".[50]

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* See also for I.A.S. (1972), Q. No. 5.

[45] See Alfred Verdoss, "Jus Dispositivum and Jus Cogens in International Law" I.J.I.L., Vol. 60 (1966), p. 63, note 56.

[46] See McDougal, "The International Law Commission's Draft Articles upon Interpretation; Textually Redivivus", A.J.I.L., Vol. 61 (1967), p. 992; see also Rosenne, "Interpretation of Treaties in the Restatement and the International Law Commission's Draft Article : A comparison", Col. J., Transnat'l Law, Vol. 5 (1966), p. 205 at p. 221.

Amendment and Modification of Treaties.*—The general rule regarding the amendment of treaties is that a treaty may be amended by agreement between the parties. This rule is contained in Article 39 of Vienna Convention on the Law of Treaties. As regards amendment of multilateral treaties, Article 40 provides the following :

1. Unless the treaty otherwise provide, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in :
   (a) the decision as to the action to be taken in regard to such proposal ;
   (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.
5. Any state which becomes a party to the treaty after the entry into force of the amending agreement shall failing an expression of a different intention by that state :
   (a) be considered as a party to the treaty as amended, and
   (b) be considered as a party to the unamending treaty in relation to any party to the treaty not bound by the amending agreement.

As regards agreements to modify multilateral treaties between certain of the parties only, Article 41 provides the following :

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if —
   (a) the possibility of such a modification is provided for by the treaty ; or

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[47] Oliver, J. Lissizyn, International Law Today and Tomorrow (Dobbs Ferry, N.Y. Oceana, 1955), p. 29.

[48] I.M. Sinclair see supra note 35, at p. 65.

[49] Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", A.J.I.L., Vol. 64 (1970), p. 495 at p. 520.

[50] Cf. Gross, "Treaty Interpretation : The Proper Role of an International Tribunal", 1969 Proceedings. American Society of International Law, pp. 108, 117.

* See also for C.S.E. (1981) Q. 7(a), see especially Article 41.

(b) the modification in question is not prohibited by the treaty and ;

  (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligation ;

  (ii) does not relate to a provision, derogation from which is incompatible with the effective execution, of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Termination of Treaties.[51]*—Treaties may be terminated by (1) operation of law; or (2) by act of the State parties.

*By operation of law.***—Termination of treaties by operation of law may be made in the following cases :

(a) *Extinction of either party to a bilateral treaty.*—Extinction of either party to bilateral treaty may amount to the termination of the treaty.

(b) *Outbreak of war.*—According to the old view, the outbreak of war between the parties resulted in the termination of the treaties. But in the modern period all treaties do not end at the outbreak of war. In regard to the operation of treaties at the outbreak of war, Starke has pointed out the following :—

(i) Treaties, between belligerent States for which general, political and good relations are essential, cease at the outbreak of war.

(ii) Treaties relating to completed situations, such as fixation of boundaries remain unaffected by war.

(iii) Treaties dealing with the rules of war remain in force and remain binding upon the parties. Hague Convention of 1899 and 1907 and four Geneva Conventions of 1949 are the glaring examples of such types of the treaties.

(iv) Some multilateral treaties relating to health, service, protection of industrial property, etc., do not completely end at the outbreak of war. They simply remain suspended and revived at the end of war.

(v) Sometimes there is an express provision in the treaty as to what would happen in case of the outbreak of the war.

We may, therefore, conclude that according to modern practice all treaties do not end at the outbreak of war. Some treaties are completely terminated, others remain unaffected whereas some others are simply suspended during the war.

(c) *A material breach of bilateral treaty.*—A material breach of a bilateral treaty by one party entitles the other party to terminate treaty.

(d) *Impossibility of performance.*—The impossibility of the performance of a treaty also is a valid ground for the termination of treaty. This provision is contained in Article 61 of the Vienna Convention on Law of Treaties, 1969.

(e) *Rebus sic stantibus.*—*Rebus sic stantibus* is also a ground for the termination of treaty. The maxim *rebus sic stantibus* means that when the fundamental circumstances under which the treaty was entered into change then this change entitles the other party to terminate the treaty. A detailed discussion of this will be taken up later on in this Chapter. At this place it is sufficient to note that if the fundamental circumstances under which a treaty is made, change, then this change may become a valid ground for the termination of treaties.

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[51] For detailed study see S.E. Nahlik, "The Grounds of Invalidity and Termination of Treaties", A.J.I.L., (1971), p. 736.

* See also for P.C.S. (1977), Q. No. 9(b); C.S.E. (1984), Q. 7 ; P.C.S. (1990) Q. 10(d) ; IAS (2005) Q. 6(b).

** See also for P.C.S (1983), Q. 4(b).

(f) *Expiration of fixed term.*—If the treaty has been concluded for a fixed period, the expiration of the fixed term will automatically terminate the treaty.

(g) *Successive Denunciation.*—Successive denunciation may also lead to the termination of a treaty. The provision relating to this is contained in Article 55 of the Vienna Convention on the Law of Treaties, 1969.

(h) *Jus Cogens*[52] *of Emergence of new Peremtory Norm of General International law.*—According to Article 64 of the Vienna Convention, if a new peremptory norm of general International law emerges any existing treaty which is in conflict with that norm becomes void and terminates. A little detailed discussion of *jus cogens* will be made later on in this chapter.

Consequences of the Invalidity, Termination or Suspension of the Operation of a Treaty*.—Article 69 of the Vienna Convention on the Law of Treaties 1969 provides that a treaty the invalidity of which is established under the convention is void. If acts have nevertheless been performed in reliance of such a treaty : (a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed ; (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

As regards consequences of the termination of a treaty Article 70, paragraph 1 provides that unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present convention :

(a) releases the parties from any obligation further to perform the treaty ; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. Paragraph 2 of Article 70 further provided that if a state denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that state and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71 of the convention deals with the consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law. It provides that in the case of a treaty which is void under Article 53,[53] the parties shall : (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law, and (b) bring their mutual relations into conformity with the peremptory norm of general international law. In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty : (a) releases the parties from any obligation further to perform the treaty.

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination ; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general International law.

As regards consequences of suspension of the operation of a treaty, the Vienna Convention provides that unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the convention : (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension, (b) does not otherwise affect the legal relations between the parties established by the treaty. Further during the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.[54]

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[52] Jus Cogens has been discussed in detail later on in this Chapter.

* See also for C.S.E. (1984), Q. 7.

[53] For Art. 53, see matter discussed under the heading "Jus Cogens" in this Chapter.

[54] Article 72.

Important Maxims relating to Law of Treaties

Following are the three important maxims relating to the Law of Treaties :

(1) *"Pacta terties nec nocent nec prosunt"*; (2) *Rebus sic stantibus*; and (3) *Pacta sunt servanda.*

(1) Pacta terties nec nocent nec prosunt.*—It is a fundamental principle of the Law of Contract that only parties to a contract are bound by the contract. Similarly it is a general principle of International Treaty that only parties to an International Treaty are bound by it. This principle is expressed in a Latin maxim called *"pacta terties nec nocent nec prosunt"*. This principle has been incorporated in Article 34 of the Vienna Convention on the Law of Treaties, 1969. This principle is subject to certain exceptions which are contained in Articles 35 to 38. They are :

(i) Treaties which concern the right of the third party. This provision finds mention in Article 36 of the Vienna Convention.[55] Through this provision even third party can be conferred some rights under the treaty.

(ii) Multilateral treaties which declare the established customary international law may bind even non-parties.[56]

(iii) Multilateral treaties which create new rules of international law may also bind non-parties. For example, Article 2(6) of the United Nations Charter provides that non-member shall act in accordance with the purposes of the United Nations Charter.

(iv) Some multilateral treaties have universal application. In such treaties it may be provided that they will be applicable even on non-parties. The United Nations Charter is such type of international treaty.

(v) When a treaty imposes some obligation on a third party and third State party accepts that obligation, then such a third party becomes bound by that treaty.[57]

As regards revocation or modification of obligations or rights of third States, Article 37 provides that when an obligation has arisen for a third State in conformity with Article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed. It is further provided that when a right has arisen for a third State in conformity with Article 36, the right may not be invoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

"In the light of the impact of the above-mentioned Articles 34 to 38 of the Vienna Convention upon the admissibility of third party rights and obligations, the practical course for States not wishing, in any treaty concluded by them, to confer such rights or impose such obligations is to stipulate expressly against this result, while a non-party state, unwilling to be saddled with an external treaty obligation, should ensure that neither by its conduct nor by its declarations has it assented to imposition of the obligation."[58]

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* See also for I.A.S. (1977), Q. No. 2 ; C.S.E. (1988), Q. 5(d); P.C.S. (1990) Q. 6(b) ; UPPCS (2008) Q. 6(a).

[55] Article 36 provides the following ; (1) A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not included unless the treaty otherwise provides. (2) A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

[56] Article 38 of the Vienna Convention provides : Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of International law recognized as such.

[57] Article 35 provides : An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in wirting. But when an ohligation has arisen for a third State in conformity with Article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed. Similarly, when a right has arisen for a third State in conformity with Article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

As provided under Article 38 of the Vienna Convention and noted above, even non-parties may be bound by a treaty if it creates customary rule of International law. It has, therefore, been remarked : "A treaty does not create rights or obligations for a third State without its consent but the rules set forth in a treaty may become binding upon a non-contracting State as customary rules of International law".* One of the important examples of such a treaty is the 1958 Geneva Convention on the High Seas. Even non-parties to the Convention are bound by the freedoms of the High Seas enunciated in it and other provisions. The preamble of Convention says that the provisions incorporated in the Convention are "generally declaratory of established principles of International law". Similarly sovereignty over air space and sovereignty over continental shelf to the extent of exploitation of resources are as a result of customary rules generated by Chicago Convention on International Civil Aviation, 1944 (Art. 1) and 1958 Geneva Convention on the continental shelf[59] respectively. In practice even non-parties to these Conventions follow these provisions and consider them binding. In *North Sea Continental Shelf Cases*,[60] the International Court of Justice expressed the view that provisions in treaties can generate Customary Law and may be of norm-creating character".[61]

(2) Rebus sic stantibus.*—*Rebus sic stantibus* is also considered to be a ground for avoidance or termination of treaty. The maxim *rebus sic stantibus* means that if the fundamental or material circumstances under which a treaty is concluded change, then this change becomes a basis for the avoidance or change or termination of a treaty. "It is widely recognized that if fundamental changes in the circumstances upon which a treaty rests take place, these changes may be invoked as a ground for the termination of the treaty. The principle, known generally as the doctrine of *clausula rebus sic stantibus* is based on the assumption that there is an 'implied clause in every treaty that provides that the agreement is binding only so long as the material circumstances on which it rests remain unchanged."[62] Some writers have expressed the opinion that this principle as the basis for the termination of the treaty, creates very difficult problem. However, "There may be situations in which the continued application of a treaty may be both contrary to the shared expectations on the parties and an intolerable burden on them".[63]

Criticism.—Some jurists have criticized the principle of *rebus sic stantibus*. According to Starke, "The *rebus sic stantibus* doctrine is one of the enigmas of International law. Its exact scope and application are uncertain, practice is inconsistent and International law tribunals feel shy of committing themselves to the pronouncements or decision involving it." It may be noted that this observation does not ~~find~~ place in the last three editions of Starke's book. The reason for this is that since Article 62 of the Vienna Convention on the Law of Treaties, 1969, provides for fundamental change of circumstances as one of the grounds for termination of treaties and determines the scope and limit of the application of this ground, *rebus sic stantibus* is no more an enigma of international law. Prof. Oppenheim has also pointed out, "The operation of the doctrine is necessarily limited for the simple reason that it is the function of the law to enforce contracts of treaties even when they become burdensome for the party bound by them.[64] He has further added that this explains why in almost all cases in which the doctrine *rebus sic stantibus* has been invoked before an International Tribunal, the latter while not rejecting it in principle, has refused to admit that it can be applied to the case before it. He cites example of the case *Free Zones of Upper Savoy and District of Gex,*[65] wherein the Permanent Court of International Justice decided in 1932 that "the changes upon which France rely has no reference to the whole body of circumstances which the contracting parties had in mind at the time the free zones were created and hence they could not be taken into consideration".

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[58] Starke, note 2, at p. 446.

* Asked in I.A.S. (1977), Q. No. 2.

[59] Article 2 of the Convention.

[60] I.C.J. Rep. (1969), p. 3.

[61] Ibid, at p. 43 : The jurisprudence of the International Court of Justice has been discussed under the heading "Generation by Treaty of Customary Rules of International Law" in Chapter on Sources of International Law.

* See also for I.A.S. (1974), Q. No. 6 (b); I.A.S. (1971), Q. No. 9; I.A.S. (1963), Q. No. 4; I.A.S. (1961), Q. No. 6(a) ; P.C.S. (1976), Q. No. 10 (d), P.C.S. (1982), Q. 4 and 7 (b) ; P.C.S. (1984), Q. 10 (b) ; C.S.E. (1996) Q. 8(d).

[62] Edward Collins, International Law in a Changing World (1969), p. 292.

[63] Oliver J. Lissitzyn, "Treaties and Changed Circumstances (Rebus sic Stantibus)" A.J.I.L., Vol. 61 (1967), p. 895 at p. 898 ; He further adds : "The dangers for the stability of treaties of the International Community residing in the doctrine of rebus sic stantibus can be exaggerated. The idea that it can play a significant role in unleading determined law-breakers and aggressors such as Hitler is fantasic. Great political issues are not decided by International law," Ibid, at p. 915.

The Report of the International Law Commission on which the Vienna Convention is based, rejected the theory of an implied clause or term and preferred the doctrine of fundamental change upon grounds of equity and justice as the basis of the doctrine. It is also significant to note that Article 62 does not at all mention the words *rebus sic stantibus*. "Soviet reluctance to use the principle of *rebus sic stantibus* as justification for denouncing treaties lies in the fact that as a legal argument *clausula rebus sic stantibus* is a weak argument, while a charge of violations of treaties by the other side is legalistically, at least impeachable.[66] The famous American jurist Cheney Cheney Hyde, the author of "International Law, as chiefly interpreted and applied by the United States" has rejected the term *rebus sic stantibus* "unhelpful". Lord McNair in his book on the 'Law of Treaties' has regarded the term as essentially one of the intention of the parties 'implied conditions' or 'disappearance' of the *"aison de'etre"* of the treaty.

Conclusion.—As pointed out earlier, it is a fundamental principle of the Law of Treaties that once the parties enter into a treaty, they are bound by its provisions. This principle is expressed in the time honoured maxim or rule known as *"pacta sunt servanda"*. But, "The *Pacta sunt servanda* means the inviolability, not of the unchangeability of treaties. The revision of treaties is neither exception nor in contradiction with the norm of *pacta sunt servanda*".[67] According to Prof. Brierly, "In short, the clausula is a rule of construction which secures that a reasonable effect shall be given rather than an unreasonable one which would result from literal adherence to its expressed terms only".[68] In his view, there is a close similarity between the doctrine *rebus sic stantibus* and 'implied term' in English law of the 'Frustration of Contract'. He has rightly written "the doctrine *rebus sic stantibus* is clearly a reasonable doctrine which it is right that International law should recognize".[69] However, it may be submitted that the doctrine *rebus sic stantibus* should be clearly defined and should not be allowed to serve as a means to undermine international agreements by providing an excuse for the breaches of treaty obligations that States find it inconvenient to fulfil. Article 62(1) of the Vienna Convention on the Law of Treaties, adopted in 1969 exhibits awareness of this difficulty by allowing the invocation of the clausula only if—(a) the existence of those circumstances (which have changed) constitute an *essential basis* of the consent of parties to be bound by the treaties; and (b) the effect of the change is radically to transform the extent of obligation still to be performed under the treaty. Article 62(2) excludes treaties that fix boundaries from the operation of the doctrine in order to avoid an obvious source of threat to the Peace.[70]

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[64] L. Oppenheim, International Law, Vol. 1, English Edition, p. 940.

[65] P.C.I.J. (1932) series A/B No. 46.

[66] Kazimierz Grzybowski, Soviet Public International Law (1970), p. 441.

[67] Josef L. Kunz, "The Meaning and the Range of the Norm Pacta Sunt Servanda", A.J.I.L., Vol. 39 (1945), p. 181 at p. 197.

[68] J.L. Brierly, The Law of Nations, Sixth Edition (1963), p. 356.

[69] Ibid, at p. 338.

[70] It has been aptly observed : "Given the delicacy of the article and the doctrinal dispute as to whether or not the principle represented an implied term in treaties......... its adoption nearly unchanged in the form proposed is a tribute to the skill with which the International Law Commission had balanced a rule which afforded 'a safety valve in the Law of Treaties' yet provided protection to the security of treaties by 'adequate safeguard's......... against its arbitrary application". Richard D. Kearney and Robert E. Dalton. See supra note 41 at p. 544 : see also Ibid at p. 561.

Thus the two doctrines *pacta sunt servanda* and *rebus sic stantibus* can be reconciled to some extent. It is certainly the most fundamental principle of the law of treaties that every treaty is binding upon the parties, and must be performed by them in good faith. But International Law is a dynamic concept and it endeavours to adopt itself to the needs of the day, in order to be effective. International Law or any law for that matter, must keep pace with the tide of the time to obliterate those norms which have fallen out of date and to baptise new principles as norms of the law. Allowance therefore must be made for the discharge of treaties if fundamental circumstances change or as Article 62(1) of the Vienna Convention of 1969 provides by allowing the invocation of *clausula rebus stantibus* only when changed circumstances constitute an *essential basis and if the effect of change is radically to transform the extent of obligations still to be performed under the treaty.*

(3) Pacta sunt servanda.—The maxim *pacta sunt servanda* has already been discussed in detail under the heading "Basis of the Binding Forces of International Treaties".

Unequal Treaties.*—There is a great controversy in regard to the concept of unequal treaties. This concept has been developed by the communist countries, particularly Soviet Union and China. "The doctrine of unequal treaties was directly linked to the principle of the equality of sovereign States. States could not be forced to accept obligations contrary to basic principles of International Law, particularly the principle of co-existence."[71] It is further pointed out, "In the first place the validity and force of treaties depended upon their being a free expression of the will of the parties ...... In the second place, no treaties could contradict recognized principles of International Law.[72] Furthermore, "The principle that International Treaties must be observed, does not extend to treaties which are imposed by force and which are unequal in character—such treaties contradict international law and hence cannot enjoy its protection. Their repudiation cannot be considered a violation of the principle that International Treaties must be observed".[73] According to the Soviet view, an example of special category of unequal treaties are those which were entered into between the imperialist powers and colonial and dependent nations. Similarly a treaty which provides that one State has the right to exercise power on the territory of the other, such as, agreements permitting establishment of foreign military bases, collective security agreements between the capitalist States, and economic assistance agreements, will be unequal.[74]

The term unequal treaties has been explained in the following words : "Equal treaties are concluded on the basis of the equality of the parties ; unequal treaties are those which do not fulfil this elementary requirement. Unequal treaties are not legally binding, equal treaties must be strictly observed.[75] "While Western writers and Statesmen oppose this doctrine, ostensibly on the basis of its vagueness and the adverse effects it would have on the sanctity of treaties, it is increasingly regarded as just in the "unequal States,"[76] "In the attempt to provide justification for their efforts to change the *status quo,* the less developed nations increasingly rely on the argument that 'unequal' or 'inequitable' treaties, and the treaties imposed by duress, are invalid *ab initio.* Attacking the treaty by which the Union States obtained the canal Zone, for example, the foreign minister of Panama called it "humiliating, injurious, unjust and inequitable" and said that it does not conform to the principles, precepts and norms of international morality universally accepted today.[77]

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* See also for I.A.S. (1977), Q. No. 10(a) ; IAS (2009) Q. 7(b).

[71] Kazimierz Grzybowski, Soviet Public International Law (1970), p. 41.

[72] Ibid.

[73] Ibid.

[74] Ibid. For Soviet theory and practice of unequal treaties see Jan F. Triska and Robert M. Slusser. The Theory, Law and Policy of Soviet Treaties (Stanford : Stanford University Press, (1962); see also S. Rama Rao, "Soviet Approach to The Law of Treaties", I.J.I.L. (1974), p. 432 at p. 437.

[75] Adopted from Oliver J. Lissitzyn, International Law : Today and Tomorrow (New York, 1965), p. 53.

[76] Edward Collins, see supra note 62 at p. 290.

[77] Lissitzyn, see supra note 75, at p. 56.

Communist China is also a staunch supporter of the concept of 'unequal treaties'. In the view of Chinese writer, Hungdah Chiu, unequal treaties are contrary to international law and have no legal validity.[78] Further, "Whether or not a treaty is equal does not depend upon the form and words of various treaty provisions, but depends upon the States character, economic strength and the substance of correlation of the contracting parties".[79]

As pointed out earlier, Western States and jurists oppose the concept of 'unequal treaties'. During the last two decades, many Asian and African States have emerged and they have supported the concept of unequal treaties. It may, however, be noted that the Vienna Convention on the Law of Treaties, 1969, does not contain any provision relating to 'unequal treaties'. But since many States had raised the matter relating to 'unequal treaties' in the Vienna Conference, a Declaration was adopted which said that in past many States entered into treaties under duress and expressed the hope that in future they would not exercise duress or enter into such treaties with other States.[80]

*Jus Cogens.**—One of the most controversial provisions incorporated in the Vienna Convention on the Law of Treaties, 1969 is in respect of *jus cogens.* Article 53 of the Vienna Convention incorporates the principle of *jus cogens.* It provides : A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law.[81] For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. While the principle was being formulated by the International Law Commission, majority of jurists from the developing countries and from European countries favoured the incorporation of the principle of *jus cogens* and attached great importance to it. They expressed the view that a treaty conflicting the existing or new rule of *jus cogens* should be regarded as void.[82] On the other hand, majority of international lawyers from the Western Europe expressed considerable alert. For example Prof. Schwarzenberger, expressed the view that "International law on the level of unorganized international society, does not know of any *jus cogens.*"** But diametrically opposite view was expressed by Prof. Verdross who contended that certain principles embodied in Article 2 of the Charter of the United Nations possess the character of *jus cogens.*[83] It may be noted here that great difficulty will be experienced in the application of the rule of *jus cogens* because the International Law Commission did not define the term *jus cogens.*[84]

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[78] Hungdah Chiu, "Comparison of the Nationalist and Communist Chinese views on Unequal Treaties" in China's Practice of International Law : Some Case Studies. Edited by Jerome Alan Cohen (1972), p. 239 at pp. 258-59.

[79] Hungdah Chiu, The People's Repbulic of China and the Law of Treaties (1972), p. 63.

[80] See I.LM. 84 : 733 (July 1969).

* See also for I.A.S. (1976), Q. No. 10(ii); C.S.E. (1989), Q. 5(a) ; C.S.E. (1993) Q. 8(d) ; C.S.E. (1995) Q. 8(d) ; IAS (2007) Q. 8(c) ; IAS (2009) Q. 7(b).

[81] See Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", A.J.I.L., Vol. 64 (1970), p. 495 at p. 535; I.M. Sinclair, "Vienna Convention on the Law of Treaties" I.C.L.Q., Vol. 19 (1970), p. 47 at p. 66; V. Nageswar Rao, "Jus Cogens", and the Vienna Convention on the Law of Treaties" I.J.I.L., Vol. 14 (1974), p. 362; Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", A.J.I.L., Vol. 61 (1967), pp. 1960-61.

[82] See Schwelb, Ibid : Soviet Union is Staunch Supporter of the rule of jus cogens. For Soviet view see : S. Rama Rao, "Soviet Approach To the Law of Treaties", I.J.I.L., Vol. 14 (1974), 433 at pp. 439-440.

** C.S.E. (1985), Q. 5(b).

[83] Verdross, "Jus Dispositivum and Jus Cogens in International Law", A.J.I.L., Vol. 60 (1966), pp. 59-60.

[84] In the Commentary to this article, the International Law Commission had observed : 'The formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of Jus Cogens" Further, "The emergence of rules having the character of Jus Cogens is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of jus cogens and to leave the content of this rule to be worked out in State practice and in the jurisprudence of international tribunals." I.L.C. Report U.N. General Assembly, XXI Session, Official Records, Supp. 9 at p. 76.

As remarked by Edward Collins,[85] "Although the Commission stopped short of compiling a list of such norms, ostensibly because to do so might lead to misunderstanding as to the position of norms not included, several of the members suggested that certain types of treaties, including agreements contemplating the unlawful use of force, or trade in slaves, or the commission of acts of piracy or genocide, would clearly, conflict with peremptory norms.[86] But, in the absence of a general agreement on the precise content of *jus cogens*, the rule will surely be productive of considerable diplomatic controversy".

Reference may also be made to Article 64 of the Vienna Convention which is a corollary of Article 53 noted above. Article 64 provides : If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. "The necessity for it as a separate article springs from the fact that different legal consequences attend a treaty that is entered into in violation of an existing rule of *jus cogens* (which is considered as void *ab initio*) and the annulment of an existing treaty by the emergency of a new rule".[87]

As noted earlier, there was controversy in respect of the formulation of the rule of *jus cogens*. A compromise formula was brought forth by a group of African and Asian delegations led by Nigeria and this is now embodied in Article 66 of the Vienna Convention.[88] Article 66 provides : If, under paragraph 3 of Article 65,[89] no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed :—

(a) any one of the parties to a dispute concerning the application or the interpretation of Article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration ....

Thus, "A major achievement was the provision for reference of disputes concerning *jus cogens* to the International Court of Justice. This reflects a willingness on the part of many States that had voiced disappointment with the court in 1966 to recognize its signal appropriateness as a forum for resolution of disputes relating to *jus cogens* the one *principle that presents the most basic issue in the development of a world rule of law*".[90] Further : "By Codifying the doctrines of *jus cogens* and *rebus sic stantibus* the convention provides a framework for dealing with change in an orderly fashion. 'By re-asserting the principle of *pacta sunt servanda* it strengthens the customary rule which has always been the keystone of the treaty structure".[91]

In his separate opinion in *Military and Para Military Activities in and against Nicaragua* case *(Nicaragua* v. *U.S.A.)*[92] Judge Nagendra Singh emphasized that the principle of non-use of force belongs to the realm of *jus cogent*, and is the very corner-stone of the human effort to promote peace in a world torn by strife.

Judge Sethe Camara also, in his separate opinion, observed that he firmly believed that the non-use of force as well as non intervention the later as a corollary of equality of states and self determination are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligation on all states.

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[85] Edward Collins, see Supra note 62, at pp. 289-290.

[86] See the International Law Commission's Commentary to Article 50, reprinted in 61 American Journal of International Law p. 409 (1967).

[87] Richard D. Kearney and Robert E. Dalton, see supra note 72, at p. 538.

[88] See I.M. Sinclair, "Vienna Convention on the Law of Treaties", I.C.L.Q., Vol. 19 (1970), p. 47 at p. 69.

[89] Article 65 deals with procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of treaty.

[90] Richard D. Kearney and Robert E. Dalton, see supra note 81, at p. 561 ; emphasis added ; see also Sinclair see supra note 81.

[91] Ibid.

[92] (1986) ICJ Rep 14.

Part IV

INTERNATIONAL ORGANISATIONS

CHAPTER 30

DEFINITION, NATURE, FUNCTIONS AND EVOLUTION OF INTERNATIONAL ORGANISATION

Definition and Essentials of International Organisation.—An International Organisation has been defined "as a forum of co-operation of Sovereign States based on multilateral international agreement, and comprising of a relatively stable range of participants the fundamental feature of which is the existence of permanent organs with definite competences and powers acting for the carrying out of common aims.[1]

In the widest sense, International organisation can be defined as "a process of organising the growing complexity of international relations. International organisations are the institutions which represent the phase of that process. They are the expressions of, and contributors to the process, of international organisation, as well as, the significant factors in contemporary world affairs." Further "International organisation, the institutions may come and go in accordance to the significance of the dynamism of international relations. But international organisation, the process, exists as an established trend. It was the stimulus of the existing process ready at hand, that automatically led, after the collapse of the League of Nations, to the creation of new organisation, the U. N. ......Thus, international organisation is the process by which states establish and develop formal, continuing institutional structures for the conduct of certain aspects of their relationships with each other. It represents a reaction to the extreme decentralisation of the traditional System of international relations and the constantly increasing complexes of the interdependence of states."[2]

Following are the main essentials of international organisation, the institution :

(i) Its origin is based on multilateral international agreement.
(ii) The institution has a personality of its own which is distinct from its individual members.
(iii) It has permanent organs which carry out common aims.
(iv) As compared to the will of all members, its organs exhibit autonomy of will.

Chief Functions of International Organisations.—At present international organisations perform many functions and their functions are constantly increasing. Due to paucity of space it is not possible to mention here all the functions performed by international organisations. It will suffice to note here only those functions which are main in principle and which include other functions. Such functions are the following :—

(i) One of the main functions of international organisation is that keeping intact the sovereignty of States and despite thier different social systems, it establishes and expands peaceful cooperation among them.
(ii) Its second main function is to ensure that the competition going on among the individual States remains peaceful.

Evolution of International Organisation.—It may be noted at the outest that international organisation as a distinct phenomenon of international relations is of recent origin. The development of international organisation is possible only when certain prerequisites exist. In the first place, the whole world must be divided into a number of Sovereign States. Secondly, these sovereign States must have a substantial measure of contact with each other. Thirdly, these states must be aware of the problems which arise out of their mutual contacts and co-existence. Lastly, these Sovereign States must recognise the need for creation of international institutions for organising and regulating their relations with other.[3] These requirements were not fulfilled by the end of the eighteenth century. It was in the nineteenth century that these prerequisites were satisfied to a considerable extent and that is why the birth of international organisation took place in this period. We may, however, hasten to add that international organisation as we know today was not created all of a sudden in the nineteenth century. The International organisation has developed as a result of three major streams of developments.

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[1] Wojeiech Morawiecki, "Some Problems connected with the organs of International Organisation." Int. Orga., Vol. XIX No. 4 (Autumn 1965), p. 913 at p. 914.

[2] S. J. R. Bilgrami, International Organisation (1977), p. 1.

As regards the prerequisites for the development of International Organisation, it may be noted that the State system started developing in Europe in the Seventeenth century and the Treaty of Westphalia (1648) may be said to have formalized the State system for it recognized that the Holy Roman Empire no longer commanded the allegiance of its parts (so much so that even in spiritual matters Pope could not maintain his authority everywhere in Europe). Thus by 1648 the state system was well-established in Europe. It need not be over-emphasised that the state system which was formalized by the Treaty of Westphalia remains more or less unchanged in its basic patterns although it has been affected by a number of developments and factors such as rise of representative government, growth of international law, increase in economic inter-dependence and expansion of State-System to non-western world. As pointed out by Prof. Goodspeed, "The Internationai *status quo* is the system of nation-states wherein there continues to exist a constant struggle for power since international organisation is a mechanism designed to encourage a better functioning of the state system it must, of necessity contend with this ceaseless struggle and the forces which shape it. Despite the ideals and objectives of international organisation with the exception of the most technical matters politics and conflict are always present and will continue to be as long as the national state is the basic unit of representation. What must be examined, then are the forces underlying the state system if there is to be an understanding of the difficulties confronting the development function, and successful operation of an international organisation. These include the legal notions of sovereignty and equality, as well as the elements which make for national power and the explosive force of nationalism."[4]

With the establishment of the State System, its expansion to non-western world and the development of means of transport and communications, the first three prerequisites for the development were satisfied to a sufficient measure. However, it took considerable period of time before the fourth prerequisite could be satisfied and this took place in the nineteenth century. The development of international organisation as we know today may be divided into three main streams of developments which are following :

(1) The Concert of Europe.—The first phase of the development of the international organisation begins with the establishment of the concert of Europe. It grew out of the Holy Alliance and the Congress of Vienna in 1815. It was a loose association or exclusive club for great powers. With a view to maintain balance of power in Europe great powers joined hands and used to hold consultations among themselves from time to time. In the beginning, they concentrated their efforts in preventing dynastic and imperial interests from destroying the European balance of power. It helped to develop the habit of consultation among great powers. It thus laid the foundation for the collective negotiation which has now become a part and parcel of international organisation. The concert of Europe contained the seeds for the League Council and the Security Council for it laid the groundwork for the creation of the executive organ of an International organisation.

(2) The Hague System.—The Hague system represents the second stream of the development of international organisation. The two Hague conferences of 1899 and 1907 were not convened by European great powers. These are remarkable because for the first time all states participated in these conferences on equal terms to consult problems of international concern. "The era of the concert was the period of great power hegemony. The Hague conferences enabled smaller States to taste independence and equality."[5] While the first Hague conference was attended by 26 states, the second Hague conference was attended by as many as forty-four states thereby manifesting to approach towards universality. These two conferences contained the seeds of the League Assembly and the General Assembly. In fact, "the Hague conference were the prelude to the building of the League of Nations, a sort of interim stage in the developments of international cooperation designed to bring about a great measure of security within the system of nation States."[6]

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[3] See Inis L. Clande, J., Swords into Plomshres—The Problems and Progress of International Organisation, 3rd Edn., Random House, New York (1964) pp. 18-20.

[4] Stephen S. Goodspeed, The Nature and Function of International Organisation, Second Edition pp. 9-10.

3. Private International Unions.—The development of Private International Union could take place because its interests were international and such interests needed private international Unions. Probably Anti-slavery World Conference of 1844 was the first of such conferences as a result of which permanent arrangements were established. In between 1840 and 1914 nearly 400 permanent Unions were established. These unions were established in different fields such as International Committee of the Red Cross (1863), Inter-Parliamentary Treaty (1889), International Law Union, (1873), International Dental Union (1878), International Commercial Chamber (1919). The development of these Unions took place so rapidly that in order to co-ordinate their activities and to lay down conditions of members a Union of International Unions was established in 1910. The conditions laid down in it were as follows :

(1) existence of a permanent organ ;

(2) the object being not the profit but the interests of all or some of the States ;

(3) the membership should be open to individuals or groups of individuals. Regular meetings were provided in these Unions or institutions. Besides this several Unions established permanent Secretariats which function successfully. On the basis of their functions, 'private' and 'public' unions were distinguished.

4. Public International Unions.—The third main stream of development arose from the appearance of Public International Unions, particularly after 1850. A significant thing to be noted in connection with this auspicious development was that such agencies dealt with problems which were essentially non-political. "Whereas both the concert and Hague reflected the significance of the quest for security and the importance of high political issues, this third phenomenon was the manifestation of the increasing complexity of the economic, social, technical and cultural interconnections of the peoples of the modern world."[7] The International Telegraph Union (ITU) and Universal Postal Union (UPU) which were established in 1865 and 1874 respectively represent early public international Unions which set this benign trend to be followed by others. Such as International Labour Organisation, Food and Agriculture Organisation, World Health Organisation, International Monetary Fund and many others. These public international Unions later on became the specialized agencies of the U. N. They deal with such diverse matters as science, art, economics and finance, food and agriculture, health, International civil aviation and Communications and Transit. It may be noted that the Bureau of ITU contained the seeds for the secretariat of the League of Nations and the U. N. The development of permanent staff to perform the functions of the organisation and to carry out functions of correspondence, research, publication etc., was significant contribution of these public International Unions.

The above-mentioned development prepared the ground for the establishment of the League of Nations which represented the first attempt to develop a comprehensive global organisation. Often it is remarked that "the League of Nations pioneered in practically all aspects of international organisation."[8] But this remark does not seem to be correct. The League of Nations can at best be said to be the first international attempt at a general and comprehensive global international organisation. It was greatly indebted to the development in the field of international organisation which had taken place (as noted above) prior to its establishment.

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[5] Bilgrami, note 2, at p. 5.

[6] Goodspeed, note 4, at p. 27.

[7] See note 2, at p. 7.

Nature and Legal character of International organisation.—It has been pointed out earlier that International organisation is an international legal person and subject of international person. In *Reparation for Injuries suffered in the Service of the U. N.*[9] the International Court of Justice observed that the U. N. is an international legal person having rights and duties under international law. It can claim compensation for injuries suffered by persons under its service; what is true of the U. N. is also true of other international organisations. However, the world court added that there is nothing in the character of international organisations to justify their being considered as some form of "super-state."[10]

This view was reaffirmed by the International Court of Justice in its Advisory opinion of 20 December, 1980 *in Interpretation of Agreement of 25 March, 1951 Between the WHO and Egypt*. In this case the court said that international organisations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[11]

Privileges and Immunities of International Organisations.—For the proper performance of its function, the International Organisations or its branches wherever they may be situated, should possess some privileges and immunities. Similarly, its agents and servants who perform the functions of international organisation should possess some privileges and immunities. For the same reason, the money and Funds of International organisations are exempted from local financial rules and controls. These matters are determined by International Conventions for they cannot be left to be decided on the basis of laws and practices of States. So far as the United Nations is concerned, Article 105 provides that the organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. Representatives of the Members of the United Nations and officials of the organisation shall similarly enjoy such privileges and immunities as are necessary for exercise of their functions in connection with the organisation. The status of the Headquarters of International organisations depends on Special Agreements. The most prominent of such agreements is the Headquarters Agreement between the United Nations and the United States of America. The Advisory Opinion of 26th April, 1988 of the International Court of Justice on *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 23 June, 1947* deserves a special mention. The American Congress passed Anti-Terrorism Act, 1987. Under this Act, the Information Office of the Palestinian Liberation Organisation (PLO) situated in Washington and Observer Mission of PLO situated at Newyork were ordered to be closed by 21st March, 1988. In this connection, it may be noted, as pointed out by the Spokesman of the Secretary-General of the U. N., the Members of the PLO Mission are, by virtue of resolution 3237 (XXIX) invitees to the United Nations. As such, they are covered by Sections 11, 12 and 13 of the Headquarters Agreement of 26 June, 1947. There is, therefore, a treaty obligation on the host country to permit PLO presonnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters. In this respect, it may be noted that Section 11 of the Headquarters Agreement provides that the federal State or local authorities of the United States shall not impose any impediments to transit to or from the Headquarters district of representatives of Members or the families of such representative and other persons invited to the Headquarters district by the United Nations on official business. Section 12 provides that "the provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments or the persons referred to in that section and the Government of the United States." Section 13 provides that "Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11."

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[8] See Goodspeed, note 6, at p. 364.

[9] I.C.J. Reports, (1949) p. 174.

[10] Ibid, at p. 179.

[11] Para 37 of the Advisory opinion dated 20 December, 1980.

Further, Section 21, paragraph (a) of the Headquarters Agreement of 1947 provides :

"Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement which is not settled by negotiation or other agreed mode of settlement shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice."

Since the matter regarding the P.L.O. Observer Mission was not settled by negotiations between the U. N. and America, it was decided to refer it to the International Court of Justice for its advisory opinion. In the first week of March, 1988, a special session of the General Assembly was convened. On 3rd March, 1988, the General Assembly passed two resolutions sponsored by India and 43 other States. These resolutions provided for referring the dispute relating to PLO Observer Mission between the U. N. and the U. S. to International Court of Justice for the advisory opinion. For the first resolution 143 States voted in favour and only Israel voted against it. 143 States voted in favour of the second resolution and none voted against it. The World Court gave its advisory opinion on 26th April, 1988. In the words of the Court :

"The Court must conclude that the United States is bound to respect the obligation to recourse to arbitration under Section 21 of the Headquarters Agreement.

Further, ".........It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral of 14 September, 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since then, for example in the case concerning the Greco-Bulgarian 'communities' in which the Permanent Court of International Justice laid down that—

"It is generally accepted principle of international law that in the relations between Powers who are contracting parties to treaty, the provisions of municipal law cannot prevail over those of the treaty." (P.C.I.J. Series B., No. 17, p. 32).[12]

On 13th May, 1988, the General Assembly passed a resolution wherein America was asked to start the procedure of arbitration. 136 States voted in favour of this resolution. Only two States (Israel and America) voted against the resolution.

It may be noted here that the decision to close P.L.O. Observer Mission was taken by America under Anti-Terrorism Act, 1987. While the dispute was continuing between the U. N. and U. S. relating to closure of P.L.O. Observer Mission in Newyork, a case had been filed in American District Court challenging the American decision. In June, 1988, the American District Court ruled that under the Anti-Terrorism Act, 1987, it was not necessary to close P.L.O. Observer Mission and that the United States of America should not obstruct the functioning of P.L.O. Observer Mission. According to the then Secretary-General of the U. N., Mr. Avier Perez De Cuellar, this decision of the American Federal Court made it clear that the American judicial system respected the obligations under international law.

Like the Headquarters Agreement of 1947 between the U. N. and the U. S., there are also special agreements relating to Headquarters or Regional Offices of Specialized Agencies of the United Nations. In this connection, advisory opinion dated 20th December, 1980 of the International Court of Justice on the *Interpretation of the*

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[12] Para 57 of the Advisory Opinion of 26th April, 1988.

Agreement of 25 March, 1951 between the W.H.O. and Egypt deserves a special mention. The facts of this case are :

One of the Regional Offices of World Health Organisation (W.H.O.) is in Alexandria (Egypt). This office was established as a result of the agreement of 25th March, 1951 between W.H.O. and Egypt. Due to political situation in Middle East, W.H.O. was facing many difficulties in carrying on the functions of office. Several member States wrote letters to W.H.O. for transfer of the said regional office to some other Arab Country. Consequently, it was decided to transfer the Regional Office to some other Arab Country. Section 37 of the Agreement between Egypt and W.H.O. provides that the existing agreement can be amended on the application of either party. In such a situation both the parties shall hold consultations and if no agreement is reached within one year, then either of the parties can terminate the agreement after two years' notice. Since there was dispute in respect of application of Section 37, the W.H.O. referred the following two questions for the advisory opinion of the International Court of Justice :

(1) Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March, 1951 between the W.H.O. and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt ?

(2) If so, what would be legal responsibilities of both the W.H.O. and Egypt, with regard to the regional office in Alexandria during the two-year period between notice and termination of the Agreement.

By a majority of twelve votes to one, the International Court of Justice's Opinion in respect of the first question was that in the event specified in the Request the legal principles and rules, and the mutual obligations which they imply, regarding consultation, negotiation and notice, applicable between W.H.O. and Egypt are :

(a) Their mutual obligations under those legal principles and rules place a duty upon both the organisation and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected.

(b) In the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of co-operation place a duty upon the organization to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt.

(c) Their mutual obligations under those legal principles and rules place a duty upon the party which wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office to its new site.

Giving the answer with regard to the second question, the World Court by a majority of eleven votes to two, gave the following opinion :

In the event of a decision that the Regional Office shall be transferred from Egypt, the legal responsibilities of the W.H.O. and Egypt during the transitional period between the notification of the proposed transfer of the office and the accomplishment thereof are to fulfil in good faith the mutual obligations which the Court has set out in answering Question 1.[13]

The agreement of Headquarters or Regional Offices of International Organisations have following general features :

(i) Within the Headquarters district local laws apply. But these are subject to the application of staff administrative regulations relative to the Secretariat.

(ii) The premises and the property of the Organization are immune from search, confiscation, requisition, etc., and any other form of interference by the local authorities.

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[13] Para 51 of the Advisory Opinion of 20th December, 1980; See also para 49.

(iii) Local officials cannot enter the premises of the Organisation except with the consent of the Organisation.

(iv) It is the obligation of the local government to use diligence to protect the promises of the Organisation against outside disturbance and unauthorised entry.

(v) Except for charges of public utility services, headquarters are exempt from local taxes.

(vi) The Organisation enjoys freedom of communication and is immune from censorship.[14]

Legislative and Regulatory Functions of International Organisations.—There is no world legislature in the international field. However, international organisations and their organs perform different types of legislative and regulatory functions. For example, the General Assembly of the United Nations is not a World Parliament yet in different situations it performs legislative functions. More than a dozen of its resolutions are considered to be binding upon the member States. This has been discussed in detail in the Chapter entitled, "General Assembly of the United Nations." Similarly, the Economic and Social Council, United Nations Commission on International Trade Law (UNCITRAL) and International Law Commission also perform some legislative functions. Some Specialized Agencies of the U. N. such as International Labour Organisation (ILO), W.H.O., International Civil Aviation Organisation (ICAO) adopt regional regulations and procedures in their regional meetings. In the international field, the development of performance of legislative and regulatory functions by international organisation is like the delegated legislation in the Municipal field.

International Administrative Law.—Like the Municipal field but in very limited sense, international organisations also perform some administrative functions. For example, the European Economic Community (EEC) has the power to determine whether aid given by a member is not inconsistent with the common market and whether it is not being used in improper way. EEC possesses this power under Article 93 of Treaty of 25 March 1957 establishing the European Economic Community. Similarly, the Courts of European Community have the power to review the validity of the acts of some organs of the Community. Likewise, the organs of the international organisations have the power or jurisdiction of interpreting the provisions of the Constituent instruments. For example, the Council of the International Civil Aviation Organisation (ICAO) has such power under Articles 84-86 of the International Civil Aviation Convention of 7th December, 1944. Similarly, the Executive Directors and Board of Governors of the International Monetary Fund (IMF) under Article XVIII of the Articles of Agreement of the Fund. Reference may also be made here to development of a practice of delegating an inquiry to a smaller body or committee by an organ of international institution such as complaints regarding infringements of trade union right come for preliminary examinations before the Committee on Freedom of Association on behalf of the Governing Body of the International Labour Organisation (ILO). In certain respects this Committee is a quasi-judicial body.

Capacity or Power of International Organisations to enter into International Treaties.—The Constituent Instruments of some international organisations expressly mention the capacity or power of the Institution to enter into treaties. For example, Article 43 of U. N. Charter confers power on the Security Council to conclude special Agreements for making available the armed forces. Similarly, Article 57 of the Charter provides for entering into agreements for bringing the Specialized Agencies into relationship with the United Nations. Besides this, Article 77 expressly provides for entering into trusteeship agreements. Moreover, impliedly also, international institutions also possess power to conclude treaties (*e.g.*, Headquarter or Regional Office Agreements) to carry out or perform their functions properly. Such power may also be delegated. An example of this is the 1982 Agreement between the Government of Pakistan and U. N. High Commissioner on Refugees. In the Vienna Convention (of 21st

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[14] J. G. Starke, Introduction to International Law, Tenth Edition, Butterworths Singapore, 1989, p. 622.

March, 1986) on the Laws of Treaties between States and International Institutions, power of international organisations to conclude treaties has been recognized.

Dissolution of International Institutions.—Dissolution of International Institution may take place in any of the following three ways :

(1) If it has been established for a fixed period on the expiry of that period;

(2) If it is for some special purpose or is of temporary nature on the completion of that purpose; and

(3) On the express or implied decision of the members of the Institution. For example, League of Nations was dissolved on 18th April, 1946 by a resolution passed by the Assembly of the League.

Succession of Rights and Duties of International Institutions.—When the question of succession of rights, duties etc., of international institution to another institution arises, the question of succession of constituent functions is also involved. The first thing that deserves mention in this connection is that succession of rights and duties takes place only when the nature and functions of the predecessor and succeeding International organisations are the same. This was held by the International Court of Justice in its *Advisory Opinion* on the International Status of South West Africa (Namibia).[15] Besides this, the succeeding International organisation should have expressly or impliedly the constitutional competence to get the rights and duties in succession. If the succeeding organisation has no such capacity, there shall be no succession. It may also be noted that if the constituent instrument of the succeeding international organisation does expressly mention the functions of the predecessor organisation relating to succession, then the question of succession shall be determined in accordance with the said provisions. The best example of this is the Statute of the International Court of Justice which is the successor of the Statute of Permanent Court of International Justice.[16]

Convention on Safety of U.N. Personnel (1994)

On 9th December, 1994, the General Assembly adopted 29-article convention on the Safety of U.N. and Associated Personnel. The convention was opened for signature, ratification and acceptance. The convention defines duties of states to ensure safety and security of such personnel and to release or return those captured or detained. Under the convention state parties will be under obligation to establish jurisdiction over crimes, including murder, kidnapping or threat of attack against U.N. and Associated Personnel. It calls on host states and the U.N. to quickly conclude agreements on the status of the U.N. operation and personnel. The convention obliges Transit states to facilitate unimpeded transit of such personnel. The convention also deals with issues such as prosecution or extradition of alleged offender.

The convention had become necessary in view of the alarming rise of crimes recently against U.N. personnel especially in U.N. operations in Somalia and Bosnia. The convention is a step in the right direction. This Convention entered into force on 15 January, 1999. So far 91 parties have ratified this Convention.

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[15] I.C.J. Rep. (1950) p. 128.

[16] See ibid, at p. 630.

CHAPTER 31

THE LEAGUE OF NATIONS

Origin.—As aptly pointed out by Philip Noel Baker, "The League of Nations is the first attempt in history to furnish the international society of nations with a permanent and organic system of International Political Institution. This attempt was an outcome of the "world war." The devastating effects of the first world war compelled all right-thinking men of the world to make endeavours to establish an International Organisation which might be able to establish peace and security in the world. During the First World War certain committees relating to shipping, raw materials, food materials, fuel, etc., were formed by the allied nations. The successful working of these committees encouraged the concept of international co-operation among the states. The League of Nations is often termed as 'A Child of War'. Although to a great extent this statement is correct, yet the nature of the Covenant of the League of Nations was to some extent, influenced by certain movements which had already started before the war. The first of such movements began with the Concert of Europe. The Concert of Europe was in itself the product of long and continuous development of international organisation. The framers of the Covenant. of League of Nations found the Concert of Europe as a model for establishing League Council on more or less similar lines. The second of such movement was precipitated by Hague Conferences of 1899 and 1907. The framers of the Covenant found these Conferences as a model for the League Assembly. It was their conviction that League Assembly could further develop its legislative functions or to put it more precisely the developments of legislative functions was further possible by the Assembly of League of Nations. The third movement appeared in the form of administrative and technical unions. Universal Postal Union is a glaring example of such unions. These movements or tendencies which had been developing for some time back before the start of the First World War, greatly influenced the nature of the League of Nations.

Although the desire for the establishment of an effective international organisation had been expressed long before the First World War, yet it took the real form in the treaty of Versailles, 1919. During the War, a lot of propaganda was going on in Europe and America in official as well as unofficial fields to establish an effective International Organisation. Many proposals were being put forward in this connection. By the end of the First World War, the Statesmen of the World had finally decided to establish the League of Nations. Although their ideas were uptil now not clear yet they were at least definite about their desire to establish an organisation which might prevent further war and save the people of the world from the scourge and devastating effects of wars. In 1918 Lloyed George, the Prime Minister of Britain in one of his important speeches said, "We must seek by the creation of some international organisation to limit the burden of armaments and diminish the probability of war." Robert Cecil, after assuming the office of Minister proposed the formation of a Committee to prepare draft for establishing mutual co-operation among the nations and to maintain peace in the world. This proposal was accepted and a committee was formed under Chairmanship of Lord Phillimore.

Similarly, the French Government also established a Committee to study the plan for the establishment of League of Nations. The report of this Committee was much more clear and certain than that of Phillimore Committee. In the meantime, a significant event took place in America. On January 8, 1918, President Wilson of America put forward his famous 14-point programme for the establishment of League of Nations. This 14-point programme included the proposals for the establishment of a conference of the representatives of the Great Powers, a permanent Secretariat, Disarmament, Compulsory Arbitration and for military action against the members resorting to war and violating provisions of the proposed League of Nations. President Wilson gave an impetus and encouragement for the establishment of League of Nations. It would not be wrong to contend that much of the credit for the establishment of League of Nations goes to President Wilson.

By the end of 1918, Lord Robert Cecil had prepared a draft which was known as 'Cecil Draft.' In December 1918 General Smutts also put forward his proposals for the establishment of League of Nations. His proposals included the establishment of a General Conference, Council and Arbitration Court. Thereafter, the President of America also put forward his second and third drafts for the same purpose. An official British draft was also prepared for the purpose. Ultimately the American and British proposals were compiled in joint draft known as 'Hirst-Millar Draft.' This joint draft was presented before the League of Nations Commission of the Peace Conference. On April 21, 1919, the Peace Conference accepted the draft which was given the final shape by the Commission and thus the Covenant of the League of Nations was adopted. It is significant to note that the Covenant was kept as a part of the Treaty of Versailles, 1919. Thus finally the League of Nations was established on January 10, 1920.

Principal Organs of the League of Nations.—Following were the principal Organs of the League of Nations :

(1) *Assembly.*—All members of the League of Nations were represented in the Assembly. Each member could send its three representatives in the Assembly, although each member was entitled to have only one vote. Sir A. E. Zimmern has rightly remarked : "The Assembly was 'not a Parliament' of any other organ of a system of world government. It is simply the first outward and visible manifestation of the authority of the Rule of Law in the world." It may, however, be noted that one defect of the Covenant of the League of Nations was that the functions of the Assembly and the Council were not properly and specifically demarcated. However, there were certain functions which were exclusively performed by the Assembly. For example, it admitted new members by two-thirds majority, nominated the non-permanent members of the Council and approved or ratified the appointment of the Secretary-General.

(2) *Council.*—The principal allied and associated powers were the members of the Council. That is to say, America, Britain, France, Italy and Japan were the permanent members of the Council. Besides this, four other members were elected by the League Assembly. It was, however, unfortunate and certainly detrimental for the future of League of Nations that America could never join it although President Wilson inspired and encouraged the establishment of League of Nations. Therefore, the place of America was filled by a smaller State which was elected by the Assembly. As noted earlier, the functions of the Council and the Assembly were not clearly demarcated, the Council performed functions along with the Assembly, but there were certain functions which were exclusively performed by the Council. These functions included the nomination of additional members of the Council, preparation of plans for reduction of armaments, to advise the members in regard to the defence and external aggression and for maintaining territorial integrity of the members.

(3) *The Secretariat.*—Although neither the idea of International Secretariat nor the concept of international civil service was entirely new, yet the League of Nations deserves credit for establishing an international civil service in the real sense of the term and it was a League experiment which was further developed and perfected by the United Nations. The Secretariat of the League of Nations comprised of 600 officers and subordinate officials. It was headed by the Secretary-General who was appointed by the unanimous decision of the Council.

Withdrawal of Membership.—[*N. B.* For this please see matter discussed under the heading 'Is withdrawal of a member State from the U. N. possible ?" under the Chapter "Origin, Purposes, Principles, Membership, etc., of the U. N."]

Functions of League of Nations.—The League of Nations performed following main functions : (1) The "Reduction of National Armaments to the lowest point consistent with national safety." (Article 8). (2) To 'preserve as against external aggression, the territorial integrity and existing political independence of all members of the League.' (Article 10). (3) The third important function performed by the League of

Nations was to settle international disputes peacefully. (Articles 12 and 16). (4) Yet another important function of the League of Nations was to bring about peaceful change in international relations. (5) Last but probably the most important function performed by the League of Nations was to maintain international peace and security. Thus "The Covenant of the League of Nations was a multilateral treaty......with two-fold objectives of preserving international peace and security and promoting international co-operation."[1]

Weakness and defects of the League of Nations.—Following were the main defects and weaknesses of the Covenant of the League of Nations :

(1) One of the main defects of the Covenant of the League of Nations was that all the decisions of the Council were taken unanimously. Since the nations were divided among groups, it was not possible to decide many matters by unanimous decisions. Thus the unanimity principle which was incorporated to improve the efficiency of the working of the League of Nations proved to be detrimental and obstructed its day-to-day working.

(2) Yet another important defect of the League of Nations was that it did not completely prohibit war. The Covenant of the League of Nations permitted member-States to resort to war under certain circumstances. The Covenant provided that at the first instance members were under obligation to settle their international disputes through arbitration, judicial settlement or enquiry by Council. But if the problem was not resolved through these means they could go to war after the lapse of 3 months. That is to say, the main restriction imposed by the Covenant was that after the failure of the settlement of disputes through the above means, the nations had to wait for three months before resorting to war. That is to say, war was not completely prohibited. Jurists have, therefore, rightly remarked that this was the main constitutional defect of the Covenant.

(3) Although President Wilson of America contributed much for the establishment of League of Nations, yet it was unfortunate that America could never become its member. The obvious reason for this was that the Covenant of the League of Nations was a multilateral international treaty, and, therefore, before America become its member, it was necessary (in accordance with the provisions of American Constitution) that the consent or ratification of American Senate should have been obtained. The American Senate never ratified and, therefore, America could never become the member of the League of Nations.

(4) Yet another defect of the League of Nations was in regard to the constitutional provisions for the amendment of the covenant. It provided that if any amendment of the Covenant was not acceptable to any State, then it would mean that, that member ceased to be a member of the League of Nations. This provision proved to be fatal because in the course of time a number of States ceased to be members of the League of Nations.

(5) The League of Nations also provided for the withdrawal of the members. The members could withdraw from the League of Nations by giving a two-years' notice. This provision also proved to be detrimental. In the beginning the League of Nations had as many as 62 members which in the course of time were reduced to only 32. It was perhaps for this reason that in San Francisco Conference in 1945 when the matters relating to withdrawal of the States from the United Nations was being debated, majority of the members wanted that there should be no provision for the withdrawal of members. It was on account of this reason that the Charter of the United Nations contains no provision regarding withdrawal of members from the Organisation.

(6) The Council of League of Nations did not have the capacity to settle the international dispute peacefully.

(7) The League of Nations was also not capable to prevent great powers from attacking and exploiting smaller States.

(8) The League of Nations could not be termed as a universal International Organisation. In the beginning it had 62 members which were later on reduced to 32 members.

(9) It was based on the policy of discrimination between great powers and small States.

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[1] Stephen S. Goodspeed, The Nature and Functions of International Organisation, p. 33.

(10) Yet another cause for the failure of the League of Nations was that the great powers always considered their selfish interest over and above all things. As remarked by P. B. Potter, "The ultimate culprits in the failure of the League of Nations were the member-States. It was not the League of Nations but the Nations of the League which failed, insofar as there was failure."

(11) Last but not the least one of the main defects of the League of Nations was that it failed, and failed miserably, to perform its main and primary function of establishing peace in the world.

Factors and Events leading to the Dissolution.—In addition to the above defects and weaknesses of the League of Nations, certain events which took place, also led to the decline and ultimate dissolution of the League of Nations. Following are some of such main events :

(1) In 1923, Italy attacked an Island named Corfu belonging to Greece. Greece raised this matter in the League of Nations. The League of Nations, instead of providing any assistance to Greece to resist the Italian invasion, gave its advice in favour of Italy.

(2) In 1931, Japan attacked and conquered Manchuria. The League of Nations failed to take any effective action in this connection.

(3) One of the important functions of the League of Nations was, as noted earlier, the reduction of national armaments to the lowest point consistent with national safety. It was, therefore, under the auspices of the League of Nations that Disarmament Conference was held in 1932. It was a landmark event insofar as the holding of such a Conference was concerned, but no tangible success could be achieved and this also proved to be detrimental for the existence of the League of Nations.

(4) In 1935 Italy attacked Ethopia. The League of Nations could not take any action against Italy.

(5) In 1939 Russia invaded Finland. In this case also the League of Nations remained simply as a spectator and failed to take any action at all.

Conclusion.—It is clear from the above mentioned defects and weaknesses of the League of Nations that it was a weak International Organisation and could not maintain or establish International peace and security. Despite this, it could not but be admitted that the League of Nations ultimately failed not because of the constitutional defects of its Covenant, but because of the members who failed to fulfil the obligations assumed by them under the Covenant. Professor Goodspeed has rightly remarked : "The League of Nations was abandoned by those who failed to abide by their solemn obligations." In April 1946, the League of Nations was ultimately dissolved by a resolution of the Assembly. Fortunately, due to the untiring efforts of the Statesmen of the World, United Nations Organisation was established in 1945. The United Nations Organisation which succeeded the League of Nations not only took the place of the League of Nations, but proved to be a much more effective and successful Organisation. According to Goodspeed, "The League of Nations pioneered in practically all aspects of International Organisation. Undoubtedly one of the novel innovations was the adoption for the first time of a truly International Civil Service."[2]

Although it is not correct to say that the League of Nations pioneered in all aspects of international organisation because as noted in earlier chapter it was indebted to the developments in the field of international organisation which has preceded it yet it cannot but be admitted that it made the first important attempt to establish a general and comprehensive global international organisation. The experiment made by the League of Nations was further developed and perfected by the United Nations.

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2. Stephen S. Goodspeed, The Nature and Functions of International Organisation at p. 364; see also Percy E. Corbett, The Growth of World Law (1971), p. 86.

CHAPTER 32

ORIGIN, PURPOSES, PRINCIPLES, MEMBERSHIP, ETC., OF THE UNITED NATIONS

Factors and events leading to the establishment of the United Nations.[*]

The twentieth century witnessed the two devastating World Wars. The League of Nations was established after the First World War and was, therefore, often called the Child of War. The main function and objective of the League of Nations was to establish peace and security in the world. The League of Nations failed to achieve its objective. The causes of the failure of the League of Nations have already been discussed in detail in earlier Chapter. It is sufficient to note here that the Second World War was the ample proof of the utter failure of the League of Nations to establish peace in the world. The Second World War compelled the nations of the world to endeavour to establish an International Organisation so that mutual disputes could be resolved peacefully and that peace and security could be established in the world. Consequently, even when war was going on, the Great Powers of the world had started making their efforts in this direction. Their untiring efforts led to the holding of the Sanfrancisco Conference on January 26, 1945, wherein the United Nations Charter was adopted and signed by 51 nations of the world.[1] However, the United Nations Charter did not come into force immediately because it was necessary to have been ratified by the prescribed number of nations. This requirement was fulfilled on October 24, 1945, and consequently on October 24, 1945, the United Nations was ultimately established. 24 October every year is therefore celebrated as United Nations Day.

As pointed out earlier the nations of the world had started making efforts even during the war to establish an International Organisation. A brief discussion of the endeavours and events which led to the establishment of the United Nations will not be out of place here. A brief discussion of such events and efforts is being made below :

(*I*) *The Declaration of St James Palace* (*June 12, 1941*).—By June 1941, London had become the home of nine exiled governments. The representatives of the exiled governments of Greece, Belgium, Czechoslovakia, Luxemburg, Netherlands, Norway, Poland and Yugoslavia, the representatives of Britain, Canada, Australia, New Zealand and South Africa and Gen De Gualle of France assembled at James' Palace London. They signed a declaration on June 12, 1941, wherein they expressed their desire to establish peace.

(*2*) *The Atlantic Charter.*—After the declaration of St. James' Palace, the next important event was the adoption of Atlantic Charter of August 14, 1941. This was in fact the meeting of the two Great Statesmen of the World—Winston Churchill, the Prime Minister of Britain and President Franklin Roosevelt of America. These two statesmen met in a ship in the Atlantic Ocean. That is why, the agreement entered into by them is called the Atlantic Charter. In this Charter they undertook to make joint efforts to end Nazism and expressed their faith in the principles of equality of nations, universal peace, collective co-operation, and prohibition of acquiring territories through conquest.

(*3*) *The United Nations Declaration* (*January, 1, 1942*).—The next important event was the United Nations Declaration signed by President Roosevelt of America, Winston Churchill of Britain, Maxim Litvinov of Russia and T.V. Soong of China on January 1, 1942.

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[*] See also for I.A.S. (1973), Q. No. 9 ; I.A.S. (1969), Q. No. 10.

[1] As pointed out by P. E. Corbett : "The world has been pledged by solemn treaties for half a century to creation of an organized world community. When the first sustained effort to create such an organized World Community foundered with the collapse of the League of Nations, the pledges of Covenant were solemnly renewed in the Charter of the United Nations." Social Justice in the Law of Nations the I.L.O. Impact After Fifty Years. (Hersch Lauterpacht Lectures, (1969), p. 1.

Subsequently, the representatives of 20 other States also signed this declaration. In this declaration States pledged to render co-operation to each other and undertook the obligation that they would not enter into any agreement or armistice, agreement or treaty separately with the enemy. This declaration is very important because in this declaration, for the first time, the words "United Nations" were used.

(*4*) *Moscow Declaration* (*October 30, 1943*).—On October 30, 1943, the representatives of Britain, America, Russia and China assembled at Moscow and signed a Declaration known as "Moscow Declaration." In this declaration they undertook to take joint action against the enemy. Yet another important thing in the declaration was that signatories of the declaration emphasised the urgent need of the establishment of World Organisation which should be based on the principle of equality of nations, should be open for all the States of the world and should be able to maintain international peace and security.

(*5*) *The Tehran Conference* (*December 1, 1943*).—The next important event was holding of Tehran Conference on December 1, 1943, wherein Churchill, Roosevelt and Stalin signed a declaration which further emphasised the urgent need of the establishment of an International Organisation which should be capable of maintaining international peace and security.

(*6*) *Dumbarton Oaks Conference* (*1944*).—The Dumbarton Oaks Conference occupies very important place so far as the establishment of the United Nations is concerned. This Conference took place in two phases. In the first phase the representatives of Russia, Britain and America took part in the Conference. In the second phase, China, Britain and America took part in the Conference. This Conference occupies a significant place because in this Conference all the matters relating to the composition, functions, principal organs, etc., of the proposed organisation to be established were discussed in detail. Moreover, Britain, China, Russia and America finally gave their approval that the proposed Organisation should be named "The United Nations." After prolonged discussions, there was agreement on a number of points and these were referred as "The Dumbarton Oaks Proposals." These proposals formed the basis of the Charter of the United Nations representated the principal views of the participants. It was agreed that the primary function of the Organization would be to maintain international peace and security. The Organization was to be based on sovereign equality of all peace-loving States. It was also agreed that organs of the Organization would include a General Assembly, comprising of all the member States, a Security Council, entrusted with the primary responsibility to maintain international peace and security, an Economic and Social Council, a Secretariat and a Court. It may, however, be noted here that there were still important questions which remained unsolved and were to be resolved in later negotiations. For example, it was yet to be decided as to whether the Permanent Court of International Justice was to be continued or there should be a new court. So was the question of initial membership of the Organization because the Soviet Union wanted all the sixteen Soviet Republics to be included as full fledged original members. Last but not the least, it was also to be decided as to what will replace the mandate system of the League of Nations. All these questions were finally resolved at the Sanfrancisco Conference.

(*7*) *The Yalta Conference* (*February 11, 1945*).—The next important conference that took place is known as Yalta Conference. In this Conference besides the Foreign Ministers and Military Heads of Britain, America and Russia, Churchill from Britain, Roosevelt from America and Stalin from Russia, also participated. This Conference occupies an important place because it gave final shape to the proposed world Organisation. It also resolved certain matters which were left unsettled in the Dumbarton Oaks Conference. It was also decided in this Conference that for the preparation of the Charter of the United Nations, the next Conference would be held on April 25, 1945.

(*8*) *Sanfrancisco Conference*.—Sanfrancisco Conference was held on June 25, 1945. It was attended by a large number of States and was presided over by Lord Halifax. In this Conference, the U. N. Charter was voted and was ultimately unanimously adopted. As noted earlier, the Charter did not come into force immediately after its adoption. It was provided that the Charter would come into force only when China, France, Britain, America and Russia signed and ratified it and the majority of the other States also signed and ratified it. This requirement was completed on October 24, 1945, and consequently the Charter of the United Nations came into force from that date. Sanfrancisco Conference was attended by 51 States. These 51 States were original members of the United Nations. The membership of the United Nations has since then been more than trebled and at present the United Nations has as many as 193 (one hundred ninety-three) members. Thus we may say that the United Nations has now achieved near universality. As compared to the League of Nations it would not be wrong to say that the United Nations is an universal International Organisation in the real sense of term.

Preamble of the United Nations Charter.—[For text of the Preamble see Appendix I].

The Preamble indicates that the Charter of the U. N. is born as a result of the experiences of a devastating war and that it holds out hope for a lasting peace based on recognition of fundamental human rights which have been the casualties of war, on a recognition of sovereign equality of all States and on better economic and social conditions for the millions who have been victims of oppression and exploitation.[2] It is significant to note that as compared to the words, "The High contracting parties" used in the covenant of the League of Nations the Charter uses the words "We the peoples of the United Nations." It is pointed out, and rightly too, that it is not by accident that these words occur in the Preamble. It is up to the statesmen and the people they represent to make a success of the United Nations.[3] In the view of Schuman, the use of these words in the Charter is misleading because "those who drafted it spoke for governments, not peoples and established not a federation of peoples, but a league of States. Fulfilment of the hopes of its founders required continuing co-operation among great powers. With the advent of 'cold war' these hopes faded.[4] The preamble itself later on uses the words "our respective governments". "But it must be conceded that there is a vast difference between the attitudes and concepts of the Covenant and the Charter about individuals. While emphasis and prominence have been given to the 'High Contracting Parties' in the covenant, the Charter has given a place of significance to human rights and fundamental freedoms. Moreover it has also been rightly pointed out whatever might be the interpretation given to the Preamble, it has to be admitted that the teeming millions all over the world opined for a world Organisation which would ensure peace and security and that the Charter reflects the prevailing mood of mankind in spite of many failures and frustrations which the Organisation suffered from time to time."[5]

Legal Character of the United Nations.—Ordinarily, the United Nations is considered to be an association or organisation of States. But it should be noted here that the United Nations also has a distinct legal personality of its own apart from those of its members. It has its Headquarter and officials. According to Article 104 of the Charter, the Organisation shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purpose. Article 105 further provides that the Organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes. Similarly, representatives of members of the United Nations and officials of the Organisation shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation. Thus the United Nations is a legal person and is a subject of International Law. The United Nations is capable of holding and disposing of property and can enter into contract. In this connection, the General Assembly of the United Nations adopted the covention on the Privileges and Immunities of the United Nations in 1946. Article I of the Covention provides : "The United Nations shall possess juridical personality. It shall have the capacity (a) to contract; (b) to acquire and dispose of immovable property; (c) to institute legal proceedings." With a view to give effect to this Convention in India, the Parliament of India enacted the United Nations (Privileges and Immunities) Act, 1947 (Act No. XLVI of 1947). The Schedule to the Act describes in detail the Juridical personality,[6] rights in respect of property,[7] facilities in respect of communication,[8] and representatives of Members etc.,[9] of the United Nations.

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[2] Niranjan Bhuinya, International Organisations, p. 64.

[3] Eichelberger, The United Nations : First Twenty Years, p. XII.

[4] International Politics, p. 227.

[5] See supra note 2.

It is clear from the above discussion that the United Nations is a legal person and a subject of law. This was confirmed by the International Court of Justice in its advisory opinion *Reparation for Injuries suffered in the Service of the United Nations*.[10] The world Court said that the United Nations is an international legal person which has rights and duties under international law. It can claim compensation for injuries suffered by persons in its service. But it may be noted here that under the Charter, power to enter contract, generally has not been conferred on the United Nations. On behalf of the organization it can enter into those contracts or agreements which are mentioned in the specific provisions of the Charter.[11] For example, it can enter into agreements with specialized agencies.[12]

Purposes of United Nations.*

The purposes of the United Nations are enshrined in Article 1 of the Charter. According to Article 1, following are the purposes of the United Nations :

(*1*) *To maintain International Peace and Security*[13].—The most important purpose of the United Nations is to maintain International Peace and Security. After having expressed their determination in the preamble *"to save the succeeding generations from the scourge of war,"* it was quite natural and appropriate for the framers of the United Nations Charter to have enlisted "Maintenance of International Peace and Security" as the first and foremost purpose of the United Nations. Article (1) provides that one of the purposes of the United Nations is to "maintain International Peace and Security" and to that end : "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and International Law, adjustment or settlement of international dispute or situation which may lead to a breach of the peace." This purpose is so important that it led Prof. Hans Kelsen to remark : "The purpose of the United Nations is world peace."

(*2*) *To develop friendly relations among nations.*—The second purpose of the United Nations is to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of people and to take other appropriate measures to strengthen universal peace.

The Principle of Self-Determination**.—The principle of self-determination has been incorporated in Articles 1 [(2)], 55 and 56 of the United Nations Charter. Article 55 deals with the promotion of International Economic and Social Cooperation "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal right and self-determination of peoples ...." It is further provided that "All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."[14] These provisions have direct and particular relevance for non-self-governing territories, which are dealt with in Chapter XI of the Charter.[15]

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[6] Article 1 of the Schedule.

[7] Article II.

[8] Article III.

[9] Article IV.

[10] I.C.J. Reports (1949) p. 174.

[11] See Stephen S. Goodspeed, The Nature and Function of International Organisation, Second Edition, p. 108.

[12] For this see Articles 57 and 63 of the U. N. Charter.

* See also I.A.S. (1974), Q. No. 9 ; P.C.S. (1977), Q. No. 9(d) ; UPPCS (2006) Q. 5.

[13] For detailed discussion on International Peace and Security please see Chapter on "The Security Council"; See also S. K. Kapoor, "The Maintenance of International Peace and Security." Lawyer (November, 1972), p. 170.

** See also for P.C.S. (1966), Q. No. 3 ; C.S.E. (1991) Q. 5(a).

Thus the principle of self-determination has been incorporated in the United Nations Charter. There is, however, great controversy as to whether the principle of self-determination has become a binding principle of International Law (including the law of the United Nations). In this connection, several contentions have been put forward. In the first place it is pointed out that the self-determination had become a principle of International Law even before the adoption of the United Nations Charter. It is contended that it was incorporated in the Charter because it had already become principle of International Law. This view has been expressed by several Soviet authors.[16] This contention is far from convincing and cannot be accepted. Secondly, Article 1 (2) simply states the concept of sovereign equality of States. It does not introduce a new principle of self-determination. It is simply a warrant for enforcing the principle of democratic government on these States. It is argued that this view is in accordance with the principle of sovereign equality of the members of the United Nations mentioned in Article 2 (1) as well as the restriction put on the United Nations by Article 2 (7) which prohibits intervention in the matters essentially with the domestic matters of a State.[17] Thirdly, the Charter of the United Nations introduces the principle of self-determination as a rule of International Law and as such parties to it are under a legal obligation to accord self-determination to their peoples. This conclusion is derived from the provisions of Articles 1 (*2*), 55 and 56.[18] Fourthly, the United Nations Charter has not made the principle of self-determination as a rule of International Law. It is simply a political principle for building a community of States.[19]

In the view of an eminent author, "It is clear that Articles 1 (2) and 55 of the Charter being the provisions of treaty under International Law are binding upon the States parties to it. However, the legal value of self-determination under these Articles, is considerably diminished by three major limitations.[20] The three limitations he points out are—(i) There is a lack of an adequate measure of the definition of self-determination in the United Nations Charter.[21] (ii) The principle of self-determination in Article 1 (2) is only subservient to certain purposes of the United Nations such as "to maintain International Peace and Security," "to develop friendly relations among nations" and "to be a centre for harmonizing the actions of nations."[22] Sri Sinha[23] states, "Accordingly, if, in a particular case, self-determination results in undermining either the friendly relations among nations or universal peace, it cannot be upheld within the meaning of this Article"[24], and (iii) Article 2 (7) of the United Nations Charter which prevents intervention in matters essentially within the domestic affairs of a State is also a great limitation for the issue of self-determination, can arise only within a existing State.[25] Thus the principle of self-determination, it is argued, "does not stand out as a solid principle binding on the States which are parties to it. Of course, for binding principle to exist it is not necessary that it be absolute and unlimited by other principles. Also there is a differene between urging that the legal character of rule is destroyed as result of the absence of a full measure of definition and admitting that its affectiveness is diminished thereby.[26] Nevertheless, the three factors mentioned above do diminish significantly a State's obligation under the Charter with respect to self-determination."[27]

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[14] Article 56.

[15] Advisory Opinion of the International Court of Justice in the Western Sahara Case, I.C.J. Rep. (1975), para 54.

[16] See for example : V. V. Lyubomudrova, "The Self-Determination of Nations as one of the Basic Conditions for International Co-operation and Peaceful Co-existence" in Symposium. The International Law Norms of the Peaceful Co-existence of States and Nations (1957); I.V. Speranskaya, The Principle of Self-Determination in International Law (1961).

[17] See H. Kelsen, The Law of United Nations, pp. 51-53 (2nd Impression, 1951) : N. Bentwich and A. Martin, A Commentary on the Charter of the U. N. (1950), p. 7. See also George Steven Swan, "Self-Determination and the United Nations Charter," I.J.I.L., Vol. 22 (1982), p. 264 at 273.

[18] Q. Wright, "Recognition and Self-Determination," Proc. A.S.I.L., Vol. 48 (1958), p. 27, note 11.

[19] L. C. Green, "Self-Determination and the Settlement of Arab-Israeli Conflict', Proc. A.S.I.L. (1971), p. 40; R. Y. Zennings, "The Acquisition of Territory in International Law" (1963), p. 78.

[20] S. Prakash Sinha, "Has Self-Determination Become a Principle of International Law" Today ?" I.J.I.L., Vol. 14 (1974), p. 332 at pp. 335-36.

[21] Ibid, at p. 336.

[22] Ibid.

[23] Ibid., at pp. 336-37.

[24] Cf. A. Somewhat Similar Interpretation of this Article in M.A. Shukri. The Concept of Self-Determination in the U.N. (1965), pp. 50-51.

[25] I.J.I.L. Vol. 14 (1974), p. 337.

In order to arrive at any conclusion, it will not only be desirable but also necessary to discuss the development of International Law (especially through the resolutions of the General Assembly of the United Nations and opinions of the International Court of Justice, after the adoption of the Charter of the United Nations). The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the *Declaration on the Granting of Independence to Colonial Countries and Peoples.*[28] In this resolution the General Assembly proclaims the necessity of bringing to a speedy and unconditional end of colonialism in all forms and manifestations. To this end the resolution provides *inter alia* : "All peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural developmnt. Immediate steps shall be taken in Trust and non-Self Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions, or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom. Any attempt aimed at the partial or total disruption of the national unity and territory integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

The above provisions, thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.[29] The International Court of Justice referred this resolution in the Advisory Opinion of 21st June, 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276, 1970.*[30] With reference to the development of International Law in regard to non-self governing territories, the Court there stated : "A further important stage in this development, was the Declaration on the Granting of Independene to Colonial Countries and Peoples (General Assembly) Resolution, 1514 (XV) of 14th December, 1960 which embarces all peoples and territories which "have not yet attained Independence.[31] It further stated : "The Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law through the Charter of the United Nations and by way of customary law."[32] The World Court then concluded : "In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions may not ignore it.[33] In Advisory Opinion in the Western Sahara Case, the International Court of Justice rightly remarked : "General Assembly Resolution 1514 (XV) provides the basis for the process of

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26. L. Oppenheim, International Law (Ed. by H. Lauterpacht), Vol. 1, 1948 (8th Edition, 1955).
27. I.J.I.L., Vol. 14 (1974), p. 337.
28. General Assembly Resolution 1514 (XV) of 14th December, 1960.
29. Advisory Opinion of the International Court of Justice in the Western Sahara Case, I.C.J. Rep. (1975), para 55.
30. I.C.J. Reports (1971), p. 16
31. Ibid. at p. 31.
32. Ibid.
33. Ibid, at p. 31.

decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations."[34]

The principle of self-determination was re-affirmed by the General Assembly in 1961."[35] It was further re-affirmed in the General Assembly Declaration on Non-Intervention,[36] and Declaration of Principles of International Law Concerning Friendly Relations Among States in accordance with the Charter of the United Nations. The latter[37] resolution [i.e., Res. 2625 (XXV)] reiterates the basic need to take into account the wishes of the people concerned : "The establishment of sovereign and independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." Resolution 2625 (XXV) further provides : Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the implementation of the principle in order : To bring a speedy end to colonialism having regard to the freely expressed will of the peoples concerned. The resolution further stated : Every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence. In their action and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter. The General Assembly further declared that the "principles of the Charter which are embodied in the Declaration constitute basic principles of International Law" and appealed to all States (and even non-members) to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles. "This is but one important example of the legislative activity of the General Assembly leading to the creation of new International Law applicable to all States."[38]

It has been aptly stated, "The fact that 28-million peoples are still denied their inalienable right of self-determination and independence can leave no room for complacency. Today the majority of Member States are more than ever convinced that the perpetuation of colonial rule is not only contrary to the purposes and principles of the Charter, but is an anachronism in the modern world and an impediment to the promotion of the world peace and co-operation."[39]

The resolution 1514 (XV) and other resolutions on self-determination, have not only assumed legal implication but have assumed binding force in the process and context of colonialism. In the first place, they have been passed by overwhelming majority States. Secondly, they may be deemed to interpret and implement the provisions of the Charter. Thirdly, their recitation in numerous resolutions shows the international standard of States on the principle of self-determination. Last but not the least, this has been consistently supported by the International Court of Justice in its advisory opinions referred earlier. Thus the provisions of the Charter read in the light of numerous United Nations General Assembly resolutions make it clear that "all peoples under alien subjection have the right of self-determination."[40] Thus, ".........within the context of colonialism, self-determination

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34. I.C.J. Reports, para 57; It has been aptly stated : ".........against the heavy background of colonialism, the Declaration was not a mere statement of principle. It was in fact a Universal Magna Carta of Liberty and a bill of emancipation for all nations and peoples fighting for liberty and dignity.........The Declaration must be taken to represent the wishes and beliefs of the Community of nations", P. K. Menon, "United Nations Special Committee and Decolonization", I.J.I.L., Vol. 9 (1969), at pp. 24 and 27.
35. See Resolution 1654 (XVI) of Nov. 27, 1961.
36. Resolution 2131.
37. G.A. Res. 2625 (XXX) of 24th October, 1970; G.A., Official Records, Twenty-fifth Sessions (Suppl.) No. 28 (1971).
38. Louis B. Sohn. "The Development of the Charter of the U. N. ; The Present State" in The Present State of International Law and other Essays (1973), p. 52.
39. I. S. Djermakoye, "The U. N. and Decolonization", U. N. Monthly Chronicle, Vol. (VII) No. 3, (March, 1970), p. 37 at pp. 44-45.
40. Rupert Emerson, "Self-determination, Revisited in the Era of Decolonization", Occasional Papers in International Affairs, No. 8 (December, 1964).

has become a peremptory norm of International Law whereby a State's title to a territory having colonial status is void."[41] It cannot be applied to established States in their territorial disputes. This is clearly prohibited by General Assembly Resolution 1514 (XV) of 14th December, 1960.[42] It may be noted here that India acceded to the Two International Covenants on Human Rights on 27 March, 1979. While acceding to the said Covenants India made, *inter alia,* the following reservation : "With reference to Article 1 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words 'the rights of self-determination appearing in those Articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent states or to a section of peoples or nation which is the essence of national integrity." It need not be overemphasized here that this is in conformity with the international law as discussed above.

A study prepared by the U.N. Human Rights Commission has said that the principle of self-determination which is often invoked to challenge the territorial integrity of sovereign states, does not include a unilateral right to independence, or secession. According to the study, while prevention of discrimination is essential and equality in participation and respect for minority groups must be ensured, it must be simultaneously recognised that identity of different groups or minorities does not mean a right for the members of these groups to dismember the state or disobey the fabric of multi-cultural society. The inference drawn by the study is in conformity with international law and has been reiterated time and again by the U.N. Human Rights Commission.

The Question of Self-Determination in Kashmir

N. B. : For this please see Appendix II.

(3) *International co-operation in solving international problem of economic, social and humanitarian character.*—The third purpose of the United Nations is to achieve international co-operation in solving international problems of economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedom for all without distinction as to race, sex, language or religion.

(4) *To make the United Nations a centre for the attainment of the above common ends.*—The last purpose of the United Nations is to make it a centre for harmonising the actions in the attainment to those common ends.

Principles of the United Nations.*

Article 2 of the United Nations provides that the Organisation and its members, in persuit of the purposes enshrined in Article 1, shall act in accordance with the following principles :

(1) *The principle of the sovereign equality of all members***.—The first principle of the United Nations is that the organisation is based on the principle of the sovereign equality of all its members. According to this principle, all the members of the United Nations are equal in the eye of law irrespective of their size or strength. They are all equal in the eye of law and no discrimination can be made on any basis. Undoubtedly it is an important principle and the framers of the Charter deserve credit for having included this principle in the Charter. The fact, however, remains that it is not an absolute principle and admits certain exceptions. There are certain provisions in the Charter which are inconsistent with this principle. In the Charter permanent members (Great Powers) have been conferred upon some special privileges and rights. According to Article 27, for the decision on all important matters in the Security Council, the affirmative vote of all the

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[41] A. Rigo Sureda, The Evolution of the Right of Self-Determination, (A. W. Sijthoff, Leiden, (1973), p. 353.

[42] Paragraph 6 of the Operative part of the resolution clearly provides : "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the United Nations." For detailed study see also S. K. Kapoor, The Principle of Self-Determination under International Law and the Indian Practice", Lawyer, Vol. VIII—11 (November, 1976), p. 167.

* See also for I.A.S. (1974), Q. No. 9 ; P.C.S. (1977), Q. No. 9(d) ; UPPCS (2006) Q. 5.

** See also for I.A.S. (1975), Q. No. 8(a).

permanent members is essential. In accordance with this provision all members are not in fact equal. Besides this, the amendment of the Charter cannot be made until and unless the permanent members give their affirmative concurrence. For the amendment of the Charter it is necessary that it should be adopted by two-thirds majority of the members of the United Nations and subsequently the governments of these members should ratify it, but the majority of two-thirds members must include the five permanent members of the Security Council (Article 108). Besides, there are several other provisions in the Charter which provide some special rights to the permanent members. Thus the United Nations Organisation is based on the principle of sovereign equality of States but the great powers are legally and actually unequal to the smaller States.[43] In fact, the great powers were given the special powers in the Charter under the presumption and with the hope that they would co-operate in the same way as they did during the Second World War and would thereby establish peace and security in the world. But unfortunately, immediately, after the establishment of the United Nations, conflicts started among the permanent members and they did not fulfil their responsibilities and obligations which the Charter imposed upon them. Besides this "Several of the principles must be understood as mere exhortion to decent international behaviour and the principle of sovereign equality may be singled out as the one most likely to frustrate the purposes of the United Nations altogether.[44]

(2) The second principle of the United Nations is that all members, in order to ensure to all of them, the rights and benefits resulting from the membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

(3) *Peaceful settlement of international disputes.*—All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

(4) *Principle of non-intervention.*—According to the fourth principle of the United Nations, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or any other manner inconsistent with the purposes of the United Nations.[45]

(5) The next principle is that all members shall give the United Nations every assistance in common action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

(6) The Organisation shall ensure that States which are not members of the United Nations act in accordance with these principles so far as may be necessary, for the maintenance of international peace and security.

(7) *Non-intervention in domestic matters of State**.—The seventh and the last principle of the United Nations states that nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter. There is, however, an exception to this general principle because Article 2 (7) also provides that this principle shall not prejudice the application of enforcement measures under Chapter VII. This principle is a great restriction upon the powers of the United Nations. It may, however, be noted that the term 'domestic jurisdiction' is not clear. Its meaning and implications are dependent upon the facts and circumstances. Some matter which were considered to be within domestic jurisdiction of the States at the time of the establishment of the Charter are now considered matters of international concern. They have, therefore, ceased to be matters within domestic jurisdiction of the States. With the growth of international community and inter-dependence of the States, the scope of 'domestic jurisdiction' is constantly diminishing. It

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[43] See P. A. Sorokin, The Reconstruction of Humanity, pp. 12-17.

[44] Werner Levi, Fundamentals of World Organization, p. 31; For more details and consequences of the equality of States see Chapter on "Nature of State and different kinds of States and Non-State Entitlies.

[45] Article 2 (4); For detailed study of this principle see Chapter on "Intervention".

* See also for P.C.S. (1974), Q. No. 10(e) ; P.C.S. (1973), Q. No. 10(e) ; P.C.S. (1967), Q. No. 8. See also for P.C.S. (1981) Q. 5(b) ; For answer please see also matter relating to "domestic jurisdiction" discussed in the Chapter on "Intervention" ; C.S.E. (1991) Q. 7 (b).

is possible that the matters which are now considered to be within domestic jurisdiction of States, may in future be treated as matter of international concern and the United Nations may become entitled to intervene in those matters. Judge Lauterpacht has rightly remarked : "That any matter which is regulated by International law may not be a matter within the domestic jurisdiction of any State".

Membership*

According to the Charter of the United Nations, there may be two types of members : (i) Original members, and (ii) States which may be admitted to the United Nations in accordance with the provisions of Article 4 of the Charter. As regards the original members, Article 3 of the Charter provides that the original members of the United Nations shall be States which, having participated in the United Nations Conference on International Organisation at San Francisco, or having previously signed the declaration of the United Nations on January 1, 1942 signed the present Charter and ratified it in accordance with Article 110. As regards admission of the members of the United Nations, Article 4 provides that States may be admitted to the United Nations on the affirmative recommendations of the Security Council and by the election of the General Assembly by two thirds majority. Since the admission of States to the United Nations is an important matter, affirmative votes of 9 members of the Security Council including 5 permanent members are necessary. Moreover, Article 4 provides the five requirements or conditions for a State, to become a member of the United Nations. They are : (1) It must be a State ; (2) It must be peace-loving; (3) It must accept the obligations of the Charter; (4) It must be willing to carry out these obligations; and (5) It must be able to carry out these obligations.

At present, there are 193 (one hundred ninety three) members of the United Nations.

Whether the practice of the United Nations or of the States voting on the question of membership of States is consistent with the provisions of the Charter ?

The practice of the Organisation and those of the States while voting on the question of the admission of a State to the United Nations is inconsistent with the provisions contained in Article 4 of the Charter. Often States while voting give utmost importance to their national interests and impose certain conditions not at all mentioned in the Charter. After the establishment of the United Nations, Russia exercised its power of veto to prevent new States to become the member of the United Nations. It imposed certain conditions which were not at all in conformity with the provisions of the Charter. For example, on the question of membership of Italy and Finland, it imposed a condition while voting that it would give its affirmative vote only when Bulgaria, Hungary and Rumania were also admitted as members of the United Nations. The General Assembly of the United Nations, therefore, referred this matter in 1948 for the advisory opinion to the International Court of Justice. The General Assembly referred the following two questions for the opinion of the Court :

(1) Is a member of the United Nations, when casting its vote in the Security Council of Assembly on an application for membership juridically entitled to make its consent dependant upon conditions not expressly provided in the Charter ?

(2) Can a member subject to its affirmative vote to the additional conditions that other States must be admitted along with the State which is being voted upon ?

In reply to these questions, the International Court of Justice in its advisory opinion on *Admission of States to Membership in the U.N.*[46] by a majority held that Article 4 lays down five-conditions by way of exhaustive enumeration and not merely by way of illustration, namely, that any new applicant must—(a) be a State; (b) be a peace-loving; (c) accept the obligations of the Charter; (d) be able to carry out these obligations; and (e) be willing to do so.

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* See also for I.A.S. (1974), Q. No. 10(e) ; I.A.S. (1973), Q. No. 9 ; P.C.S. (1964), Q. No. 2.

[46] I.C.J. Reports (1948), p. 4.

Further, "The Court also ruled that a State member voting on the admission of a new State (whether on the Security Council recommendation or on the General Assembly decision) is not entitled to make its consent to the admission of an Applicant dependent on the fulfilment of conditions other than those prescribed in Article 4, and in particular is not entitled to make such consent dependent on the admission of other applicants."[47] While it is thus clear that no State has a right to be admitted as a member, the members of the General Assembly and the Security Council must exercise their judgment in good faith in reaching the decision whether a State is Peace loving, and whether it is able and willing to carry out the obligations of the Charter. This was, in effect, the view of the Court as a whole and of dissenting minority of the Judges in the advisory opinion given in 1948 on the question of the interpretation of Article 4 of the Charter."[48] Despite this legal opinion given by the Court the Security Council found itself unable and helpless on the application of the membership of certain States because of the exercise of vetos by the Great Powers. The next question that arose was exercise of General Assembly by only its decision can admit a member in the United Nations ? The General Assembly, therefore again asked the advisory opinion, of the International Court of Justice on this point. On November 22, 1949, the General Assembly requested the Court to give an advisory opinion on the following question :

> "Can the admission of a State to the membership of the United Nations.........be effected by a decision of the General Assembly when the Security Council had made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of the permanent member upon a resolution so to recommend ?

In its advisory opinion *competence of the General Assembly Regarding the Admission of State to the U.N.*,[49] the International Court of Justice on March 5, 1950, declared that "it was necessary to have an affirmative recommendation of the Security Council as well as that of the Assembly before a member could be admitted in the Organisation."

Question of the representation of Communist China in the United Nations :*

As pointed out by Jerome Alan Cohen, the topic of China and the U. N. has spawned a vast literature over the years, and the scholars have had the field day with its legal and political complexities.[50] When the U. N. was established in 1945, China was one of the permanent members of the Security Council. At that time, Chiang Kai Shek was the head of the Nationalist Government of China. In 1949, the Communists established their authority over the main-land of China. Chiang Kai Shek fled to Farmosa and established his government over there. America and many other Western Countries continued to recognize the Nationalist Government of China as *de jure* Government of China. Since the representatives of the Nationalist Government of China were hitherto representing China in the U. N. they continued to do so. Since 1950, the matter relating to Chinese representation in the U. N. had been discussed every year in the General Assembly. Ever since 1950, there had been widespread agreement that General Assembly, the only organisation in which all the U. N. members have a vote should assume initial and primary responsibility for dealing with the Chinese representation question. As stated by McDougal and Goodman, it would appear to be too late in the day to argue as scholars have said that the matter should first be decided by the Security Council.[51] In 1961, however, for the first time, General Assembly decided that proposal for change of Chinese representation was an important matter within the meaning of Article 18 of the Charter, requiring 2/3 majority vote of members present and voting. In 1971, the General Assembly reversed, and rightly too, its earlier decision and rejected the draft resolution which stated that the question was an important matter. The General Assembly went a step ahead and on 25th October, 1971, it adopted resolution 2728 (XXVI) to the effect that the representatives of the Government of People's Republic of China are the only lawful representatives of China to the U. N. and Peoples Republic of China is one of the five permanent members of the Security Council. It further decided "to restore all its rights to the representatives of its Government as the only legitimate representatives of China to the U. N. and to expel forthwith the representatives of Chiang Kai Shek, from the place which they unlawfully occupy at the U. N. and in all the organisations related to it." This resolution was passed by 76 votes in favour to 35 against with 17 abstentions.

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[47] J. G. Starke, Introduction to International Law, tenth Edition (1989) p. 635.

[48] L. Oppenheim, International Law, Vol. I, pp. 408-9.

[49] I.C.J. Reports (1950), p. 4.

* See also I.A.S. (1957), Q. No. 3.

[50] Jerome Alan Cohen, "Changing Realities and the Imperatives of New Policy" A.J.I.L., Vol. 65 (1961), p. 1 at p. 2.

[51] McDougal and Goodman, "Chinese Participation in the U. N.; The legal significance of a Negotiated Settlement", A.J.I.L., Vol. 60 (1966), p. 671 at p. 718.

There was no question of admitting or expelling a member (which undoubtedly is an important matter requiring 2/3 vote of members present and voting) but of expelling the unlawful representatives and recognising the lawful representatives of China. Michael Akehurst has aptly remarked : "The correct analysis is that States not governments, are members of the United Nations; the State of China is and always has been a member of the United Nations, the question is which government should represent it at the United Nations?"[52] "If China was either being admitted as a 'new member' or alternatively China was expelled as new 'Member' then it would require a 2/3 majority vote of the General Assembly. Resolution 2728 does not deal with either of these two questions. Rather what it deals with are the questions of representation of rights of the People's Republic of China and the expulsion of the representatives of Chiang Kai Shek. None of these two questions is an 'important' question within the meaning of Article 18, para 2 because they do not belong to the enumerated questions, therefore enumeration can be considered exhaustive rather than, illustrative."[53]

Byelorussia and Ukraine as U. N. Members*.—It has been noted earlier that the practice of State is not consistent with the criteria for admission fixed by the Charter. This is true in respect of original members as well as those States which have been admitted as members under Article 4 of the Charter. According to Article 4, membership in the United Nations is open *to all peace loving States which accept the obligations contained in the present charter and in the judgment of the Organization, are able and willing to carry out these obligations.* The term 'States' here would presumably mean sovereign States. But Byelorussia and Ukraine were not completely sovereign States, yet they were made the members of the U. N. During the Dumbarton Oaks discussions, the Soviet Union had demanded fulfledged membership for all of the sixteen Soviet Republics. On this, basis, America could claim admission for each of her 48 States. But America did not do so. At the Yalta Conference, the U. S. and U. K. agreed to support the Russian claim for the original membership of the Ukraine and Byelorussia, two of the Soviet Republics. This privilege was not granted to any other federal State. As remarked by Prof. Goodspeed, "The Charter provides some criteria for admission but they are difficult to determine objectively and the practice of observance has not been consistent. An applicant must be a State and presumably sovereign, if the accepted tests of recognition under International law are to be followed. However, several original members were not sovereign at the time they signed the Charter. Certainly India, the Commonwealth of the Philippines, the Ukrainion and Byelorussian Soviet Socialist Republics did not possess the degree of independence expected of sovereign State under International Law. While India and the Philippines now possess full independence, the same cannot be said of the two Soviet Socialist Republics. The presence of the latter in the United Nations cannot be justified on any legal grounds whatsoever. Although the Soviet Satellites-Bulgaria; Chechoslovakia, Hungry, Poland and Rumania—are technically independent, their freedom of action is analogous to the two Soviet Republics just noted and membership as Sovereign States can be questioned. Certainly the Status of the Republic of China is doubtful in many respects. The responsible character of the new African and Asian nations also leaves much to be desired.[54] So far as Byelorussia and Ukraine are concerned Prof. Goodspeed's observation seems to be correct and justified.

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[52] Micheal Akehurst, A Modern Introduction to International Law (1970) p. 250; See also Rosalyn Higgins. The Development of International Law Through the Political Organs of the United Nations (1963), pp. 150-8.

[53] M. K. Nawaz, "Chinese Representation in the U. N.", I.J.I.L., Vol. 11 (1971), p. 459.

* See also for I.A.S. (1975), Q. No. 10(e) ; For answer See also matter discussed earlier under the heading ; "Whether the practice of the State Voting on the Question of Membership of States is consistent with the Provisions of the charter ?"

Question of Membership of Yugoslavia

On 19th September, 1992, the Security Council passed resolution 777 (1992) recommending that the General Assembly decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should not participate in the work of the Assembly and should apply for the membership of the U. N. It considered that the Federal Republic could not automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the organisation. The Council passed this resolution by 12 votes. No one opposed the resolution but three States (China, India and Zimbabwe) abstained from voting.

Acting on the recommendation of the Security Council, on 22nd September, 1992,[55] decided that the Federal Republic of Yugoslavia could not automatically continue the U.N. Membership of the former Socialist Federal Republic of Yugoslavia and that it should apply for membership and "shall not" participate in the work of the Assembly.

This is for the first time that the General Assembly has explicitly decided that a Member State may not participate in its work. In 1974, the General Assembly upheld a ruling by its President, interpreting the Assembly's rejection of South Africa's Credentials, which had the effect of barring South African representatives from participating in the work of that session.

With regard to membership of Yugoslavia, introducing the draft resolution, Sir David Hannavy of the United Kingdom said, conditions for admission were clear. The applicant must be a peace-loving State, it must accept obligations contained in the Charter and it must in the organization's judgment, be able and willing to carry out those obligations. The authorities in Belgrade should convince the U. N. that they have met those admission requirements. The resolution was neither a punitive measure nor was it designed to undermine the peace process.

During the debate, a number of speakers questioned the resolution's legal basis, stating that it by passed the Charter, set a dangerous precedent which could be used against other Member States in the future and posed a threat to ongoing peace negotiations.[56] It also deserves mention that this test was not applied in case of Russia after the breaking up of the Soviet Union.

Is withdrawal of a member-State from the United Nations Possible ?*

The Covenant of the League of Nations contained the following provisions in regard to the withdrawal of members :

(1) Any member could withdraw from the League of Nations by giving a two years' notice; and

(2) If any amendment was opposed by member or was not otherwise acceptable to it, then it meant that the particular member ceased to be member of the League of Nations.

It was *inter alia,* due to this provision that the membership of the League of Nations, which at one time was 62, was reduced to 32. The Charter of the United Nations is conspicuous by the absence of any provisions in regard to the withdrawal of members. It was a matter of heated debate and discussions at San Francisco Conference, 1945. Some States wanted that the withdrawal of members should be completely prohibited; on the other hand, some States expressed the view that if the amendment of the Charter was such as was not acceptable to members then the members should be entitled to withdraw from the organization. Ultimately it was decided that no express provision should be inserted in the Charter regarding the withdrawal of members. However, a statement of 'special circumstances' was formally issued according to which the members could withdraw from the organization under special circumstances. Fenwick[57] has expressed the view that the members can withdraw from the United Nations under following two circumstances :

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[54] Stephen S. Goodspeed, The Nature and Function of International Organization Second Edition, p. 137.

[55] See Resolution 47/1 which was adopted by 127 votes in favour, 6 against and with 26 abstentions.

[56] See U. N. Chronicle, Vol. XXIX, No. 4 (December, 1992) p. 45.

* See also for P.C.S. (1964), Q. No. 2.

(1) "Withdrawal of or some form of dissolution would be obviously inevitable if the Organization was revealed to be unable to maintain peace or could do so only at the expense of law, and justice."

(2) If any State did not give its consent for any amendment of the Charter or gave its vote against the amendment or found itself unable to accept the amendment, then such a situation may entitle him to withdraw from the Organization.[58]

The question of withdrawal of membership has arisen only once in the history of the U. N. Indonesia declared her withdrawal from the U. N. because Malaysia has been elected as one of the non-permanent members of the U. N. Indonesia claimed a part of the territory, under the occupation of Malaysia. But in 1966, Indonesia again joined her seat in the U. N. as if nothing had happened. "If her withdrawal had really been effective, she would have had to seek readmission under Article 4; instead, she simply resumed her seat, as if nothing had happened, which suggests that her withdrawal had been void."[59]

Expulsion of a member from the United Nations*.—The provision regarding the expulsion of the member from the United Nations is contained in Article 6 of the Charter. It provides that a member of the United Nations which had persistently violated the principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council. Since expulsion of a member is a substantial question under the Charter, a decision on it will require nine affirmative votes of Security Council including those of the permanent members and a decision by General Assembly to two-thirds majority.

Suspension of members.**—The provision relating to the suspension of a member finds mention in Article 5 of the Charter. Article 5 provides that member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly, upon the recommendation of the Security Council. It further provides that the exercise of these rights and privileges may be restored by the Security Council. It is clear from the above provision that although a member may be suspended by the General Assembly upon the recommendations of the Security Council, the Security Council has been conferred upon with the power to restore rights and privileges of such members even without the concurrence of the General Assembly. Suspension of members is also a substantial question and hence the same procedure will be followed as in the case of expulsion of members.

Principal Organs of the United Nations*.**—Following are the six (6) principal organs of the United Nations :—

(1) The General Assembly,
(2) The Security Council,
(3) The Economic and Social Council,
(4) The Trusteeship Council,

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[57] Charles G. Fenwick, International Law, pp. 209-10.

[58] "This Statement as opinion forms part of the Travaux preparatories of the charter, and may therefore be used to interpret the charter", Michael Akehurst, A Modern Introduction to International Law (1970), p. 249.

[59] Ibid, at p. 250.

* See also for P.C.S. (1964), Q. No. 2.

** Ibid.

*** See also P.C.S. (1975), Q. No. 3.

(5) The International Court of Justice, and
(6) The Secretariat.

N.B.—The composition, functions and powers of the above six principal organs have been discussed in detail in separate Chapters.

COMPARISON BETWEEN LEAGUE OF NATIONS AND UNITED NATIONS

League of Nations	United Nations
1. The Covenant of the League of Nations was a part of Treaties of Versailles, 1919.	1. The birth of the United Nations Organization does not owe to any peace treaty imposed upon the vanquished nations.
2. The League of Nations was an organization of the States as is clear from its preamble which uses the words "High Contracting Parties of the Covenant."	2. The United Nations may be said to be the organisation of the people because its preamble uses the words "We, the people of the United Nations."
3. The League of Nations had 3 principal organs : (a) Assembly, (b) Council and (c) The Secretariat.	3. The United Nations has 6 principal organs : (a) The General Assembly; (b) The Security Council; (c) The Economic and Social Council; (d) The Trusteeship Council; (e) The Secretariat; and (f) The International Court of Justice.
4. The functions of the League were ordinarily limited to the political activities.	4. As compared to the League of Nations, the United Nations besides performing the chief functions of the maintenance of peace and security in the world, also performs important functions relating to social, economical, educational and cultural matters. Even if we leave aside its functions for the performance of peace and security, the United Nations has become an organization of inescapable importance for the functions that it has performed in social, economical, educational, cultural and humanitarian fields.
5. The League of Nations was based on the principle of unanimity. For decision on all important matters, unanimous concurrence of the members was necessary.	5. As compared to the League of Nations, the United Nations is much more a democratic organisation. Even important matters of the United Nations are decided on the basis of majority vote. All the important matters are decided in the Security Council with the concurrence of 9 members including the affirmative votes of 5 permanent members. All other matters, namely—procedural, are decided by the majority of 9 members of the Security Council. As regards the General Assembly, all important matters are decided by two-thirds majority of the members present and voting. Other matters are decided by simple majority.

6. In the League of Nations, great powers did not possess veto power.	6. The Charter of the United Nations has conferred upon the permanent members of the Security Council the power of veto.
7. The Covenant of League of Nations provided for the withdrawal of members. The members of the League of Nations could withdraw from the League after giving a two-years notice. Besides this, if an amendment of the Covenant was not acceptable to any member or if he voted against it, it meant that particular member ceased to be the member of the League of Nations. This provision proved to be fatal because in the course of time members one by one withdraw from the League. In the beginning it comprised of 62 members which was later on reduced to 32.	7. The Charter of the United Nations is conspicuous by the absence of any provision in regard to the withdrawal of members from the Organization. This was due to the unhappy experience of League of Nations. However, as pointed out by Fenwick, the members of the United Nations may also withdraw from the Organization, if any amendment of the Charter is not acceptable to them and they vote against the said amendment. Moreover, they may also withdraw from the organization in case organization fails to achieve its chief objective. While the membership of League of Nations was reduced considerably in the course of time, the membership of U. N. is constantly increasing. Starting from 51, membership of the U. N. has now swelled to 193 (one hundred ninety-three).
8. The powers of the Assembly and the Council of the League of Nations were not clearly demarcated.	8. The powers of the General Assembly and the Security Council of the United Nations have been clearly demarcated. Under the Charter Security Council has been entrusted the primary responsibility for the maintenance of peace and security in the world. On the other hand, the General Assembly is deliberative body.
9. Under the League of Nations, actions could be taken against the members only when they resorted to war in violation of the provisions of the Covenant. To put it more precisely, war was not completely prohibited in the League of Nations and the members under certain circumstances had the right to go to war.	9. Under the United Nations Charter, an enforcement or preventive action can be taken against the members even before they resort to war. Action can be taken against them under the Charter if there is a threat or danger to international peace and security.
10. The League of Nations lacked armed forces and its decisions were mere recommendations.	10. The United Nations is empowered to use armed forces for the maintenance of peace and security. For this purpose the Member-States are bound to provide armed forces to the United Nations. For this purpose there is a provision for the establishment of the Military Staff Committee. However, it must be conceded that because of the mutual conflict and non-cooperation among the major powers, these provisions have not been properly implemented. Nevertheless, United Nations is much more effective than the League of Nations in regard to the maintenance of peace and security.

11. Under the League of Nations the procedure of enforcement action was decentralised and Members of the League had no obligation to give armed forces to the League on its request.	11. Under the Charter the primary responsibility for the maintenance of peace and security is that of the Security Council and the States have undertaken the obligation to respect and carry on the decisions of the Security Council.
12. There was no provision in regard to self-defence in the Covenant of League of Nations.	12. The Charter under Article 51 confers on States the right of individual or collective defence.
13. The Covenant of League of Nations did not have any provision in regard to the regional agreements on agencies.	13. Under the Charter there is a Chapter (Chapter VIII) for regional arrangements. Articles 52 to 54 of the said Chapter make clear provision in regard to the regional arrangements which are permitted for the solution of regional problems and also for assisting the United Nations Security Council for the maintenance of world peace.
14. The League of Nations did not give much attention for encouraging human rights and fundamental freedoms.	14. The United Nations has performed commendable functions in regard to human rights and fundamental freedoms.
15. The League of Nations was European in character and was greatly influenced by the Concert of Europe of 19th century.	15. As compared to the League of Nations, the United Nations is much more a representative organization. At present it has as many as 193 (one hundred ninety-three) members and has become nearly universal.
16. The League of Nations deserves credit for starting the experiment of mandate system under which the territories snatched from the enemy States were brought under the control of the Mandatory Commission and were entrusted to certain developed countries for their administration and development.	16. The United Nations is undoubtedly indebted to the League of Nations so far as the beginning of the experiment of the mandatory system was concerned. However, the United Nations deserves credit for improvement and perfection of this system. It has almost completed the work of its trusteeship system.
17. The League of Nations also deserved credit for giving to the world an International Tribunal known as the 'Permanent Court of International Justice' which performed creditable and commendable work in the judicial field. But it was neither an integral part of the Covenant nor was the chief judicial organ of the League of Nations.	17. Under the Charter of the United Nations, International Court of Justice is the principal judicial organ of the United Nations and the Statute of the International Court of Justice is an integral part of the Charter. (Article 92).
18. The League of Nations deserves credit for starting an international civil service in the real sense of the term.	18. Although the U. N. is indebted to the League of Nations yet it deserves credit for enlarging and further improving the system.

19. The League of Nations did not prohibit war. It simply put certain restrictions upon Member States to resort to war.	19. The Charter of the U. N. prohibits war. However, it permits resort to war in self-defence.
20. The League of Nations aimed to restrict the right to go to war. It did not prohibit use of force.	20. The Charter of the U. N. prohibits use of force in International relations [Art. 2 (4)].
21. The Covenant of the League of Nations aimed to regulate relations of only parties to the Covenant.	21. The Charter of the U. N. goes a step ahead and aims to regulate even the relations of non-members in respect of international peace and security. Article 2 (6) provides that the organisation shall ensure that States which are not members of the U. N. act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.

It is clear from the above discussion that as compared to the League of Nations, the United Nations is much more effective, powerful and successful organisation. It has attained near universality. Despite its weakness and failures in the field of peace and security, it has performed commendable functions in the social, economic, cultural, educational and humanitarian fields. It has become an organisation of inescapable importance. It would not be wrong to contend that the United Nations has now become an indispensable organisation. As remarked by Finkelstein, "The United Nations...... demonstrated its usefulness to point where it would be difficult to see a world which did not have a United Nations".

In his report on the work of the organisation, the Secretary-General of the United Nations,[60] said : The world needs a renewed revitalized and more responsive United Nations now more than ever. The organization must be capable of responding swiftly and effectively the challenge of our ever-changing world. We need to close the gap between rhetoric and reality. We will achieve this only if in the year ahead we can agree on fundamental reforms to transform the organization's human resource base, enhance accountability, strengthen management performance, and adopt more modern business processes and practices.

The Secretary-General concluded by saying—Let us strive to make the United Nations that can better meet the world's greatest needs and highest aspirations.

Convention on the Safety of U.N. Personnel (1999).—A brief mention may be made here to convention on the Safety of U.N. Personnel which was adopted on 9 December, 1994. This U.N. convention was drafted by International Law Commission. This convention was adopted with a view to ensure safety of U.N. Personnel working at different projects in different countries. The convention was figured on 9th Dec. 1994. The convention became effective on 15th July, 1999, So far 94 countries have become parties to the convention.

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[60] General Assembly, Official Records, Sixty-second Session, Supplement No. 1(A/61/1), 2007.

CHAPTER 33

THE GENERAL ASSEMBLY OF THE UNITED NATIONS

Composition.—The General Assembly is one of the principal organs of the United Nations.[1] The General Assembly consists of all the members of the United Nations. Each member may have not more than five representatives in the General Assembly.[2] At present the General Assembly comprises of 193 (one hundred ninety-three) members.

Voting Rights*.—Each member of the General Assembly has one vote. Decisions on important questions are made by a two-thirds majority of the members present and voting. Such questions include the matters relating to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council and Trusteeship Council, the admission of new members of the United Nations, the suspension of the rights and privileges of membership, the expulsion of members, questions relating to the operation of the trusteeship system, and budgetary questions. Decisions on other questions, including the determination of additional categories of questions to be decided by a two thirds majority, shall be made by a majority of members present and voting.[3]

Functions and powers**

Professor Leonard has classified the powers and functions of the General Assembly under the five headings (I) Deliberative functions; (II) Supervisory functions; (III) Financial functions; (IV) Elective functions; and (V) Constituent functions.

I. Deliberative Functions.—By deliberative functions we mean the functions of the General Assembly regarding discussion, studies and recommendations and passing of resolutions on different matters. The General Assembly performs the following deliberative functions :—

(i) The General Assembly may discuss any question or matter within the scope of the present Charter or relating to the powers and functions of any organ provided for in the present Charter.[4] There is however, an exception to this. Article 12 provides that while the Security Council is exercising functions (in respect of any dispute or situation) assigned to it in the present Charter, the General Assembly shall not make any recommendation with respect of that dispute or situation unless the Security Council so requests. It is clear from the above provision that Article 10 confers upon the General Assembly very wide deliberative functions except in respect of those matters which are being considered by the Security Council. The General Assembly, under this Article, has been empowered to discuss any question or any matter within the scope of the Charter.

(ii) The General Assembly may consider general principles of cooperation in the maintenance of international peace and security including the principles governing disarmaments and regulations of armaments and may make recommendations with regard to such principles to the members or to the Security Council or to both.[5]

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[1] Article 7 of the Charter of the U. N.

[2] Article 9.

* See also for P.C.S. (1978) Q. No. 6(a).

[3] Article 18.

** See also for P.C.S. (1972), Q. No. 7 ; P.C.S. (1977), Q. No. 4 ; P.C.S. (1984), Q. 7 ; For answer see also matter discussed under the heading "Expanding Role of General Assembly—Uniting for Peace Resolution, 1950", in this Chapter.

[4] Article 10.

[5] Article 11 (1).

(iii) The General Assembly may call the attention of the Security Council to situations which are likely to endanger International Peace and Security.[6]

(iv) The General Assembly is also entitled to consider those matters or problems which are likely to endanger International Peace and Security and may make its recommendations in this connection.

(v) The General Assembly has also been entrusted important responsibilities under Article 13 which provides that the General Assembly shall initiate studies, and make recommendation for the purpose of—(a) promoting international co-operation in the political field and encouraging the *progressive development of International law and its codification* and (b) promote international co-operation in the economic, social, cultural, education and health fields, and assist in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

It is clear from the above powers and functions of the General Assembly that the General Assembly is a very powerful principal organ of the United Nations. It may also be noted that after the establishment of the United Nations, the powers and functions of the General Assembly have constantly increased and it has performed important functions. However, there are certain limitations of the General Assembly.

Limitations of the General Assembly.—(1) The resolutions or declarations of the General Assembly are not binding upon the States. They are merely recommendations. Therefore, the General Assembly cannot be said to be a world parliament because it cannot legislate for the States of the world and its declarations and resolutions do not have binding force upon the States. However, with the growth of the interdependence of States and the concept of international community, some changes have come in regard to the significance of resolutions of General Assembly. Under certain circumstances, these declarations and resolutions may create legal implications.

(2) Yet another great limitation of the General Assembly in particular and United Nations as whole is contained in Article 2 (7) of the Charter which provides : "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter.........." However, it may be noted that the meaning of the term "domestic jurisdiction" has not been clarified in the Charter. As a matter of fact, its meaning and scope depend upon the factors of time and circumstances. When discussions were going on in San Francisco Conference, the intention of the members was that the General Assembly would not consider any matter which was within the domestic jurisdiction of States. They clearly intended that the General Assembly would not pass any resolution on matters which were the internal affairs of the State. As pointed out by Prof. Gilmour, "it is now generally agreed that a great change has come in this respect and that the scope of the 'domestic jurisdiction is constantly lessening." [7] According to Judge Lauterpacht, "any matter which is regulated by international law cannot be matter within the domestic jurisdiction of a State." Q. Wright has also expressed the view that the discussion or passing of resolutions by General Assembly on general matters does not amount to intervention in the domestic affair of any States.[8] As a matter of fact, some matters which were thought to be matters within the domestic jurisdiction of States when the United Nations was established are now considered matters of international concern. It is quite possible that some matters which are now considered within the sphere of domestic jurisdiction, may become matters of international concern in future. Despite this it cannot but be admitted that Article 2 (7) is an important limitation of the powers of the General Assembly in particular and the United Nations as a whole in general.

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[6] Article 11 (3).

[7] D. R. Gilmour, "The Meaning of 'Intervene' within Article 2 (7) of the U. N. Charter", I.C.L.Q. (1967), p. 330 at p. 351.

[8] Q. Wright, "Is discussion Intervention ?", A.J.I.L. (1956), 102.

LEGAL SIGNIFICANCE OF U.N. GENERAL ASSEMBLY RESOLUTIONS*

It may be noted at the outset that the General Assembly is not a world legislative body. It cannot legislate in regard to most political matters; it can only recommend.[9] It is clear both from a reading of the U. N. Charter (Article 18) and its historical background that the General Assembly has not been conferred any law-making power over States.[10] Although the General Assembly is not a legislative body in the ordinary sense of the term, its law-making powers have, however, generally been recognised in two special contexts (i) in respect to most of the internal operations of the U. N. and (ii) in relation to the rules of International law which govern the conduct of Member-states outside the U.N.[11] As regards the latter, the case of the admission of Israel to the U. N. may be cited. But the legal significance of such precedents is not due to the content of the resolution but due to a practical decision reached by the community of nations. Hence the crucial question still remains as to whether a General Assembly resolution announcing in abstract form a rule governing State conduct is capable of law-making effect by virtue of its consent.

Prof. W. Friedmann has aptly pointed out : "A declaration of principles is fine as far it goes but it does not commit anybody to any specific section." [12] But, "there are several ways in which a resolution, by being linked to one or more of the traditional sources of international law, can serve as a law-creating mechanism. A resolution can interpret the United Nations Charter or other treaty, accelerate the development and clarify the scope of a customary rule or identify and authenticate a general principle of law recognised by civilised nations. A resolution tied in this way to a traditional sources of international law."[13] In one of his dissenting opinions, Judge Abjandro Alvarez of the International Court of Justice remarked that the declarations by and resolutions of the General Assembly, though not of binding character in themselves, may acquire a binding force on receiving the support of public opinion.[14] In this connection Prof. Krzys of Skubisewsk has remarked that since the resolutions of the General Assembly are addressed to member, States and Governments, their effectiveness naturally depends upon the backing and compliance of the member-States.[15] But as remarked by Prof. Roger Fisher, the member-States in their domestic as well as foreign operations are under heavy pressure from various sources to conform to accepted standards of behaviour. He has also identified four sources of pressure : (i) likelihood of direct retaliation by the Government directly affected; (ii) the possibility of an adverse reaction among allies; (iii) political criticism by Government's own constituents, and (iv) the deeply rooted moral nature of the individual decision-makers.[16] Prof. Lande has also remarked that "the danger of external resources, the reaction of other States, and the pressure of domestic and world opinion are thus important factors influencing government compliance with the Assembly's resolutions." [17]

Moreover, a General Assembly resolution may sometimes focus, crystallise, formulate and express world opinion. As remarked by F. Blaine Sloan, "The judgment made by the General Assembly as a collective world conscience is itself a force internal to the individual conscience of any given States." He further remarked that the Assembly's moral force," is in fact a nascent legal force which may enjoy in the rounded words of Justice Cardozo, a twilight existence hardly distinguishable from morality and justice until the time when the 'imprimatur' of the world community will attest its jural quality.'[18] But Prof. Gabriella Rosner Lande has rightly remarked that, the nascent legal force of the Assembly has already begun to develop. In certain respects the distinction between the status of resolution as recommendation and resolution as legislation may have become rather thin.[19] He also cites six additional variables : (i) the time, (ii) vote, (iii) language, (iv) fundamental issues, (v) the method and means, and (vi) the expectations of members in regard to the resolution which influence the effectiveness of U. N. General Assembly resolution and member-States compliance with them.[20] While discussing effectiveness of resolution 1962—XVII relating to Legal Principles on Outer Space, J.E.S., Fawcett remarked : "We must wait on the future to see whether the requirement of the consent of States in international law-making can ever become independent of the treaty process and be satisfied by a vote in the General Assembly or an International Conference convened by it. In the law of the Sea conventions at least; the treaty form has already begun to seem like a grumbling appendix.[21] However, it may be noted that the "continual recitation by the General Assembly of certain principles that are described as binding obligations because of their roots in the established sources of international law does serve to reinforce the claim that the paticular resolution enunciates binding principles." [22]

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* See also for P.C.S. (1977), Q. 4 ; For more details and recent developments see also matter discussed under the heading "Resolutions and Declaration of General Assembly of the U.N. as a source of Universal International Law" at pp. 80-82, ante ; see also S.K. Kapoor, "Significance of U.N. General Assembly Resolutions". II, S.C.J. (December, 1972) p. 68.

[9] Gabrielle Rosner Lande, "The Changing Effectiveness of General Assembly Resolutions" Proc. A.J.I.L., April, 23-25, 1964 at p. 162.

[10] Krzys of Skubisewki, "The General Assembly of the U. N. and its power to influence National Action" Proc. ASIL, April 23-25, 1964 at p. 153.

[11] Samuel A. Bleicher, "The Legal Significance of Recitation of General Assembly Resolution", AJIL Vol. 63, No. 3 (July 1969), p. 444 at p. 445.

[12] Seldon Redivivus—Towards A Partition of the Seas", A.J.I.L., Vol. 65, (October, 1971), p. 757.

[13] See note 11, See also Brownlie, "Principles of Public International Law", p. 11.

[14] "They have not yet acquired a binding character, but they may acquire it if they receive, which in several cases has condemned an act contrary to a declaration with more force than if it had been a breach of a convention of minor importance", Reservations to the Convention on Genocide, Dissenting opinion of Alvarez, J., (1951) I.C.J. Rep. cited in Proc. A.S.I.L., April 23-25, 1964 p. 153.

[15] "The General Assembly of the U.N., and its Power to Influence National Action", Proc. A.S.I.L., April 23-25, 1964, p. 153.

[16] "Bringing Law to Bear on Governments", 74, Harvard Law Review (1961), pp. 1134-35.

[17] Proc. A.S.I.L. April 1984, p. 165.

It is probably due to these considerations that one of the most remarkable judicial decisions on international law of recent years, an Italian Court did not hesitate to test the Iranian Oil Industry Legislation for its consistency with the General Assembly Resolution—(1803-XVII) on Permanent Sovereignty Over Natural Resources.[23] Lastly, as pointed out by Rosalyn Higgins the key issue is not the non-binding character of Assembly resolution but the cumulative effect of such resolutions taken as an indication of the emergence of the rules of general customary law. She writes : "What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities giving rise to general *opinio juris,* have created the norm in question." [24] As aptly remarked by Prof. Inis L. Claude, Jr. : "States are more inclined to deny their violations than to proclaim them as acts of defiance and the very fact that they make strenuous efforts to influence Assembly resolutions means that they are reluctant to go against the grain of majority sentiment in that body." [25] Prof. Leo Gross has also remarked that, "Some resolutions such as those dealing with Outer Space may derive special significance from the fact that they represent the consensus of two powers which have a virtual *duopoly taat* in that original field.[26] The same can be said about the resolution relating to the Deep Sea Floor. It has been rightly remarked that resolutions of the General Assembly purporting to be of a law-making character are certainly "an important link in the continuing process of development and formulations of new principles of International Law." [27]

It is relevant to note here what Prof. J.F.S. Fawcett has remarked about Resolution 1962 (XVIII) which declared Legal Principles on Outer Space. He has said that Resolution 1962 (XVIII) "may fairly claim to have furthered the progressive development of

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18. "The Binding Force of a Recommendation of the General Assembly of the U. N." 25 BYBIL (1948), pp. 32, 33.
19. The Changing Effectiveness of General Assembly Resolutions", Proc. ASIL., April 1961, p. 162 at p. 165.
20. ibid.
21. International Law and the Uses of Outer Space, p. 14.
22. Samuel A, Bleicher, "The Legal Significance of Recitations of General Assembly Resolutions", AJIL, Vol. 68 (July 1969), p. 444 at p. 454.
23. Anglo Iranian Oil Co. v. S. U. P. O. R., (1955) I.L.R. 40.
24. Rosalyn Higgins, "The U.N. and Law Making : Political Organs", 64 A.J.I.L. (Sep. 1970), p. 43.
25. "Some Implications and Questions for the Future". Int. Organ. Vol. XIX (Summer 1965), p. 835 at p. 845.
26. "The United Nations and the Rule of Law", Int. Orgn. Vol. XIX (Summer 1965 p. 537 at p. 556.
27. Wolfgang Friedmann, "The Changing Structure of International Law", p. 139.

International Law called forth by Article 13 (1) because it has formulated general principles of law of international conduct or authoritatively interpreted the United Nations Charter......"[28] So is the case with the Resolution 2749 (XXV) relating to the Deep Sea Floor. Regarding such type of resolutions Mc Nair has said that, "while it is unsafe to generalise upon them there is no reason or principle why they should not establish obligations,"[29] Prof. C. Wilfred Jenks has also remarked that "they are much more than a programme of desirable objectives; they are, an attempt to deduce some of the implications for International Law." [30] Before the conclusion of the Outer Space Treaty, Prof. Jenks aptly remarked : "The authority of the Declaration of legal principles may be expected to grow with the passage of years. While it is somewhat less than a treaty, it must already be regarded a rather more than a statement of custom." [31]

It may, therefore, be concluded that a General Assembly resolution announcing in abstract form a rule governing State conduct is capable of creating obligations and implications of international law. As noted earlier, by being linked to one or more of the traditional sources of international law, it can serve as a law creating mechanism. Lastly, a resolution which has formulated general principles of law or international conduct or authoritatively interpreted the United Nations Charter may fairly claim to have furthered the progressive development of international law called forth by Article 13 (1) of the United Nations Charter.

II. Supervisory functions.—The General Assembly supervises the functions of other principal organs and specialised agencies of the United Nations. The General Assembly particularly exercises sufficient control over the two principal organs of the United Nations, namely, the Economic and Social Council and Trusteeship Council. The Economic and Social Council, in fact works as a subordinate organ of the General Assembly. Similarly excepting the strategic areas which are under the direct supervision and control of the Security Council, the Trusteeship Council also acts like a subordinate organ of the General Assembly. The General Assembly exercises control over these organs and performs many supervisory functions in this connection. Moreover, the Security Council and other organs of the United Nations have to submit annual reports to the General Assembly. The General Assembly considers and discusses these reports. The General Assembly also exercises some control over the Secretary-General of the United Nations. In fact, the annual session of the General Assembly begins with the discussion and consideration over the report of the Secretary-General on the work of the organisation.[32] Thus we see that the General Assembly is one of the potent principal organs of the United Nations. Besides performing certain functions which have been allotted exclusively to it, it supervises the functions of other organs and specialised agencies of the United Nations.

III. Financial Functions.—The General Assembly also performs important financial functions. It considers and approves the budget of the United Nations. Article 17 provides that the General Assembly shall consider and approve the budget of the organisation. Article 17 further provides that the expenses of the organisation shall be borne by the members as apportioned by the General Assembly. Further, the General Assembly shall consider and approve any financial and budgetary arrangements with specialised agencies and shall examine the administrative budgets of such specialised agencies with a view to making recommendations to the agencies concerned. As pointed by Prof. Leonard, "This is an important provision as it involves the power to review the work of other organs and to exercise a degree of control by deciding which activities will receive financial reports." He further adds, "As General Assembly controls purse strings, it is a potent power."

The Powers of the General Assembly reached their zenith with the passing of the Uniting for Peace Resolution, 1950. This resolution conferred upon the General Assembly important powers relating to international peace and security. Under this resolution the General Assembly has been empowered to send the Emergency Forces of the United Nations for the supervision of cease-fire of conflict areas or to maintain international peace and security. It was under this resolution that the United Nations Emergency Forces (UNEF) were sent to Egypt during Suez Crisis of 1956. Later on United Nations Forces were sent to Congo in 1960 to maintain law and order in that State. Since the passing of the Uniting for Peace Resolution, Russia has been opposing the said resolution on constitutional and other grounds. According to Russia, it is contrary to the provisions of the Charter. In the view of Russia, the primary responsibility of maintaining peace and security has been conferred upon the Security Council under the United Nations Charter. Therefore, sending the United Nations Forces and thereby incurring huge expenditure upon them by the General Assembly is contrary to the United Nations Charter. Consequently, Russia has refused to pay any expenses incurred by the United Nations for sending Emergency Forces to Egypt in 1956, and to Congo in 1960-61. France also adopted the same attitude. This created a financial crisis before the United Nations because huge amount of money of the United Nations was spent on the said operations. In order to resolve this dispute and to ascertain true legal position, the General Assembly of the United Nations requested the International Court of Justice to give its advisory opinion on the matter and to interpret para 2 of Article 17 which lays down, "The expenses of the organisation shall be borne by the members as apportioned by the General Assembly."

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[28] J.E.S. 'Fawcett, "International Law and the Uses of Outer Space", p. 13.

[29] Ibid., p. 7.

[30] Law, Freedom and Welfare, p. 33.

[31] C. W. Jenks, "Space Law" (Stevens, 1965), p. 185.

[32] Article 98 of the Charter.

The obvious reason which necessitated the reference of this matter for legal opinion of the International Court of Justice was the question of validity of the expenses incurred by the United Nations under the Uniting for Peace Resolution in Congo and Egypt. On July 20, 1962, the International Court of Justice in its advisory opinion *on certain expenses of the organisation,*[33] ruled that the General Assembly of the United Nations is entitled to perform all those functions which are not prohibited under the Charter and which are performed for the fulfilment of the purposes of the Charter as laid down in Article 1. The International Court of Justice had also to make it clear whether the expenses incurred in sending United Nations Emergency Forces to Egypt in 1956 and to Congo in 1960, were to be considered, "the expenses of the Organisation" within the meaning of Article 17 (2). The International Court of Justice gave its affirmative reply that such expenses were the expenses of the organisation and could, therefore, be apportioned by the General Assembly among the members of the United Nations.[34] In other words, it held that Russia was bound to pay the expenses incurred by the United Nations in the said operations and as apportioned by the General Assembly among the members particularly Russia. Thus indirectly the International Court of Justice upheld the validity of the Uniting for Peace Resolution, 1950, and made it clear that the General Assembly can do all that which is not prohibited under the Charter.

Despite the above decision by the International Court of Justice, the problem could not be resolved because Russia and France refused to pay their shares of expenses incurred in sending the United Nations Emergency Forces in Egypt and Congo.[35] Consequently, on September 1, 1965, a resolution was passed wherein it was provided that in cases of sending the forces to Egypt and Congo by the United Nations and expenses incurred thereby by the United Nations, the provisions of Article 19, shall not apply. Article 19 provides, "A member of the United Nations which is in arrears in the payment of its financial contribution to the Organisations shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of contributions due from it for the preceding two full years." The General Assembly Resolution of 1965, was necessitated because of the fact that America adamant to see that Russia was deprived of its vote in General Assembly because of being in arrears in payment of its financial contributions to the Organisation. The said resolution, in order to revolve the financial crisis with which the Organisation was confronted, also recommended that expenses incurred by the United Nations in the said operations shall be met by requisite voluntary contributions from different Member-States of the United Nations.

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[33] I.C.J. Reports (1962), p. 151.

[34] The International Court of Justice observed : "By Article 17; paragraph 1, the General Assembly Is given the power not only to 'consider' the budget of the organisation but also to 'approve' it. The decision to 'approve' the budget has a close connection with paragraph 2 of Article 17, since thereunder the General Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specifically stated in Article 17, paragraph 2, each Member to bear that part of the expenses which is apportioned to it by the General Assembly. When those expenses include expenditures for the maintenance of Peace and Security, which are not otherwise provided for, it is the General Assembly which has the authority to apportion the latter amounts among the Members. The provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.........The Court accordingly finds that the argument which seeks by reference to Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security, is unfounded."

Financial crisis faced by the U. N.

The U. N. at present is facing a financial crisis. The unprecedented financial crisis is due to the reason that some 18 members of the U. N. have been withholding portions of their annual contributions for some or the other reason. Besides this, 72 members have been in arrears for a long time. Moreover, the expenditure of the U. N. has been constantly increasing. To quote only one example, starting with 1,566 employees in 1945 now it has as many as 11,400 people on its payrole.

The U. N. is owed $ 450 million in arrears and the U. S. threatened heavy cuts unless it (*i.e.,* the U. N.) changed the voting system. The U. S. is required to pay 25 per cent of the regular budget of around $ 800 million annually. The main reason for the present financial crisis is the U. S. decision to impose cuts and deferments on its assessed contribution to the U. N. The U. S. attitude towards international organisations in general and the U. N. in particular has become very rigid for sometime. It withdrew from the I.L.O. and the UNESCO. It stopped its contribution to the U. N. Fund for Population Activities. It has been pointed out in some studies at the U. S. that the basic character of the U. N. has radically changed due to the emergence of the non-aligned bloc as a factor in the affairs of the organisation. It is pointed out that the 'automatic' majority of the third world is proving to be a great hindrance to the U. N. making itself effective.[36]

According to Article 17 (2) of the U. N. Charter, the expenses of the organisation shall be borne by the members as apportioned by the General Assembly. Therefore, withholding assessed contribution by member nations is certainly a violation of the Charter. On 24 October 1987, the U. N. celebrated its 42nd anniversary but at that time it was passing through an acute financial crisis. In 1987 the U. N. is owed 450 million dollars in arrears from its members. The U. S. alone owed more than 340 million dollars.

It may, however, be noted that there is something unrealistic about the way the expenses of the organisations are apportioned among the members. The system which started in 1945 continues even today though the membership of the U. N. has more than trebled since then. In the beginning western countries especially the U. S., agreed to the system because they commanded the majority. With some modifications this position continued upto 1960. But due to the emergence of large number of Asian and African countries in the 1960s the position changed altogether. As aptly pointed out by Mr. Rikhi Jaipal, India's ambassador to the U. N. 1974-79 and U. N. Assistant Secretary-General 1979-84, "It is essentially a conflict over the voting power of the western minority and that of the Third World majority. Decisions on budgetary questions require a two-thirds majority

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35. In his dissenting opinion Judge Winiaski of Poland observed that the purposes set forth in the Charter are very vast and therefore in very uncertain terms. This does not mean that any means may be resorted to achieve these purposes. An act of any organ does not become valid simply because it is done to achieve the purposes of the United Nations (I.C.J. Reports (1962), p. 151 at p. 2301. The opinion is in conformity with the Russian view. But the majority of the Court rejected this view.

36. See T.J.S. George, "Glooms at the United Nations", Indian Express, 8 October 1986.

vote in the General Assembly. This creates a problem for a minority of some 15, mainly western countries which contribute nearly 85 per cent of the U. N. budget, and resent being outvoted by a majority of some 110 countries that together contribute only 1.95 per cent." [37] He has, therefore, rightly suggested, "Some form of pragmatic and realistic collaboration among States is urgently needed to make a reality of a voluntary organisation of sovereign nations that has limited finance, no enforcement machinery and restricted powers.[38] It may be added that the problem is not merely legal, it is a more financial and political problem.

To break the deadlock, a group of 27 countries was set up. Later on its strength was reduced to 16 and finally 6 comprising of the Indian ambassador, Mr. C. R. Gharekhan, and ambassadors of the U. S., the Soviet Union, China, Brazil and Cape Verde. After scores of meetings, the six members group reached a consensus, accepting a formulation proposed by India. Under the formula, General Assembly's procedure of voting on the budget is reconfirmed, but the committee on programme co-ordination, which does the ground work for the budget, has been urged to take decisions by consensus without prejudice to its right to decide issues by voting. Before winding up its 41st annual session on Thursday 18 December 1986 night, the General Assembly adopted new guidelines co-sponsored by India and 18 other countries for deciding programme budget. While India hailed it as a "historic decision", the U. S. called it "hope for (U. N.'s) future." The General Assembly President, Humayun Rashid Chaudhury of Bangladesh said, "You are going to have financially reviewed, leaner, efficient, credible U. N." However, he warned, "we cannot afford to be complacent. The result of our efforts still needs to undergo the acid test of implementability." [39] Though the above-mentioned formula may ease the present crisis for the time being, it will be wrong to be complacent and to think that the crisis has been averted for ever.

On 22 December 1988, the General Assembly passed the budget for next three years. In the history of the Organisation, for the first time the budget was passed unanimously. The modified budget of 1988 and 1989 was passed and the budget passed for the years 1990 and 1991 was comparably less than that of the last two years. This is indeed good as far as it goes but since the U. N. is an indispensable organization and there is no alternative to it, it will be in the interest of international community to make sufficient money to the U. N. to perform its functions properiy.

On 16th January 1992, Member States owed the organization over $ 1 billion. The United States, the largest contributor, was over $ 400 million in arrears. To meet the financial crisis proposals were made such as : interest should be charged on amounts of assessed contribution not paid on time. Organization's financial regulations should be suspended to permit the retention of budgetary surpluses ; and the working capital should be increased to a level of $ 250 million from 1 January 1992. A proposal was also made for the establishment of a temporary Peace Keeping Reserve Fund at a level of $ 50 million, to meet initial expenses of peace-keeping operations.

The then Secretary General of the U. N. Mr. Boutros Boutros Ghali, announced on 8 February, 1992 the discontinuation of 12 U. N. departments and the assignment of their functions to other existing units. The departments include those dealing with political and Security Council affairs, special political questions, regional co-operation, decolonisation and trusteeship, disarmament affairs, international economic and social affairs and technical co-operation for development. The U. N. centres for science and technology for development, transnational corporations, ocean affairs, the law of the sea and disarmament affairs are being abolished. According to the entire plan, the staff reduction may be in the neighbourhood of 20 to 25 per cent, thus effectively cutting down expenditure on employees and making the U. N. more efficient.

Reference may also be made here to the report of the 11-Member panel convened by the Ford Foundation in consultation with the office of the U. N. Secretary-General, in response to growing concerns about U.N.'s financial problems. In a 34-page report entitled "Financing an Effective United Nations," the group outlined a comprehensive and detailed series of recommendations to place the organization on sounder financial footing. The group noted that as compared to 15,000 peace-keepers deployed around the world two years ago, it has now nearly 55,000. The panel called for the establishment of a $ 400 million revolving fund for peace-keeping, financed by three annual assessments on Member States, that would assure reliable funding in the critical start up phase of operations. The panel suggested that the U. N. consider a unified peace-keeping budget financed by a single annual assessment, to replace the current system under which each mission is financed separately. It affirmed that a unified budget would enable the U. N. to create an ongoing infra-structure for managing operations and providing them with common services.

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[37] The U. N. Crisis", Indian Express, 24 October 1986.

[38] Ibid.

[39] Indian Express, 21 December 1986.

With regard to U.N.'s persistent budget short fall, the group called on all countries to pay their assessed dues on time and in full. Governments should also pay their dues in four quarterly instalments rather than current single payment due in January. The U. N. should be able to charge interest on late payments. These suggestions, especially the one regarding charging of interest on late payments merit serious consideration.[40]

Despite the efforts of the Secretary-General of the United Nations and others, the financial crisis of the United Nations still persists. On 15th January, 1996, there were $ 3.3 billion arrears out of which $1.6 billion was against the regular budget and $ 1.7 million against peace keeping operations. Out of the total arrears $ 1.5 billion is owed by the United states. It may be noted that United States is assessed 25 per cent of the regular U.N. budget and 31 per cent of peace keeping costs. For several years the U.S. Congress has refused to fund these obligations in full. Last year the U.S. Congress reduced the U.S. peace keeping contributions to 25 percent. Time and again the U.S. has been impressing upon the U.N. to effect substantial cuts in the budget and U.N. staff. It was due to such pressure that the General Assembly has adopted a no-growth budget of $ 2.6 billion for 1996-97. The Management experts have proposed sweeping personnel cuts so as to reduce spending by $ 1.8 billion. Secretary-General Boutros Boutros Ghali has proposed several steps to pull the U.N. out of the edge of insolvency. His steps include giving the U.S. Congress a greater incentive to pay America's back dues by cutting U.S. share of five to 15 or 20 per cent. Though not specifying the exact number, he has also agreed to make drastic personnel cuts. About ten per cent or around 1,100 persons will lose their job in the U.N.

The financial crunch is so grave that the U.N. has been using contributions made for peace-keeping operations to run its day to day operations to keep the U.N. afloat. The financial crunch has hurt especially the countries contributing troops and equipment to peace-keeping operations because the U.N. has failed to pay them for their equipment and services. India is a major contributor and has claims between $ 50 and $ 70 million. Other major contributors include Britain, France and Canada.

Though 26 member states, including India, paid their contributions in full in 1996 financial position of the U.N. did not change as the U.S. did not clear its debts.

A bipartisan panel of the United Nations Association of the United States has reached the shocking conclusion that lack of funds will lead to the collapse of the United Nations. Even if this may not be accepted as true the situation remains to be grim.

In July 1997 American Senators proposed a plan to solve financial crisis of the U.N. The plan included the following points :

(1) Payment by America of $819 millions in next three years ; (2) reduction of the total percentage of U.N.'s budget paid for by the U.S. from the present 25 percent to 20 per cent; (3) reimbursement to Washington for "costs incurred" during U.N. peace keeping operations ; (4) having an American Inspector General within U.N. as well as its three largest agencies—ILO, FAO and WHO to look after financial matters.

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[40] See U. N. Chronicle, Vol. XXX No. 2 (June, 1993) p. 73.

The American proposal could receive only frosty response. If American proposal for reduction of total per cent from 25% to 20% is accepted, similar claim may be made by European Union and other developed states. It will prove to be counter productive. America is indebted to the U.N. for the non-payment of its contributions. It is not entitled to impose condition for payment of its debts. Already, there is a feeling among the large number of countries that the U.N. acts at the dictates of the U.S. If American demand for the presence of American Inspector General in U.N. to oversee financial matter is accepted there will be great resentment by these countries. It will almost amount to a veto by U.S. in financial matters of the U.N.

It may also be noted that America is talking of payment of $819 million in next three years and subsequently it was raised to $930 million whereas it was $1.5 billion to the U.N. which is more than half of $2.6 billion currently owed to the U.N. by member States.

In October 1997, U.N. Secretary-General, Kofi Annan presented a slimmed-down budget of $2.583 billion for the two year period 1998-1999. In December, 1997, the General Assembly of the U.N. rejected American demand of lowering its contribution from the current 25 per cent but agreed to hold new negotiation next year. This was on the recommendation of the U.N. Finance Committee which resolved to consider reviewing the scale of assessment for the years 1999-2000 during the 52nd session in the light of all relevant factors, contributions and to make a determination in this respect.

In March, 1999, U.N. Secretary General Kofi Annan once again appealed to the political leaders of America to pay more than one billion of arrears. In October, 1999, Deputy Secretary General Joself E. Conore declared in clear words that if America does not pay 350 million dollars to the U.N. by 31st December, 1999, America will lose the right of voting in the General Assembly. According to the U.N., America owe 1.7 billion dollars of arrears but according to the U.S. only 1 billion 25 million dollars are due because for the rest being peace keeping costs are in dispute.

In the first fortnight of November, 1999, the Republican Leaders in White House arrived at a compromise to end the stalemate over payment of U.S. arrears to the United Nations. In return for Clinton Administration had to accept certain conditions. According to the said compromise the U.S. would pay $100 million subject to the conditions mentioned in Helms-Biden legislation of the U.S. congress. Probably the most arrogant conditions was that the U.N. members must accept the amount in the legislation ($ 926 million) as full payment of what the U.S. owes. But the amount of U.S. past due was $1.6 billion according to the U.N. Yet another important condition was that the U.N. members must agree to reduce the U.S. share of the U.N. dues from 25 per cent to 22 per cent and the U.S. share of peace-keeping from 31 per cent to 25 per cent.

The position of the payment of member's contribution to the U.N. is very unsatisfactory. In the beginning of year 2000, as many as forty five countries had lost their vote in the General Assembly. The Assembly had exempted seven other countries from the non-vote rule due to special circumstances, such as civil war and natural disasters. They are : Bosmia, Comoros, Tajikistan, Republic of Congo, Guinea-Bissau, Nicaragua and Georgia. Thus 52 countries whose debts exceed contributions of two full years is the biggest number in recent years. Last year 42 countries were in this category compared to 39 in 1998, 43 in 1997, 39 in 1996 and 25 in 1995.

The United States just escaped being classified in this group, Washington owes the United Nations more than 1-2 billion dollars.

A great set back to the U.S. has been in the defeat and consequent removal from the United Nations Human Rights Commission.

In June, 2001, U.N. Secretary General Kofi Annan once again appealed member States to contribute more money for the proper functioning of the United Nations.

The financial position of the U.N. thus continues to be grim. Great statemanship and reconciliation between competing claims will be imperative to save the U.N. from utter collapse.

On 29th October, 2003, United Nations Secretary-General recommended 0.5% growth in the organisation's budget for the year 2004-2005 including small extra expenditures on programmes for Africa, crime prevention and human rights. Such a recommendation has been made after nearly a decade of no growth in U.N. budget. Giving the reasons for his recommendations, Mr. Kofi Annan said that the security of UN mission staff would require more funds than presently requested. The results based budget reflects a major effort to align the activities of the organisation with priorities agreed on at the Millennium Summit of 2000 and major world conferences. His proposed budget also provided for more staff training as it proposed hiring 117 new young professionals.

On 8 March, 2006, U.N. Secretary-General, Kofi Annan submitted a report for the reform of the U.N. In his report, he commented that the reforms have become necessary rather imperative because conditions have changed and in many aspects the present rules and regulations have outlived their utility. As compared to the earlier times when the United Nations simply organized the conferences now its responsibilities have become operational. Out of the 30,000 staff members of the U.N. more than half employees are engaged in fields. The operations of Peace Keeping have increased four times and 70% of 10 billion dollar, budget is spent on 80,000 international forces.

Since then the financial position of the U.N. has not improved and it has been more or less the same.

IV. Elective Functions

The General Assembly perform two types of elective functions : (*A*) Regarding admissions of new States to the United Nations; and (*B*) Election of members for other organs.

(A) *Regarding admission of new Sates to the United Nations.*—The General Assembly performs important functions in respect of admission of new States to the United Nations. The Charter of the United Nations uses the term 'admission' in this respect. But, as pointed out by Prof. Leonard, it is in fact 'election' and therefore, comes under the elective functions of the United Nations. A new State is admitted to U. N. by decision of the General Assembly by two-thirds majority of the members present and voting upon the recommendations of the Security Council.[41] Besides this, the General Assembly also possesses certain powers in respect of suspension and expulsion of members. In this connection following may be noted :

(*a*) A member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of rights and privileges of membership by the General Assembly upon the recommendations of the Security Council.[42] Since the suspension of the rights and privileges of the membership is an important and substantial matter, it can be done only when the General-Assembly passes resolution by two-thirds majority of the members present and voting upon the recommendation of the Security Council.

(*b*) A member of the United Nations which has persistently violated the principles as contained in the Charter may be expelled from the Organisation by the General Assembly upon the recommendation of the Security Council.[43] Since the expulsion of members is also a substantial matter, the same procedure is followed as has been mentioned above in the case of suspension of members.

(*c*) A member of the United Nations which is in arrears of the payment of its financial contribution to the organisation may be deprived of its vote by the General Assembly by resolution passed to that effect by two-thirds' majority of the members present and voting.[44]

(B) *Regarding election of members of other organs.*—The General Assembly performs important functions in regard to the election of members for other organs of the United Nations. In this connection the General Assembly performs the following functions :

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[41] See Article 4 of the Charter.

[42] Article 5.

[43] Article 6.

[44] Article 19.

(*a*) It elects 10 non-permanent members of the Security Council.[45]

(*b*) It elects 54 members of the Economic and Social Council.[46]

(*c*) It also elects some members of the Trusteeship Council.[47] For this, Article 86 (c) provides that the General Assembly shall elect as many members of Trusteeship Council for a period of three years as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those members of the United Nations which administer trust territories and those which do not.

(*d*) It also takes part in the election of the Judges of the International Court of Justice.[48]

(*e*) The General Assembly also takes part in the appointment of the Secretary-General. In this connection, Article 97 provides that the Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council.

V—Constituent Functions.[49]—The General Assembly performs important constituent functions also. It takes part in the amendment of the Charter. The Charter provides that amendments to the present Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations including all the permanent members of the Security Council.[50] So far there have been only a very few (three) amendments to the Charter. Amendments to Articles 23, 27 and 61 were adopted by the General Assembly on 17th December, 1963 and came into force on 31st August, 1965. A further amendment to Article 61 was adopted by the General Assembly on 20 December, 1971, and came into force on 24 September, 1973. An amendment to Article 109, adopted by the General Assembly came into force on 12 June, 1968.

A persual of the above-mentioned powers and functions of the General Assembly leads to the irresistible conclusion that General Assembly is a very important and potent principal organ of the United Nations. As noted earlier, its powers reached their zenith on the passing of the Uniting for Peace Resolution, 1950, which conferred upon it important powers in respect of maintenance of International Peace and Security.

Expanding role of General Assembly—Uniting for Peace Resolution, 1950.[51]

Since the establishment of the United Nations the powers and functions of the General Assembly have constantly increased. In this connection a brief discussion of the Uniting for Peace Resolution of November 3, 1950, is not only desirable but necessary. A brief discussion is, therefore, being given below :

*Uniting for Peace Resolution 1950.**—On account of mutual conflict and non-operation among the permanent members of the Security Council, the Security Council has failed miserably to perform its primary responsibility for the maintenance of world peace. The provisions enshrined in Article 48 for the contribution of armed forces to the United Nations by member States, could not be enforced because special agreements were necessary for this but they could not be entered into because of the conflict among the major powers. Consequently, the Security Council proved to be a very weak organ so far as the maintenance of peace and security was concerned. The first important achievement of the Security Council was that of action taken in Korean Conflict of 1950, when it decided that North Korea was an aggressor and ordered for action to be taken to repel the aggression. This decision by the Security Council could be possible because when this matter was being considered by Security Council, the Russian representative was not present. On August 1, 1950, when the Russian representative returnd to the Security Council, the Security Council became incapable of taking any action because of the exercise of veto by Russia. America, therefore, took initiative with the support of France, Britain and other Western countries to equip United Nations with necessary and adequate machinery to deal with the matters relating to International peace and security. Due to the initiative of America, supported by Western countries, the General Assembly of the United Nations passed Uniting for Peace Resolution on November 3, 1950. This resolution provided the following :

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[45] Article 23.

[46] See Article 61 of the Charter.

[47] Article 86.

[48] Article 8 of the Statute of International Court of Justice.

[49] For detailed study, see Chapter on "The Amendment of the U. N. Charter".

[50] Article 108 of the Charter.

[51] See also S. K. Kapoor, "The Maintenance of International Peace and Security", Lawyer (November 1972), p. 170; L. H. Woolsey, "Uniting for Peace", A.J.I.L., Vol. 45 (1951), p. 129.

* See also for P.C.S. (1976), Q. No. 10(8) ; I.A.S. (1968), Q. 9 ; P.C.S. (1984), Q. 7 ; P.C.S. (1983), Q. 9 ; See also for P.C.S. (1991), Q. 10(a).

(1) A special emergency session of the General Assembly can be called by the 9 affirmative votes of the Security Council to that effect or by the majority of the members of the General Assembly.

(2) If the Security Council fails to prevent any aggression or to take any action in respect of any breach of peace, the General Assembly may consider this matter.

(3) This resolution empowered the General Assembly to take collective measures including the use of the armed forces for the maintenance of peace and security.

(4) A 14-member Peace Observation Commission established to supervise conflict areas and to submit report to the General Assembly in that regard. It may, however, be noted that this Commission could go to the conflict area when the State concerned gives its consent in this connection.

(5) Each member was asked, under the resolution, to maintain certain elements within its armed forces fully equipped so that the same could be available to the United Nations at its demand.

(6) A 14-member Collective Measures Committee was also established under the resolution so as to study and report the matters relating to International Peace and Security.

> "The objective of the resolution was to improve the machinery of the United Nations for preserving peace".[52] Josef L. Kunz has also pointed out, "It was an attempt to transfer the sanctioning competence from the Security Council to General Assembly in order to evade veto and to revise the task of the United Nations to maintain and restore International Peace and Security".[53]

Validity of the Uniting for Peace Resolution.—Validity of the Uniting for Peace Resolution, 1950, has been challenged and criticised by some jurists and Communist countires, particularly Russia.[54] Russia opposed this resolution from the very beginning on the ground that it is inconsistent with the provisions of the Charter. In her view, Charter conferred upon the Security Council the primary responsibility for the maintenance of peace and security and only the Security Council is empowered to use armed forces for this purpose. The view of Russia can be criticised because under Article 10 of Charter, the General Assembly is empowered to consider any matter within the scope of the Charter. Besides this Article 24 referred to by Russia simply provides that the *primary responsibility* for the maintenance of International Peace and Security will be that of the Security Council. But the term 'primary responsibility' does not mean that if Security Council fails to perform its responsibility, the responsibility of the United Nations Organisation as a whole ends. "No provision of Charter, not even Article 24 would allow the conclusion that the responsibility of the Organisation as a whole is ended in case of inability or unwillingness of the Council to take prompt and effective action."[55]

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[52] Juraj Andrassy, "Uniting for Peace", A.J.I.L., Vol. 50 (1956), 563.

[53] See also Nagendra Singh, Recent Trends in the Development of International Law and Organisation Promoting Inter-State Co-operation and World Peace (1969), p. 1.

[54] See Kazimierz Grzybowski, "International Organization from the Soviet Point of view" in The Soviet Impact on International Law (1965), pp. 50-51.

Another eminent jurist, Miss Gutteridge, has expressed the view that the United Nations is capable of legal development in accordance with the needs and circumstances. In her view the United Nations can do so if it fulfils two tests. (1) It should not be against the provisions of the United Nations Charter; and (2) It should be for the attainment of the purposes contained in Article 1 of the Charter.[56]

On the basis of the above discussion it would not be wrong to say that Uniting for Peace Resolution is a resolution which fulfils the above two tests. In short, Uniting for Peace Resolution is a valid resolution and is not inconsistent with the provisions of the Charter. As pointed out by Prof. Leonard, "The remarkable development in United Nation's brief career has been the place assumed by the General Assembly." "The decline of the Security Council and the consequent rise of the General Assembly to the role of prominent organ of the United Nations is probably the most striking constitutional change that has been experienced by the organisation."[57] With the successive failures of the Security Council to perform the functions entrusted to it under the Charter there was constant growth of the powers of the General Assembly. The main cause for the inability of the Security Council to perform its functions was the exercise of veto by the permanent members. Besides this, General Assembly perform certain functions which were approved by the International Court of Justice thereby leading to the enhancement of the powers and functions of the General Assembly. A brief reference of establishment of the Administrative Tribunal by the General Assembly as a subsidiary organ and the opinion of the International Court of Justice on the validity of the decisions given by this tribunal may be made. Some members of the United Nations criticised the establishment of the administrative tribunal and particularly the effect that its decisions were to be binding upon the members of the organisation as a whole. Some members criticised it on the ground that it was *de facto* amendment of the Charter because the General Assembly is only one of the principal organs of the United Nations. It is, therefore, not empowered to establish an Organisation whose decisions may be binding upon the other organs, members or the organisation as a whole. But the International Court of Justice rejected this criticism altogether and upheld the validity of the establishment of administrative tribunal as well as the binding force of its decision upon the members of the United Nations.[58]

Similarly, in regard to the validity of the expenses incurred by the General Assembly for sending United Nations Emergency Force (UNEF) in Egypt in 1956 and for sending United Nations Emergency force in Congo (United Nations Operation in Congo) in 1961, the International Court of Justice in its advisory opinion in 1962 upheld the validity of the expenses incurred by the General Assembly on both the said operations. In its advisory opinion delivered on July 20, 1962, the International Court of Justice clarified the powers of the General Assembly under Article 17 to apportion the Expenses of the Organisation among the members and thereby indirectly upheld the validity of the Uniting for Peace Resolution, 1950.[59]

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[55] Juraj Andrassy, "Uniting For Peace", A.J.I.L., Vol. 50 (1956), p. 563 at p. 574; In its advisory opinion on Certain Expenses of the U. N. (1962), the International Court of Justice observed : "The responsibility conferred is 'primary' not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, 'in order to ensure prompt and effective action." To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement or coercive action against an aggressor. The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorises the General Assembly to 'recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations.' The word 'measures' implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so......."

[56] J. A. C. Gutteridge, The United Nations in a Changing World (1969), p. 8 : see also Castaneda, Legal Effects of United Nations Resolution (1969) at p. 33 : Mc Cullock V. Maryland, 4 Wheat, 316 (1819); Rahmatullah Khan, Implied Powers of the United Nations (1959), p. 3; I.C.J. Rep. (1949) at p. 182.

[57] Stephen S. Goodspeed, the Nature and Functions of International Organization, p. 158.

[58] See Effects of Awards of Compensation made by the United Nations Administrative Tribunal, I.C.J. Reports (1954), p. 47; see also S. Engel, The Changing Character of the United Nations (1969), p. 3.

Besides the performance of the important functions for the maintenance of peace and security, since the passing of the Uniting for Peace Resolution, the General Assembly has also performed important functions in respect of human rights and fundamental freedoms. It has made proper use of the powers conferred on it under the Charter and thereby has performed important functions in the social, economic and cultural fields. These functions of the General Assembly have naturally enhanced the prestige and power of the General Assembly as one of the principle organ of the United Nations.

Despite the fact that Uniting for Peace Resolution equipped the General Assembly with necessary powers for the performance of important functions in respect of maintenance of peace and security, the Congo experience has made it clear that it can succeed only when there is co-operation among the permanent members of the Security Council. In Congo, the United Nations has in fact performed commendable functions and has been able to maintain law and order in that conflict area. But because of the refusal of France and Russia to pay their part of the expenses as portioned by the General Assembly in the said operation, the United Nations was confronted with financial crisis. Professor Goodrich has rightly remarked that even for the successful functioning of the General Assembly, the co-operation among the permanent members of the United Nations is very essential.

Procedure.—The annual sessions of the General Assembly may be convened either by the Security Council or by the majority of the members.[60] The General Assembly is entitled to formulate its own rules and procedures.[61] The General Assembly is also empowered to establish subsidiary organs for the performance of its functions. The session to the General Assembly begins with the discussion on the report of the Secretary-General on the work of the Organization. As pointed out earlier, each member is represented in the General Assembly and can send 5 representatives. Consequently, the General Assembly is a big body. It has, therefore, formed certain main and other committees through which it performs its major functions. The Committees of the General Assembly are of following types : (1) Main Committees; (1) Procedural Committee; (3) Standing Committee; and (4) *Ad-hoc* Committees.

The main Committees of the General Assembly generally consider the agenda of the General Assembly and prepare recommendations for the General. Each member of the United Nations is entitled to have its representative in the main committees. Following are the main Committees of the General Assembly : (i) Political and Security Committee; (ii) Economic and Financial Committee; (iii) Social, Humanitarian and Cultural Committee; (iv) Trusteeship Committee including non-self governing territories; (v) Administrative and Budgetary Committee; and (vi) Legal Committee. In addition to these there is a *Special Political and Security Committee.*

General Assembly resolutions as a source of Universal International law

N. B.—For this please see Chapter on "Sources of International Law."

Establishment of Subsidiary Organs by the General Assembly.—Under Article 22 of the Charter of the United Nations the General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions. From the beginning the General Assembly has made use of the power conferred on it under

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[59] See Certain Expenses of the U. N., I.C.J. Rep. (1962), p. 151; In his separate judgment, Sir Percy Spender of the International Court of Justice observed that it was the aim of the Charter to adopt itself to the Changing circumstances which were neither contemplated nor could be foreseen at the time of the framing the Charter. The purposes of the Charter should be given the prime consideration in any interpretation of the Charter. [Ibid, at p. 185].

[60] Article 20 of the Charter.

[61] Article 21.

Article 22 and has established several subsidiary organs. For example through a resolution[62] in 1947, it established International Law Commission. In 1963 through another resolution[63] it established the United Nations Institute for Training and Research (UNITAR). Earlier it established the United Nations Administrative Tribunal. In 1954 the International Court of Justice upheld its validity and held that its decisions were binding upon the Member States.[64] The decision of the Tribunal has also been upheld by the International Court of Justice in *Application for Review of Judgement No. 158 of the U. N. Administrative Tribunal*[65] and *Application for Review of Judgment No. 273 of the U. N. Administrative Tribunal.*[66] In recent years the General Assembly has utilized this power in establishing semi-autonomous institutions. For example in 1964, it established United Nations Conference on Trade and Development (UNCTAD). Similarly in 1966 it established U. N. Industrial Organization. Thus the old view that new institutions can be established only by international treaty, is no more tenable. Now new institutions can be established by resolutions of the General Assembly unanimously passed by Member States.[67]

Recent Sessions of the General Assembly :

63rd Session of the General Assembly.—The 63rd session of the General Assembly opened on 16th September, 2008. The priorities of the 63rd session were :

(1) The Millennium Development Goals;
(2) The Global Fund Crisis;
(3) Climate change;
(4) The Joint U.N.—African in Darfur (UNAMID);
(5) A Global Counter-Terrorism; and
(6) Security Council Reforms.

The 63rd session opened at the U.N. Headquarters at New York, with its new President saying that issues of global food crisis, U.N. Reforms, and climate change are among the key themes of its one year work.

64th Session of General Assembly.—The 64th Session of the General Assembly took place on Tuesday, 15 September, 2009. The general debate was held on 23-26 September and 28-30 September, 2009. On 10 June, 2009, Ali Abdussalam Triki of Libya was elected President of the U.N. General Assembly.

65th Session of General Assembly.—65th Session of General Assembly opened on 14th September, 2010. In this session the theme of the general debate was "reaffirming the central role of the United Nations in global governance" as proposed by the President elect, Mr. Joseph Deiss of Switzerland who was the President of the 65th Session.

66th Session of the General Assembly.—66th Session of the General Assembly opened on 13th September, 2011. High level meeting of the theme, "Addressing desertification, land degradation and drought in the context of sustainable development and poverty eradication". The general Debate of the session took place on 21 to 24 and 26 and 27 September, 2011.

67th Session of the General Assembly.—67th Session of the General Assembly opened on 18 September, 2012. The general debate opened on 25th September, 2012.

68th Session of the General Assembly (2013-2014).—68th Session of the General Assembly opened on Tuesday, 17th September, 2013. The theme of the 68th Session was the Post-2015 Development.

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[62] Gen. Ass. Resolution 174 (II of 21st November, 1947, which was amended in 1950, 1955 and 1961).

[63] Gen. Ass. Resolution 1934 (XVII) of December 11, 1963.

[64] See Effects of Awards of Compensation made by the U. N. Administrative Tribunal, I.C.J. Reports (1954), p. 47.

[65] Advisory Opinion of 12 July, 1973.

[66] Advisory Opinion of 20 July, 1982.

[67] Louis B. Sohn, 'The Development of the Charter of the U. N. : The Present State' in the Present State of International Law and other Essays (1973), p. 58.

69th Session of the General Assembly.—The 69th Session of the General Assembly opened on 15th September, 2015. The First meeting of the General Committee took place on Wednesday, the 16th September, 2015.

70th Session of the General Assembly.—70th Session of General Assembly was held in New York from 15 September, 2015. President Mogens Lykkatoft chose the theme of the debate as "The United Nations at 70 : the road ahead for peace".

71st Session of the General Assmebly.—71st Session opened on 13 September, 2016 and was held from 13 September to 12 September, 2017. The theme of the 71st Session was "The Sustainable Development Goals : A Universal Push to Transform our World".

72nd Session of the General Assembly.—72nd Session of the General Assembly opened on Tuesday 12 September, 2017. Debate opened on 19th September, 2017. The theme of the Session was "Focussing on People : Striving for Peace and a Decent Life for All on a Sustainable Planet".

73rd Session of the General Assembly.—73rd Session of U.N. General Assembly opened in 18 September, 2018. The Debate started on 25 September, 2018.

74th Session of the General Assembly.—It opened on 17 September, 2019. The General Debate started on Tuesday, 24 September, 2019. It was held in New York City of the United States of America. It was held from 17 September to 30 September, 2019.

Evaluation of the work of the General Assembly.—The General Assembly has performed important functions in the social, economic and cultural fields and in the fields of human rights. Besides this Uniting for Peace Resolution, 1950 conferred upon the Assembly important powers relating to the maintenance of International Peace and Security. There has been a constant development of the powers and functions of the General Assembly. "Thus the United Nations General Assembly......has not only assumed for itself a position of the pre-eminence among the organs of the United Nations, but has become the symbol of democratisation in the world community of States inasmuch as the Security Council with its veto system and permanent seat for the Great Powers has yielded place in many respects to the democratic organ of the General Assembly which is based on the egalitarian principle of 'one State one vote.'[68] In *Effects of Awards of Compensation made by the United Nations Administrative Tribunal,*[69] the International Court of Justice held that the General Assembly can establish an administrative tribunal whose decisions may be binding upon itself. Some jurists have opined that it was nothing but a *de facto* amendment of the United Nations Charter. As pointed out by D. W. Bowett. "......by and large, the Assembly has sought to regulate its action by reference to those purposes and principles and has been understood by the narrower questions of legal interpretation of specific Article of the Charter". [70] In the words of Judge Alvarez: "...........the Assembly..............is tending to become an international legislative power. In order that it may actually become such a power, all that is needed is that Governments and public opinion should give it support. Public opinion is an important factor which comes into play in the new international law".[71] The Gulf War (1991) and the breaking up of the Soviet Union are likely to bring about revolutionary changes in the U N. In the present Uni-polar world (with U. S. as the sole super power), majority of the member-States are now demanding greater democratization of the world body. If their demands succeed, and succeed it must, General Assembly is the only organ of the organisation which can best represent the wishes, hopes and aspirations of the over-whelming majority of the member States of the U. N, may the "people of the United Nations". The procedure and functions of the General Assembly should therefore be revised suitably to meet the new situations.

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[68] Nagendra Singh, Recent Trends in the Development of International Law and Organization Promoting Inter-State Co-operation and World Peace (1969), p. 15.

[69] I.C.J. Rep. (1954), p. 47.

[70] D. W. Bowett, the Law of International Institutions (1970), p. 51.

[71] Reservations to the Genocide Convention, I.C.J. Rep. (1951), p. 15 at p. 49; In the words of an Indian author, "The G. A. (i.e., General Assembly) resolutions constituted the 'joint action' and the 'process through which states and peoples' pursued their objective. The point is, it would be native to ignore such law-creating resolutions." Rahmat Ullah Khan, "International Law—Old and New," I.J.I.L., Vol. 95 (1975) p. 371 at p. 374; see also Richard Falk, "On the Quasi-legislative competence of the General Assembly", A.J.I.L., Vol. 60 (1966), pp. 782-791; P. Chandrasekhara Rao, Charter of Economic Rights and Duties", I.J.I.L., Vol. 15 (1975), p. 351 at p. 370; For contra see N. G. Onuf, "Professor Falk on the Quasi-Legislative competence of the General Assembly" A.J.I.L., Vol. 64 (1970), p. 349 at pp. 354-355 : M.K. Nawaz, "International Law : Old and New", I.J.I.L., Vol. 15 (1975), p. 380.

Before suspending the 14-week 47th session of the General Assembly, on 23rd December, 1993, Assembly President Stoyan Gavev of Bulgaria asserted, "The General Assembly is facing an historic challenge to truly become a *functional world Parliament* on the basis of the United Nations Charter". Further, "The countries of the world have assigned to the United Nations the Heavy responsibilities of maintaining international peace and security, as well as of addressing a wide range of global, regional and local problems".[72]

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[72] See U. N. Chronicle, Vol. XXX No. 1 (March, 1993) p. 29.

CHAPTER 34

THE SECURITY COUNCIL

Composition*.—The Dumbarton proposals emphasized the establishment of an executive organ, whose membership might be limited and which could be entrusted the 'primary responsibility' for the maintenance of International Peace and Security. In San Fancisco Conference, it was finally decided to establish such an organ in the form of the Security Council.[1] In accordance with the provisions of Article 7 of the United Nations Charter, the Security Council is one of the principal organs of the United Nations. It comprises of 15 members (5 permanent members and 10 non-permanent members). China, Russia, America, France and Britain are the permanent members of the Security Council.[2] The first Security Council came into being on 12th January, 1946, when the General Assembly elected its 6 members. Before 31st August, 1965, the Security Council consisted of eleven members. On 17th December, 1963 amendment to Article 23 of the Charter was adopted by the General Assembly. It provided that the Security Council would consist of 15 members—5 permanent and 10 non-permanent members. This amendment came into force on 31st August, 1965. Before the amendment, even without exercising veto, the permanent members could prevent the Security Council from taking decision on any matter because the Security Council then consisted of 11 members and decision on ordinary or non-substantial matters required seven affirmative votes. If five permanent members voted against the proposal, Security Council could not take any decision on it. But this is no more possible because now the Security Council consists of 15 members—5 permanent and 10 non-permanent members and decision on non-substantial or procedural matters 9 affirmative-votes are required. Thus on non-substantial matter, the Security Council can take a decision on the basis of the affirmative votes of non-permanent members. Ten non-permanent members are elected by the General Assembly for a period of 2 years.

Need for Enlargement of the Security Council**

After the Gulf War (1991) and the breaking of the Soviet Union the need for enlargement of the Security Council is being greatly felt in view of the changed situation. Since the breaking of the Soviet Union, we are living a Unipolar World with the United States of America as the sole Super power. In the Non-Aligned two day Foreign Ministers Conference held at Larnaca (Cyprus) in the first week of February 1992, the need for democratisation of the U. N. system emerged as a recurrent theme. For example, Indian Foreign Affairs Minister, who was the first to address the delegates during the closed-door deliberations, stressed that with a view to reflect the increased strength of the General Assembly and the new power configuration in the world, one way of democratising the U. N. would by reviewing the membership of the Security Council. There seems to be much force in the view expressed by Indian Foreign Affairs Minister. When the membership of the Security Council was increased from 11 to 15 in 1965 the membership of the U. N. was 113. Since then the membership of the U. N. has increased to 193 (one hundred ninety-three) 'at present' but the membership of the Security Council remains the same. Besides this, there are other imbalances in the existing composition of the Security Council. Africa and Latin America are unrepresented. China is the sole representative of Asia, the largest continent from the point of area and population. Then two economic super powers—Germany and Japan are not the permanent members. Moreover, India also ought to be made a permanent member. In view of these reasons, the membership of the Security Council ought to be increased from 15 to 25 including 10 permanent members. The new five permanent members should be chosen from amongst the countries such as Japan, Germany, India, Egypt, Brazil and Nigeria. Besides this 5 new non-permanent members should be elected on Geographical basis to make the Security Council more representative.

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* See also for P.C.S. (1995) Q. 10 (b).

[1] See D. W. Bowett, the Law of International Institutions (1970), p. 25.

[2] Article 23 of the U. N. Charter.

** See also for C.S.E. (1992) Q. 8(c) ; P.C.S. (1995) Q. 10(b).

According to the World-watch Institute, a Washington think Tank, the Security Council should be expanded to include India and other countries, saying that the current permanent members have usurped the Council's authority and have relegitimised wars an arbitor of conflict. In its tenth annual report entitled, "State of the World", World-watch says, "If the United Nations is to move towards a more activist and interventionist stance, it needs not only greater financial backbone, but all the political legitimacy it can muster. This concerns in particular the Security Council". Further, "Leaving decision making relating to international peace and security exclusively to the Security Council will always carry with it a certain danger of usurpation by the great powers, as the Gulf War demonstrated when the Coalition led by the United States was given a blank cheque for driving Iraq out of Kuwait.

The United States favoured using military force and never showed any intention of placing the coalition's military operations under the control of the Security Council."

The report added that instead of nurturing the growth of international norms constraining the use of force, the episode helped relegitimise war as an arbitor of conflict. According to the report, "Making the Security Council more representative and democratic may help curb such abuse". The World-watch further says, "Just because war is a social institution does not mean it is inevitable : created by humans, it can be abolished by them given sufficient will and perseverance". Finally, the report has suggested that the criteria for permanent membership should include, on addition to traditional 'big power' factors like military powers and economic muscle, population, size and financial and other support for the U. N. perhaps with the stipulation that permanent members jointly represent at least 50 per cent of the world's regions.[3]

There is no denying the fact that for any amendment of the Charter, affirmative votes of five permanent members is essential. Further, while consenting to increase of membership in past, the five permanent members retained their privileges. Even in the present situation the five permanent powers would not like to share their power with those outside the said five. It is therefore necessary to build public opinion and to put pressure on the existing five permanent members and especially on the U. S. because in the present Unipolar world much will depend on the attitude adopted by the U. S. the sole super power. The developing countries should continue to put pressure, through forums such as Non-Aligned Movement (NAM), until their objectives are achieved.

The target date for enlarging and reforming the Security Council was 50th anniversary of the U.N. in 1995. The target date having already passed, there is great uncertainty in this connection. According to the U.S., it would not agree to any proposal for enlargement of the Security Council if Germany and Japan were not given permanent seats. But developing countries including India are not willing to give up their claims. In view of these uncertainties, Secretary-General Boutros Boutros Ghali said that it would take a considerable time before the Security Council was enlarged and reformed.

A major shift in U.S. policy came in the latter part of the year 1997. In October, 1997 the U.S. advocated seats for developing nations in the Security Council. But it advocated regional or rotational basis for selecting new permanent members for the expanded Council in order to provide representation to the regions which are unrepresented among the five permanent members. The U.S. proposed that Asian countries should select a regional candidate for a permanent seat on Security Council adding that the criteria for inclusion should be decided first on global, non-discriminatory and equitable basis. This proposal was not at all acceptable to India. Rejecting the American proposal, India said that rotation is not possible. Moreover, the terms rotation and permanent are contradictory. India has already declared its candidature for a permanent seat in the Security-Council. Japan has recently offered to increase its contribution to the U.N. if it gains a permanent seat in the Security Council.

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[3] See the Hindustan Times, Dated 10 January, 1993.

G-4 group floated a new U.N. Security Council reform draft. G-4 (namely India, Germany, Japan and Brazil) stepped up their compaign to win permanent seats to the U.N. Security Council by floating a new proposal aimed at securing wider international support especially from African Countries. G-4 circulated a draft proposal on 16th May, 2005 seeking to add six permanent seats and four non-permanent seats to expand the U.N. Security Council from its current fifteen to twenty-five. The new proposal envisaged two new members from Asia, one from Latin America, one from Western Europe and two from Africa. The proposal further envisaged to add four non-permanent seats—one from Africa, one from Asia, one from Eastern Europe, and one from Latin America and the Caribbean.

Though this proposal was aimed at seeking support of the U.S. and China for Security Council expansion which was being stymied by the U.S. and China and they were the first to reject this move. In fact, America was the main country (*i.e.* permanent member) which is obstructing the expansion of the Security Council.

In the second half of May, 2005 the U.S. said that it had yet not formulated its decision on the issue and so far it supported a permanent seat only for Japan. In July, 2005 the U.S. explicitly blocked any expansion of the Security Council for sometime. Thus both China and U.S. are obstructing the further expansion of the Security Council while Russia and U.K. are not only supporting the expansion but also supporting permanent seat for India. India should accept permanent seat only if it is accompanied with veto power.

Since then on one or the other excuse U.S. had been obstructing India's claim to be a permanent member of the Security Council. However, after the signing of the Nuclear Deal between India and America in October, 2008, America's stand on India's claim softened. But it continued to say that it was a very complex issue. Finally, during U.S. President Obama's visit to India in the first week of November, 2010, U.S. President Obama speaking before Indian Parliament supported India's claim to be a permanent member of the Security Council. Thus it is for the first time that the U.S. has openly supported India's claim.

Recently China has been behaving, like and probably is, the staunch enemy of India. Therefore, so long as China continues to oppose India's claim to permanent membership of the Security Council, India cannot become the permanent member of the Security Council. China's stand at Doklam recently shows how belligerent is China against India. Therefore, if the Security Council is to be made effective for the maintenance of International peace and security, the unanimity rule must be replaced by majority rule. But alas! that is not easy to happen, because the amendment process of the U.N. is such that any amendment can be obstructed by any member of the United Nations. Thus only complete overhaul of the United Nations is the only remedy.

Voting Rights*.—According to Article 27, each member of the Security Council shall have one vote. The decisions of the Security Council on procedural matters shall be made by affirmative votes of 9 members. But decision on substantial matters requires affirmative votes of 9 members including the affirmative votes of 5 permanent members. There is, however, an exception to this rule—for any decisions under Chapter VI and under paragraph 3 of Article 62, a party to a dispute shall abstain from voting. A negative vote cast by a permanent member on a substantial matter is called a *'veto'*. For casting a veto it is necessary that the representative of the permanent member desiring to exercise this right must be present and cast his vote in the meeting of the Security Council. Absence of the representative of a permanent member from the meeting of the Council is not considered as *'Veto'*. In 1950 on the question of Korea, the Security Council could take a decision because the representative of Soviet Union was not present in the meeting of the Council. Later on it was argued on behalf of Soviet Union that absence of its representative constituted *'Veto'* but other members of the Council did not accept this argument. Since then it has become a custom that absence of the representative of a permanent member from the meeting of the Council does not constitute a *'Veto'*. Before a matter is put to vote, the President of the Council gives a ruling as to whether the matter is important or procedural. This decision can be challenged by a veto which makes it important. Since the matter now becomes important, the possibility of 'double veto' arises.

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* See also for P.C.S. (1978), Q. No. 6 ; C.S.E. (1985), Q. 5 (c) ; For answer see also matter discussed under the heading "Double Veto" discussed later on in this Chapter.

Function and powers of the Security Council**

Functions and powers can be conveniently discussed under the following heads :

(I) Maintenance of International Peace and Security; (II) Elective Functions; (III) Supervisory Functions; and (IV) Constituent Functions.

(I) Maintenance of International Peace and Security.[4]*******—It has been rightly remarked, "The purpose of the United Nations Organisation is world peace". The Preamble of the U. N. Charter says "We the People of the United Nations determined.................to unite our strength to maintain international peace and security.................". The very first purpose of the United Nations is *"to maintain international peace and security"*. [5] Then one of the principles of the Charter emphasises the concern of the organisation in respect of world peace by providing, "All members shall settle their international disputes by peaceful means in such a manner that *international peace and security,* and justice are not endangered".[6] Further, the principle of non-intervention by the U. N. in domestic jurisdiction of member states provides an exception in respect of enforcement measures under Chapter VII.[7] It need not be over-emphasized that said enforcement measures are taken to maintain or restore international peace and security.[8] Besides this, though the Charter does not "impair the inherent right of individual and collective self-defence" of the members of the U. N., even this right is subordinated to 'world peace' for the Charter clearly provides that "Measures taken by members in the exercise of this right to self-defence.................shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to *maintain or restore international peace and security"*. [9] In order to ensure prompt and effective action by the United Nations, Member States have conferred upon the Security Council the *'primary responsibility'* for the maintenance of international peace and security. The members have also agreed that in carrying out its duties under this responsibility, the Security Council acts on their behalf.[10] The members of the United Nations have also agreed to accept and carry out the decisions of the Security Council.[11] With the least diversion for the armaments and the world's human and economic resources, the Security Council is responsible for formulating, with the assistance of the Military Staff Committee,[12] plans to be submitted to the members of the United Nations for establishment of a system of regulation of armaments. The Security Council is so organised as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at all seats of Organisation.[13] It is further provided that the Security Council shall hold periodic meeting at which each of its members may, if it so desires, be represented by a member of the Government or by some other specially designated representative.[14] Thus the Charter envisages periodic meetings of the Security Council but this provision has not been utilised and no such meeting was held for twenty years since the inception of the

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** See also for I.A.S. (1959), Q. No. 5 ; P.C.S. (1982), Q. 9 ; P.C.S. (1987), Q. 10(a) ; IAS (2007) Q. 7(b).

[4] For detailed study see also : S. K. Kapoor, "The Maintenance of International Peace and Security." Lawyer (November, 1972), p. 172.

*** See also for C.S.E. (1984), Q. 6—For answer see also Chapter on "The General Assembly"; P.C.S. (1988), Q. 2(a).

[5] Article 1, paragraph 1 of the Charter.

[6] Article 2, paragraph 3.

[7] Article 2, paragraph 7.

[8] See Article 39.

[9] Article 51.

[10] Article 24 of the Charter.

[11] Article 25.

[12] Article 26

[13] Article 28, paragraph 1.

[14] Article 28, paragraph 2.

Charter.[15] The Security Council held its first periodic meeting on 21st October, 1970 with an agenda containing the item 'Review of the International situation'.[16] The Charter further provides that the Security Council hold meetings at such place other than the seat of the Organisation as in its judgment will best facilitate its work.[17] In pursuance of this provision the Security Council held a session in Panama in March, 1973 wherein it was decided to prepare a Charter of the important resolutions passed by the United Nations.

Pacific Settlement of disputes.*—Chapter VI of the United Nations Charter deals with the pacific settlement of disputes. Article 33 of the Charter provides that the parties to any disputes, continuance of which is likely to endanger the maintenance of International Peace and Security shall, first of all, seek a solution by negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Further, the Security Council, shall when it deems necessary, call upon parties to settle their disputes by such means. It is also provided in the Charter that if the parties to a dispute fail to settle it by the means mentioned in Article 33 they shall refer it to the Security Council. It is further provided that if the Security Council deems that the continuance of disputes is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action or to recommend such terms of settlement as it may consider appropriate.[18]

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation which is likely to endanger the maintenance of International Peace and Security.[19] Any Member of the United Nations may bring any disputes, or any situation of the nature referred above, to the attention of the Security Council.[20] The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures of methods of adjustment. In making recommendations under this provision, the Security Council should also take into consideration that legal disputes as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the statute of the Court.[21] Lastly, without prejudice to the provisions of Articles 33 to 37, the Security Council may if all the parties to any dispute so request, make recommendations with a view to a pacific settlement of the dispute.[22]

Sanctions against aggressor or action with respect to threats to peace, breach of peace and acts of aggression.*—Chapter VII of the Charter deals with the action with respect to threats, breach of peace and acts of aggression and confers upon the Security Council wide powers in this respect. The Security Council possesses the following powers in this respect :

(1) The Security Council first determines whether there exists any threat of peace, breach of peace or an act of aggression has taken place, and then it may recommend what measures shall be taken to maintain or restore international peace and security.[23]

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[15] B. S. N. Murti, "Periodic Meeting of the Security Council Article 28, Paragraph 2 of the U. N. Charter", I.J.I.L., Vol. 10 (1970), p. 283 at p. 284.

[16] Ibid, at p. 298.

[17] Article 28, paragraph 3.

* See also for P.C.S. (1983) Q. 9(i) ; P.C.S. (1991) Q. 10(a) ; See also Chapter on General Assembly ; C.S.E. (1991) Q. 7(a).

[18] Article 37.

[19] Article 34.

[20] Article 35.

[21] Article 36.

[22] Article 38.

* See also I.A.S. (1960), Q. No. 11; I.A.S. (1954), Q. No. 7; P.C.S. (1969), Q. No. 9. For provisions of the Covenant of the League of Nations see matter discussed under the heading "Covenant of the League of Nations and Collective Security", in Chapter entitled "Collective Security" and also the matter discussed under the heading "Legal Regulation of War, its Legal Charter and Effects"; P.C.S. (1983), Q. 9 (ii); C.S.E. (1983), Q. 7(a)—For answer see also Chapter on "Intervention".

[23] Article 39 of the Charter.

(2) The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions and may call upon the members of the United Nations to apply such measures which include complete or partial interruption of economic relations and of rail, sea, postal, telegraph, radio and other means of communication and the severance of diplomatic relations.[24]

(3) If the measures mentioned above (*i.e.*, in Article 41) prove to be inadequate, the Security Council may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operation by sea, or land forces of the members of the United Nations.[25]

(4) It is further provided that the Security Council may ask the members of the United Nations to contribute to the maintenance of International Peace and Security and to make available on its call armed forces, etc., for the purposes of maintenance of International Peace and Security (Article 43). However, it may be noted that Article 43 also provided that for the contribution of the armed forces special agreement or agreements were to be entered into. Due to conflict among major powers, no such agreements have been entered into. Thus, although the Security Council has been empowered to make use of armed forces and to ask the member-States to contribute them, this provision has not been implemented because of the mutual fears and suspicions, non-co-operation and conflict among the permanent members of the Security Council.[26]

(5) There is also a provision for the establishment of a Military Staff Committee to advise and assist the Security Council on all questions relating to its military requirements for the maintenance of International Peace and Security, the employment and command of the forces, placed it on its disposal, the regulation of armament, and possible disarmament.[27] But this provision also have not been implemented and there are no military forces at the disposal of the Security Council.

It is clear from the above provisions that the Security Council possesses wide powers in respect of the maintenance of International Peace and Security but the Security Council has not been able to make use of these powers because of the conflict and non-co-operation among the permanent members. The whole structure of the maintenance of International Peace and Security in the United Nations was based on the assumption that the permanent members of the United Nations would co-operate in the same manner as they did during the Second World War. As remarked by Lawrence S. Finkelstein, "It did not take long for San Francisco hopes of Great Power unity to fade. Bitter disillusionment rapidly replaced cautious optimism of the spiring of 1945. Irreconcilable conflict over German settlement; the harsh disagreement over other peace treaties; the clash of interest over Trieste; guerrilla war in Greece; and the continuance of Soviet forces in Iran beyond the agreed deadline rapidly produced an atmosphere of distrust and hostility. In United Nations itself the Security Council was the scene of bitter clashes and within a year Soviet Union had cast several vetos and staged the famous walk-out over Iranian affair."[28] As pointed out by Prof. Goodrich, while the frequent use of veto was not inconsistent with the provisions of the Charter, the Western countries alleged that it was an abuse. Confrontation between the East and the West and frequent use of the veto by Soviet Union accelerated the Cold War.[29] This proved to be detrimental to the smooth functioning

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24. Article 41.
25. Article 42 of the Charter.
26. See also Leland M. Goodrich and Anne P. Simons, The United Nations and Maintenance of Peace and Security, pp. 398-405.
27. Article 47.
28. Lawrence S. Finkelstein, "The United Nations : Then and Now", Int. Orgn., Vol. XIX, No. 3 (1965), p. 367 at p. 382.
29. L. M. Goodrich, "The Maintenance of International Peace and Security", Int. Orgn., Vol. XIX, No. 2 (1965), p. 429 at p. 432.

of the Security Council. It also resulted in the failure of the Security Council from equipping itself to exercise the full powers conferred on it by the Charter.[30]

Definition of 'Aggression'.—Since Chapter VII of the Charter deals with sanctions against aggressor and before taking action under this chapter the Security Council first decides whether there exists any threat of peace or an act of aggression has taken place, it is very necessary to know the meaning and definition of the term 'aggression'. It need not be overemphasized that the definition of the term 'aggression' has been considered most urgent for consideration of international security and world peace.[31] After 51 years of work by jurists and political experts, the term 'aggression' has been finally defined. Attempts in this direction began as early as in 1923 under the League of Nations. After the dissolution of the League, work in this connection was continued under the United Nations. The United Nations special committee on the question of defining aggression, submitted the draft definition of 'aggression' (containing 8 Articles) to the General Assembly on April 1974 which are as follows[32] :

Article 1.—Aggression is the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the U. N., as set out in this definition.

Explanatory note.—In this definition the term 'state'—(a) is used without prejudice to questions of recognition or to whether a state is a member of the U. N., and (b) includes the concept of 'a group of states' where appropriate concept of.

Article 2.—The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may in conformity with the Charter conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3.—Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression : (a) The invasion or attack by the armed forces, of a State of the territory of another State, or any military occupation, however, temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof ; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fields of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4.—The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5.—No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility. No territorial acquisition or special advantage resulting from aggression are or shall be recognised as lawful.

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[30] "............any failure is due more to the attitude of its members than to any constitutional defects in the Charter provisions." D. W. Bowett, "The Law of International Institutions" (1970), p. 25.

[31] See the statement of Dr. Nagendra Singh, representative of India in the Sixth Committee on the definition of aggression, 3 November, 1971 appearing in I.J.I.L., Vol. II (1971), p. 724.

[32] See I.L.M. Vol. XIII, No. 3 (May, 1974), pp. 710-714.

Article 6.—Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter including its provisions concerning cases in which the use of force is lawful.

Article 7.—Nothing in this definition and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration of Principles of International Law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination : nor the right of these peoples to struggle to that end to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8.—In their interpretation and application the above provisions are inter-related and each provision should be construed in the context of the other provisions.

The above definition was finally adopted by the United Nations General Assembly on December 14, 1974 without a vote.[33] It is undoubtedly a significant achievement. It may, however, be wishful thinking to contend that the above definition is exhaustive and perfect and that it has no loopholes. What is still more important is as to how the United Nations will ensure that aggression is not committed against any country or people or how it will ensure the punishment of the guilty.[34] Further, "From a formal point of view, this labourious exercise in achieving an acceptable form of definition of aggression and its adoption by the General Assembly in a formal declaration appears hardly to put rest the quest to establish a definition of aggression once and for all."[35] The U. S. representative, however, claimed, "The text is inevitably of a compromise, what is remarkable is that we have succeeded at all when previous generation have failed."[36] The Soviet representative also said that the definition has "accomplished its main purpose of depriving a potential aggressor of the possibility of using juridical loopholes and pretexts to unleash aggression."[37] But these claims have been refuted by Prof. Julius Stone. He points out : "This is so far, from the realities disclosed by an examination of the definition that remarkable text rather appears to have codified into itself (and in some respects extended) all the main 'juridical loopholes and pretexts to unleash aggression' available under pre-existing international law, as modified by U. N. Charter. Ambitions of delegations to narrow some major loopholes were usually balanced by the inclusion of provisions demanded by other states which efficiently neutralized the clarification proposed and often produced new obstruction to boot. This is true even for the more concrete problems surrounding 'armed aggression' and the legal liberty of self-defence against it. It is even truer as to the less concrete problems of 'indirect' and 'economic' aggression which though not expressly mentioned in the definition, may often be affected (and further complicated by implications) from its text and from its very silences. The status of extreme economic coercion in the form, for example, of the 1973 oil boycott and of legitimate responses to it under Article 2 (4) of the Charter remains as legally problematic as ever."[38] Further, "As to some of the 'loopholes' and 'pretexts' indeed even apart from saving clauses and the question of constitutional power, the very text of the consensus definition embodied in Resolution 3314 remains besieged by many mutually conflicting interpretations among the states concerned, at least as grave those which it was the ostensible object of the definition exercise to remove. So we face the paradox that the closing off of 'loopholes' and 'pretexts' hailed by the Soviet Union as the great achievement is precisely what the definition did not achieve."[39] Besides this, "To have substance, the claims made for the consensus definition (for instance, as to deterring aggressors, enlightening states or guiding U. N. organs) world require the elimination, or at least substantial reductions, of the many chronic doubts and uncertainties concerning the Charter provisions as to the limits of lawful use of force and powers of U. N. organs in relation thereto. The doubts and uncertainties, according to him, are in respect of Articles 2 (4), 10-12, 24, 25, 39 and 51.[40] It may therefore be concluded that the definition of aggression has a number of loopholes and weaknesses. The only matter of satisfaction is that in the form of consensus definition a beginning has been made. Even though it is a partial success it is welcome in the context that previous generation had failed.

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[33] General Assembly Resolution 3314 (XXIX), December 15, 1974.

[34] See also Quincy Wright. "The Prevention of Aggression", A.J.I.L., Vol. 50 (1956), pp. 514, 527; Q. Wright, "The Concept of Aggression in International Law" 29 A.J.I.L., 373 (1935); J. Stone Aggression and World order ; A critique of U. N. Theories of Aggression (1959).

[35] K. Venkat Raman, "Aggression" A Description to serve as a Definition" India Quarterly, Vol. XXXII (1969), p. 42 at p. 47.

[36] Adopted from Ibid., at p. 48.

[37] U. N. Doc. A/c 6/SR 1472 at page 2 (1974).

[38] Julius Stone, "Hopes and Loopholes in the 1974 Definition of Aggression", A.J.I.L., Vol. 71 (1977), p. 224.

Illustration.—Armed internal conflict takes place in State *A*. The rebel factor has bases in neighbouring states and is given necessary arms by State *B*. Has the State *B* committed aggression against State *A*. ?*

State *B* has not committed aggression within the meaning of the definition of aggression noted above. According to Article 1 of the definition, "Aggression is the use of armed forces by a State............" State *B* has not made use of armed forces against State *A*. For aggression, the use of armed forces of a state is necessary. Since State *B* has not made use of armed forces against State *A*, it cannot be held guilty of aggression.

Consequences of the failure of the Security Council.—The failure of the primary achievement of the maintenance of International Peace and Security had the following three consequences :

(a) The General Assembly started performing those functions which were entrusted to the Security Council such as the determination of the breach of peace or act of aggression and to recommend action (including the use of armed forces) by members.

(b) As an alternative there developed a strong regional security system outside the United Nations such as NATO and Warsaw Pact.

(c) Peace keeping operations (including use of armed forces voluntarily contributed by Member States) were evolved under Chapters VI and VII.[41]

Veto and its effect on the efficiency of the Security Council*

In accordance with the provisions of Article 27 of the Charter, the affirmative vote of 9 members of the Security Council (including the permanent members) is necessary for all important matters. In other words we may say that China, Russia, America, Britain and France, (the permanent members of the Security Council) have been conferred upon the veto power. The veto power was conferred upon them because the framers of the Charter assumed that these Great Powers shall fulfil their responsibility and shall co-operate among themselves for the maintenance of peace and security.[42] This assumption proved to be wrong. The conflict among the Great Powers started immediately after the establishment of the United Nations. The right of veto given to the permanent members of the Security Council has greatly impaired the efficiency of Security Council. Because of this, the Security Council has become a weak organ of the United Nations and has not been able to perform functions entrusted to it under the Charter. It is often claimed that the Security Council was responsible for stopping the North Korea from over-running South-Korea in 1950. But "Nothing could be more misleading since the United States was able to obtain United Nations blessing for military action on that occasion because the Soviet delegate had absented himself from the Security Council and could not interpose his veto in time.[43] When Soviet representative returned to the Security Council the Security Council became unable to make any further action in Korea. Similarly in other important matters the Security Council is not able to perform its functions of maintenance of peace and security because of the exercise of veto power. Recent example of this is the Indo-Pak War of 1971. In the beginning the Security Council could not take any decision because Russia exercised its veto in favour of India. Thus, the veto has greatly impaired the efficiency of the Security Council. As aptly remarked by Prof. Julius Stone, "The Security Council entered upon its tasks for the maintenance of peace, endowed with theory with powers to bind United Nations members by its decision and crippled in practice by the power of each permanent member to prevent by its veto any substantial decision at all".

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[39] Julius Stone, "Hopes and Loopholes in the 1974 Definition of Aggression", A.J.I.L., Vol. 71 (1977), p. 224 at p. 225.

[40] Ibid at pp. 243-44.

* C.S.E. (1989), Q. 7(a).

[41] Bowett, note 30, at p. 37.

* See also for P.C.S. (1964), Q. No. 3(e) ; I.A.S. (1966), Q. No. 8 ; C.S.E. (1985) Q. 5(c) ; IAS (2001) Q. 5(b).

[42] See Tarlok Singh Batra, "Veto Power of the Security Council", I.J.I.L., Vol. 18 (1974), p. 76 at p. 78.

[43] Stephen S. Goodspeed, The Nature and Functions of International Organization, Second Edition, p. 648.

According to the Soviet view, "The well-known clause providing for unanimity of the permanent members of the Security Council when major decisions are to be taken is also a reflection of the principle of co-existence........."[44] In the words of another Russian writer, "As the unanimity principle in its United Nations version is the only platform on which socialist and free economy countries can establish working relations, it assures the Universal Charter of the United Nations. As it is absolutely necessary to preserve this universal character, the unanimity principle is the corner stone of the present public order of the world. It must be adhered to, come what may". [45] Thus in the present circumstances, veto system is inevitable and it has no alternative. But it should be remembered that it is not necessary that its use be made in the same way as was made in the first decade of the United Nations. When the Security Council is unable to take any decision because of veto used by any permanent member, the responsibility of the U. N. as a whole does not come to an end and the General Assembly can then take necessary action in the matter.[46] While it cannot be denied that the veto system is inevitable it must be added that it is a necessary evil. Since it is very difficult rather impossible to remove this necessary evil efforts should be made to find out procedures and methods through which the abuse of this right may be checked or at least restricted.

The "right of veto enjoins upon the permanent members to exercise the right in accordance with the principle of good faith which means that the right must be exercised reasonably, honestly, in conformity with spirit of law, and with due regard to the interests of others by not exercising it in good faith, the user not only deprives the aggrieved member of the benefit of redress but also the other members of the organisation of some of the benefits envisaged under the Charter. (Violation of Article 2 (2) of the Charter implies this conclusion).[47] Further, "the responsibility to maintain international peace and security was conferred upon the Security Council as a whole and not upon any member individually, even a permanent member of the Council; and since Article 27 (3) does not speak of 'all' permanent members, it is submitted that it becomes legal obligation of the Security Council (as a body) to take collective action even against the permanent member/members guilty of Charter violation by the use of armed forces; none of the members, permanent or non-permanent, has the right to paralyse the whole organisation to suit its own interest". [48] Though quite useful, such an interpretation of the U. N. Charter is not likely to be accepted by any permanent member of the Security Council and in the present set up collective action against a permanent member is not possible.

It may be noted here that power of the permanent members to cripple the Security Council from taking any action in respect of maintenance of peace and security has been greatly affected by Uniting for Peace Resolution.*

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44. Victor P. Karpov, "The Soviet Concept of Peaceful Co-existence and Its Implications for International Law", in the Soviet Impact on International Law, Edited by Hans W. Baade, (Dobbes Ferry,New York, 1965), p. 14 at p. 17.
45. Kazimierz Grzybowski, "International Organisations from the Soviet Point of view", Ibid. p. 38 at p. 50.
46. See J.E.S. Fawcett, The Law of Nations (London, 1968), p. 144.
47. See note 41-ante, at p. 80.
48. Ibid, at p. 82.

* See for P.C.S. (1983), Q. 9 ; For the Provisions of Uniting for Peace Resolution, 1950 see Chapter on "General Assembly".

Veto system has now almost crippled the Security Council. Recently even in the case of terrorists, when fourteen members of the Security Council notes to name, a particular person as a 'global terrorist' China exercises its veto or otherwise supports such terrorists. Recently China openly and shamelessly has supported such terrorists. Thus veto, instead of serving the purposes of the Security Council and the U.N. as a whole, has proved an evil.

Indian view on veto system.—India regards veto as a necessary 'evil' with which states have to learn to live with because in view of existing state of international affairs, and in present circumstances, there is no alternative to it.

Contribution of the Security Council in the maintenance of Peace and Security.—As pointed out earlier, the veto has greatly affected the efficiency of the Security Council. Some jurists have pointed out that the only achievement which the Security Council can claim is that of Korea. But it has been made clear earlier that even in that case the Security Council could take decision in the beginning only because the Soviet representative was not present to exercise his veto. But it would be wrong to contend that the Security Council has not made any contribution for the maintenance of International Peace and Security. As a matter of fact, the Security Council has been able to perform its functions properly in cases where the interests of the permanent members were not directly involved. In such cases the Security Council has performed creditable functions. The Security Council has made significant contributions for the cause of world peace in Korea (1948), Indonesia (1949), Indo-Pak-Conflicts (1949, 1965 and 1971), Congo (1960-61), Cyprus (1964), Arab-Israeli-Conflict (1973), Palestine etc.

Reference may be made to the recent situation in Middle East and especially Resolution 2108 (2013) adopted by the Security Council at the 6991st meeting on 27 June, 2013. In this Resolution, the Security Council noted with concern that the situation in the Middle East is tense and is likely to remain so unless and until a comprehensive settlement covering all aspects of the Middle East can be reached. The Security Council strongly condemned the incidents threatening the safety and security of United Nations personnel in recent months including the detention of 21 UNDOF Peace keepers within the area of limitation on 6th March, 2013 by armed elements of the Syrian opposition the detention of 4 UNDOF peace keepers within the area of limitation in the vicinity of Al Jamla on 7th May by armed elements of the Syrian opposition and the detention of 3 UNTSO observers on 15th May by a group of anti-government elements.

Reference may also be made to Resolution 2106 (2013) adopted by the Security Council at the 6984th Meeting on 24 June, 2013. In this Resolution, the Security Council affirmed that sexual violence when used or commenced as a method of tactic of war or a part of widespread or systematic attack against civilian population can significantly accelerate and prolong situation of armed conflict and impede the restoration of international peace and security. The Council emphasized in this regard that effective steps to prevent and respond to such acts significantly contribute to the maintenance of international and security and stressed women's participation as essential to any preventive and protective response.

The Security Council noted that casual violence can constitute a crime against humanity or a constitutive act with respect to genocide. The Council further recalled that rape and other forms of serious sexual violence or armed conflict are war crimes.

The Security Council called upon Members to comply with the relevant obligation to continue to fight impurity and prosecuting those subject in their jurisdiction who are responsible for such crimes. The Council encouraged Members to enable prosecution for such acts.

The Security Council recognized that affirmative investigation and documentation of sexual violence in armed conflict is instrumental both in bringing perpetration to justice and ensuring access to justice for survivors.

However, it cannot but be admitted that Security Council successes are few but its failures are many. Often it is crippled by the provision of veto power. For example in present times, it has failed to end or even minimise the tension between the United States of America and India and China over 'Doklam'. It has failed and failed miserably to take any effective action against terrorism. It may be noted that one thing is certain that it cannot take any action against a permanent member of United Nations even if it violates provisions of the U.N. Charter or otherwise threatens International Peace and Security or if it does anything which is violative of the principles of international peace and security.

Evaluation.—It would be wrong to say that the Security Council has proved to be a complete failure. As a matter of fact, it has been able to perform its functions in cases wherein the direct interests of the permanent members were not involved or where they agreed.[49] United Nations Secretary-General Kurt Waldheim said that the Security Council had proved its value time and again as an indispensable means of defusing critical conflict situations where a major confrontation threatened. It had been less successful in pre-empting conflict by early consideration of potentially dangerous situations. Potential threats to international peace and security and even actual wars were not automatically referred to the Council. In fact, there had been, and were, conflict situations which Member States were very reluctant to have considered by the Security Council.[50] It cannot be denied that the provision of veto has greatly affected its efficiency and it has not been able to perform those functions which are entrusted to it under the Charter and this led to the constant expansion of power and functions of the General Assembly. The powers and functions of the General Assembly reached their zenith in 1950 with the passing of the Uniting for Peace Resolution. Under this Resolution the General Assembly has started performing some of those functions which were entrusted to the Security Council under the Charter and should have been performed by it. But it may be noted that the General Assembly has certain limitations. It is a big body and cannot take as quick and immediate action, as a smaller body like Security Council can. Moreover, the Congo experience has shown that even for the successful functioning of the General Assembly, the cooperation among Great Powers is necessary.

It has been rightly pointed out that the 5 Great Powers (permanent members of the Security Council) have responsibility for world security. But because of the conflict among them the prospects for a workable system of collective security and world peace seem to be fragile. "Some, who originally thought law would work, because it would be enforced by the dominant powers through the Security Council of the United Nations changed their views when the cold war destroyed illusions of Great Powers co-operation to maintain peace.........".[51] Further, "International Security is not possible not for transient or remediable reasons but because the concept is self-contradictory. Thus the myth of International Security ; the persistent belief, contrary to historic evidence as well as to logical demonstration, that States can continue to be sovereign and independent while at the same time it is nevertheless possible to work a system of security among them, International Security.[52] It is, therefore, clear that International Security is not possible unless and until the States of the world are prepared to surrender a part of their sovereignty and to submit to the control and supervision of International body in the real sense of the term. In the view of Prof. Levontin, "There is a need to explode dangerous myth; if not explode atleast expose—for as the myth continues, time is liable to be misspent on it and we have no time to misspend."[53]

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[49] But as pointed out by Prof. Q. Wright, "The United Nations has been more successful in stopping hostilities than in preventing them by setting the underlying problem. This is witnessed by the ceasefire lines allegedly temporary, which remain as inadequate barriers to hostilities in Germany, the Order Neisse Line, Kashmir, the Straits of Formosa, Korea, the Middle East Cyprus and specially Vietnam." The Foundations for a Universal International System", in Asian States and the Development of Universal International Law, Edited by R. P. Anand, (1972) p. 145 at p. 167.

[50] U. N. Monthly Chronicle, Vol. XV (April, 1978), p. 54.

[51] Louis Henkin, How Nations Behave (1968), pp. 134-155; Prof. Lincoln P. Bloomfield has aptly remarked : "When the U. N. Charter was drafted in 1945, the provisions for keeping the peace had to be drawn up to the abstract. There was no tangible enemy, crises were in the future, and commitments were to be made in vacuum. It was only when it became clear what the world was really like that 'peace-keeping' was invented. It turned out that in most conflict situations there was no definable aggressor or victim, that the danger was uncontrolled escalation of local conflicts into the nuclear realm and that the real enemy was a fantastically complex set of instabilities, inequities and passions to which 1945 international ground rules were inadequately related.........the prospects for the workable system of multilateral Peace-keeping remain fragile." "The U. S., the Soviet Union and the Propsects for Peace-keeping." Int. Orgn., Vol. XXIV, No. 3 (Summer 1970), pp. 548, 562.

[52] A. V. Levontin, The Myth of International Security, pp. xvii and xviii.

It is clear from the foregoing discussions that the Charter's provisions for keeping the peace are unrealistic. The maintenance of International Peace and Security cannot be ensured unless there is a superior authority with physical force greater by far than that of any potential aggressor. It is also clear, "that any failure (on the part of the Security Council, is due more to the attitude of its members than to any constitutional defect in the Charter provisions". [54] This is clearly evident from the vacation of Iraqi occupation and aggression as a result of the Gulf War (1991) and the role played by the Security Council. The U. N. cannot be effective in the absence of the assumption in which it was found. Last, but not the least, International law must clearly state what is illegal and must provide the penalties for its defiance. These are the principal requisites for an effective and dependable enforcement machinery of the United Nations.

(II) Elective Functions.—The Security Council also performs some elective functions. For example, Security Council and the General Assembly separately elect the judges of the International Court of Justice.[55] In this way the Security Council participates in the election of Judges of the World Court. Besides this the Security Council also recommends the appointment of the Secretary-General of the United Nations. Article 97 provides that the Secretary General shall be appointed by the General Assembly upon the recommendation of the Security Council. Although the word 'election' has nowhere been used in this Article, but in fact it is the election because the appointment of the Secretary-General is a substantial matter under the Charter and, therefore affirmative votes of 9 members including 5 permanent members are necessary.

(III) Supervisory Function.—The Security Council also performs some supervisory functions. That is to say, it supervises the functions of the Organization as a whole although its supervisory functions are not as wide as that of the General Assembly. But since it has been conferred upon some very important functions in regard to the expulsion and suspension of members it may not be wrong to contend that through this it exercises supervision upon the United Nations as a whole. Article 5 provides that a member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. This Article further provides that the exercise of these rights and privileges may be restored by the Security Council. That is to say, in respect of the restoration of rights and privileges of the members, concurrence of General Assembly is not required. The Security Council has been given exclusive power in this connection. Moreover, Article 6 provides that a member of the United Nations which has persistently violated the principles contained in the Charter, may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council. These powers enable the Security Council to exercise supervision over the Organisation as a whole. Last but not the least, the Security Council is responsible for control and supervision of the strategic areas of the Trust territories, under the Trusteeship System of the United Nations.

(IV) Constituent Functions.—The constituent powers of the Security Council are very important. Article 108 of the Charter provides that amendments to the present Charter shall come into force for all members of United Nations when they have been adopted by a vote of two-thirds of members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations, including all the permanent members of the Security Council. It is clear from this that no amendment of the Charter is possible unless and until all the permanent members of the Security Council give their affirmative votes on it and it is subsequently ratified by their respective governments.[56] In respect of the constituent powers, the Security Council is certainly a more important organ than the General Assembly.

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[53] A. V. Levontin, The Myth of International Security, pp. xvii and xviii at p. xviii.

[54] D. W. Bowett. The Law of International Institutions (1970), p. 25.

[55] See Articles 4 and 8 of the Statute of the International Court of Justice.

Double Veto*—The importance of veto power has been discussed earlier in detail. It has also been pointed out that it has greatly affected or impaired the efficiency of the Security Council. Article 27 provides that the decisions of the Security Council on all important matters shall be made by an affirmative vote of 9 members including the concurring votes of permanent members. That is to say, no important decision can be taken by the Security Council unless and until 5 permanent members give their affirmative votes. Whenever a question arises whether a matter is procedural or substantial, double veto may be used. By 'double veto' we mean that the permanent members of the Security Council can use their veto two times. Whenever a matter or resolution is to be voted, the President of the Security Council determines the procedure of voting and rules whether only 9 affirmative votes are required or whether these 9 affirmative votes should include the affirmative votes of 5 permanent members. In other words in the first place, it is the President of the Security Council which gives his decision as to whether the matter is substantial or procedural. The decision of the President of the Council can be challenged. If any permanent member of the Security Council challenges the said decision of the President of the Council or it gives negative vote or veto against such decision the matter which the President rules as procedural becomes substantive. This is the first time when a permanent member can use his veto. That is to say, the permanent member of the Security Council can by the use of first veto make a procedural matter substantive. Once a matter is declared or becomes substantive, decision on it can be vetoed by any permanent member of the Security Council. This is the second time when a permanent member can use his veto. Thus a permanent member can use his veto two times and this is generally known as 'double veto'. Russia used double veto on the question of Greece, Czechoslovakia and Spain. The essence of double veto has been aptly summed up by Prof. Goodspeed in the following words : "The essence of veto is to manoeuver the Council in voting whether a question is substantive or not. The veto is possible on such a vote which thereby guarantees that the question will become substantial if so desired. Once declared substantive, the question itself can be vetoed.[57]

Relationship between Security Council and the General Assembly**.—In accordance with the provisions of Article 7 of the Charter both Security Council and General Assembly are the principal organs of the United Nations. These two organs occupy a place of prominence in the whole set-up of the United Nations. Many matters under the Charter require recommendations of the Security Council and a decision of the General Assembly. That is to say, no decision can be taken on such matters unless the Security Council has recommended and the General Assembly has also concurred with that decision. For example, the Security Council and the General Assembly separately elect the Judges of the International Court of Justice. Besides this their participation is necessary for admitting a new State to the United Nations. A new State can be admitted to the United Nations only when the General Assembly elects it by two-thirds majority upon the recommendation of the Security Council. Similarly both participate in the suspension and expulsion of members. All these matters can be decided only when there is an affirmative recommendation of the Security Council and concurring decision of the General Assembly. Similarly, the Secretary-General is appointed by the General Assembly on the recommendations of the Security Council.

Moreover, there are certain other provisions under which the Security Council and the General Assembly are connected with each other. The Security Council sends its annual report to the General Assembly. The Budget of the Security Council is also passed by the General Assembly. So far as the maintenance of world peace and security are concerned, its 'primary responsibility' rests upon the Security Council (Article 24) but if Security Council fails to perform its functions or fails to make its affirmative recommendation in regard to any conflict, the General Assembly may step in and perform certain functions relating to peace and security. These powers have been conferred upon the General Assembly under the Uniting for Peace Resolution, 1950. Thus we see that the General Assembly and Security Council are intimately connected with each other. In fact, the United Nations can achieve its objective only when these two principal organs of the United Nations co-operate with each other in solving the problems confronting the Organisation.

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[56] Article 109 of the Charter.

* See also for P.C.S. (1964), Q. No. 3(e) ; I.A.S. (1964), No. 12.

[57] Stephen S. Goodspeed, The Nature and Functions of International Organization. Second Edition, p. 147; see also Alexander W. Rudzinski, "The So-called Double Veto", A.J.I.L., Vol. 45 (1951), p. 443.

** See also for I.A.S. (1959), Q. No. 5.

Comparison of the League Council with the Security Council*.—The originators of the Covenant expected the Council to be the pivotal organ of the League, a sort of revitalized yet disguised Concert of Erupe operating under the majority will of the United States, Great Britain, France, Italy and Japan. It was to perform the role of a modified executive committee and, as such to administer League policy.........As the League system developed, however, the Council failed to measure up to some of the hopes for it. Its life was handicapped from the start by the defection of the United States.........The repeated failure of all the permanent Council members to accept their responsibilities under the Covenant weakened the position of the Council and eventually destroyed the League."[58] The Security Council was also envisaged as the executive of the United Nations by the framers of the U. N. Charter. They conferred upon it the 'primary responsibility' for the maintenance of International Peace and Security, the basic purpose of the United Nations. But because of the conflict among the major powers, the Security Council has failed to fulfil the expectations of the framers of the Charter. But as compared to the League Council, it has proved to be more active and potent and has many a times prevented the escalation of armed conflicts. While the League Council's greatest failure was its inability to prevent the Second World War, the United Nations has been so far successful to prevent the breaking out of the Third World War and much of the credit for this must be given to the Security Council. The Security Council is certainly more potent and effective than the League Council because, *inter alia,* it is represented both by the U.S. and the U.S.S.R.

The Covenant did not make clear demarcation of the functions of the Assembly and the Council. The powers of the Council were scattered throughout the provisions of the Covenant. On the other hand, the Charter of the U. N. made clear demarcation of the functions of the Security Council and General Assembly. Decisions on all substantial matters in the League Council required "the agreement of all the Members of the League represented at the meeting."[59] Thus "the unanimity rule prevailed during Council meetings which permitted any member, large or small, the right of veto."[60] Obviously, on most of the matters it was found difficult to obtain the concurrence of all the members. Procedural matters could, however, be decided by a majority of the Members of the League represented at the meeting. Having benefitted from the experiences of the League, the framers of the Charter modified and diluted the Unanimity Rule. The right of veto was conferred on only five permanent members—the U. S., the U. K., France, China and U.S.S.R. Decision on substantial matters required a majority of seven votes including those of permanent members. Procedural matters required any seven votes. When it was realized that even on procedural matters, decision could not be taken without the help of permanent members, Charter was amended. The number of members of the Security Council was increased from 11 to 15 and it was provided that substantial matters would require nine votes including those of five permanent members. Procedural matters, would require any nine votes. Since Security Council now consists of 15 members, 5 permanent and 10 non-permanent, decision on procedural matters can now be effected by affirmative votes of non-permanent members of the Council. This modified or diluted unanimity rule has proved to be much more effective than that of the League.

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* See also for P.C.S., (1965), Q. No. 5.

[58] Goodspeed, see supra note 57, at pp. 38-39.

[59] Article 5 of the Covenant of the League Council.

[60] Goodspeed, see supra note 57, at p. 40.

The League Council did not possess armed forces or effective sanctions to enforce its decisions. The sanctions at the disposal of the Security Council are certainly more effective. The framers of the Charter envisaged armed forces at the disposal of the Security Council to ensure the maintenance of International Peace and Security and they provided accordingly.[61] But it required special agreements which could not be materialized because of the conflict among major powers. The Security Council also does not possess the permanent armed forces although the Charter envisaged it. Thus the Security Council also depends upon the Member States in this connection. However, Article 54 of the Charter provides that the Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council. Moreover, it is provided that the Members of the United Nations agree to accept and carry out of the decisions of the Security Council in accordance with the present Charter.[62] Under Article 42, it can take such action by air, sea or land forces as may be necessary to maintain or restore International Peace and Security. There was no such provision under the Covenant and here lies the vital difference between the two. In 1950 when North Korea attacked South Korea, the Security Council did take armed action although the fact remains that most of the armed forces were contributed by America and they fought under the banner of the U. N.

The Covenant did not clearly define the limits of self-defence. Article 51 of the Charter only clearly defines the limits of individual and collective self-defence but places the whole matter subject to the review, control and supervision of the Security Council.

Under Chapter VI of the Charter, the Security Council possess wide powers in respect of pacific settlement of disputes. These powers are far greater and wider than those possessed by the League Council.

In view of the above discussion, it may be concluded that the Security Council is definitely a more potent, effective and more representative organ than its predecessor, the League Council, and it has made positive contributions in maintaining or restoring International Peace and Security in a number of conflicts.

Limitations of the Security Council

The first great limitation of the Security Council is the right of veto possessed by the permanent members. It has been discussed earlier in detail as to how veto has impaired the efficiency of the Security Council. Even apart from veto, the Security Council suffered from its inception by other disabilities; some of which were open while others were concealed. These disabilities which threatened its paralysis as an executive organ of International Community were as follows :[63]

(1) The first was the inherent right of individual and collective self-defence against armed attack provided under Article 51 of the Charter.[64]

(2) Secondly, Articles 52 to 54 give the Members liberty of action to enter into regional arrangements.[65]

(3) Thirdly, Articles 53 (1)[66] and 107[67] give the Members liberty of action against former enemy States.

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[61] See Articles 43 and 47 of the Charter.

[62] Article 25.

[63] See Julius Stone, Legal Control of International Conflicts, p. 243.

[64] This has been discussed in detail in Chapter entitled "Intervention".

[65] For detailed study of this see Chapters on "Collective Security" and "Regionalism".

[66] Article 53 (1) provides: The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy State, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such State, until such time as the Organization may, on the request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a State. Article 53 (2) further provides that the term enemy State as used in paragraph 1 of this Article applies to any State which during the Second World War has been an enemy of any signatory to the present Charter.

[67] Article 107 provides: Nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action. It may be noted here that for practical purposes both Articles 53 and 107 have almost become redundant.

(4) Last but not the least, the exclusion from U. N. jurisdiction of matters essentially within the domestic jurisdiction of States as expressly provided under Article 2 (7) of the Charter and by implication under various Articles of Chapters VI and VII.[68]

Binding Character of the Resolutions of Security Council

The resolutions of the Security Council are binding upon the Members. This is evident from Article 25 of the Charter which provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. There is no controversy in respect of the binding effect of the resolutions of the Security Council relating to enforcement measures under Chapter VII of the Charter. But there is some controversy in respect of the binding character of other decisions of the Security Council, especially those made under the provisions of the Charter relating to international disputes and dangerous situations. In its *advisory opinion concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West-Africa). Notwithstanding Security Council Resolution 276* (1970),[69] the International Court of Justice laid these doubts to rest.[70] The World Court observed : 'It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. *Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter.* Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that Part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement actions under Articles 41 and 42 of the Charter that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since the effect is secured by Articles 48 and 49 of the Charter."[71]

But this was an advisory opinion of the Court and some States, particularly France, pointed out that it was a consultative opinion and not a decision. Italy approved Court's opinion in respect of Namibia but disagreed with the Court's interpretation on Articles 24 and 25 of the Charter. After detailed discussion on the Court's opinion, the Security Council adopted by 13 votes to the Court's opinion *vide* resolution 301 (1971). As pointed out by an author,[72] "However, this was perhaps not conclusive of the matter. The abstaining States, for instance, explained that they had abstained because they could not support a resolution which implicitly accepted the advisory opinion of the International Court of Justice." Further, "In conclusion, it should be observed that the controversy as to the scope of Article 25 persists, at least in the attitudes of several States, and that the majority view in the Namibia Advisory opinion has not been accepted as a definite disposal of the issue."[73]

The correct legal position seems to be as stated by the International Court of Justice. The decisions of the Security Council in respect of enforcement measures under Chapter VII as well as other decisions are binding upon the Member States by virtue of the provisions enshrined in Article 25 of the Charter.

First Ever U. N. Council Summit

N.B.—For this please see chapter on "Maintenance of International Peace and Security : Appraisal and New Trends".

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[68] This has also been discussed in detail in Chapter on "Intervention".

[69] I.C.J. Reports (1971), p. 16.

[70] See Louis B. John, "The Development of the Charter of the U. N.; Present State" in The Present State of International Law and other Essays, (1973), 39 at p. 56.

[71] I.C.J. Reports (1971), p. 16 at pp. 52-53.

[72] S. Azadon Tiewal, "Binding Decisions of the Security Council within the Meaning of Article 25 of the United Nations Charter," I.J.I.L., Vol. 15 (1975), p. 195 at p. 213.

[73] Ibid.

CHAPTER 35

THE ECONOMIC AND SOCIAL COUNCIL*

Composition.—The Economic and Social Council (ECOSOC) consists of 54 members which are elected by the General Assembly, one-third of its members are elected each year by the General Assembly for a term of 3 years.[1] Before 31st August, 1965, the Economic and Social Council consisted of 18 members. This number was increased to 27 by an amendment of the Charter in 1963 which came into force on 31st August, 1965. A subsequent amendment to Article 61, which entered into force on 24th September, 1973, further increased the membership of the Council from 27 to 54.[2] Since the membership of the U.N. has now swelled to 192 (one hundred ninety two), a plea can be made for further increase in the membership of the Economic and Social Council to make it more representative. Each member of the Economic and Social Council is entitled to have only one representative in the Council. At present India is one of the members of the Council.

Voting.—Each member of the Economic Social Council is entitled to have one vote. The decisions of the Economic and Social Council are made by a majority of the members present and voting.[3]

President.—President of ECOSOC is elected for one year term and chosen from small or mid-sized represented in ECOSOC. In current session Nestor Osorio was elected sixty-ninth President of Economic and Social Council on 28 January, 2013. Ambassador Osorio was then the Ambassador and Permanent representative of Colombo to the U.N. in New York.

Powers and Functions.—The Economic and Social Council performs the following functions :—

(1) The Economic and Social Council may make or initiate studies and reports with respect to economic, social, cultural, educational, health and related matters and may make recommendations with respect to any such matters to the General Assembly, to the members of the United Nations and to specialised agencies concerned.[4]

(2) It may make recommendation for the purposes of promoting respect for and observance of human rights and fundamental freedoms for all.[5]

(3) It may prepare draft conventions for submission to the General Assembly with respect to matter falling within its competence.[6]

(4) It may call, in accordance with the rules prescribed by the United Nations, International Conference on matters falling within its competence.[7]

(5) The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.[8]

(6) The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out the recommendations of the General Assembly.[9]

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* UPPCS (2003) Q. 8(a).

[1] Article 61 of the United Nations Charter.

[2] See also Egon Schwelb, "Entry into Force of the Second Amendment to Article 61 of the United Nations Charter." A.J.I.L., Vol. 68 (1974), p. 30.

[3] Article 67.

[4] Article 62, paragraph 1.

[5] Ibid., paragraph 2.

[6] Ibid., paragraph 3.

[7] Ibid., paragraph 4.

[8] Article 65.

[9] Article 66, paragraph 1.

(7) It may, with the approval of the General Assembly, perform services at the request of the members of the United Nations and the specialised agencies.[10]

(8) It shall also perform such other functions as are specified elsewhere in the present Charter or may be assigned to it by the General Assembly.[11]

The Economic and Social Council helps in the establishment of world peace by improving the lot of the poor, wounded, and illiterate people. It endeavours to improve the life of the people in many respects. Besides the above-mentioned functions, the Economic and Social Council performs important functions of effecting co-ordination in the works of different specialized agencies. The Economic and Social Council co-ordinates the works of the specialized agencies so as to avoid duplication of a similar work by more than one specialized agencies and to make them more efficacious in the performance of the special functions for which they have been established.[12]

The Economic and Social Council is responsible for improving the standard of living of the people, to provide full employment and to develop social and economic conditions of the people of the world. In order to perform its functions more effectively it has established the four Regional Commissions : (1) Economic Commission for Europe (ECE), (2) Economic Commission for Asia and Far East (ECAFE); (3) Economic Commission for Africa (ECA); and (4) Economic Commission for Latin America (ECLA).

Economic and Social Progress.—The attainment of the economic and social progress is one of the important functions of the United Nations and it was probably with this thing in mind that the framers of the Charter of the United Nations inserted a separate Chapter (Chapter IX) entitled 'International Economic and Social Co-operation'. It is one of the important duties of the United Nations to improve the standard of living of the people, to provide opportunities of full employment and to encourage social and economic development. It is the duty of the United Nations to encourage the achievement of international co-operation in solution of social, economical, educational, cultural and problems relating to health. Article 55 of Chapter IX provides that with a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among the nations based on respect for the principle of equal rights and self-determination of the people, the United Nations shall promote :

(a) higher standards of living, full employment and conditions of economic and social progress and development;

(b) solution of international economic, social, health and related problems; and international, cultural and educational co-operation ; and

(c) universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Under Article 56, all members *pledge* themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55.

For the attainment of these objectives, the General Assembly in 1961, declared the United Nations Development decade. In order to achieve appropriate and balanced economic and social development and for the proper utilisation of economic material and human resources, the United Nations prepares plans and tenders advice to the members. For the attainment of these objectives, the United Nations has convened conferences, many conventions, and has launched many programmes. It has also established certain institutions, the more important of which are given below :

(1) *The United Nations Conference on Trade and Development* (UNCTAD).[13]—It was established as a permanent subsidiary organ of the General Assembly in 1964. Its first conference was held in Geneva in 1964 and the second conference was held in 1968 at Delhi. The main objective of UNCTAD is to encourage international trade for economic development.

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[10] Article 66, paragraph 2.

[11] Article 66, paragraph 3.

[12] See Article 57.

[13] For detailed study see Chapter on "The UNCTAD".

On 11th May, 2005, the General Assembly confirmed the appointment of Supachai Panitchpaddi of Thailand as Secretary-General of UNCTAD. He replaced Rubucus Ricuperco, who remained Secretary-General of UNCTAD from 1995 to 2004.

(2) *The United Nations Development Programme.*[14]—The United Nations Development Programme performs the important function of assisting the under-developed and developing countries in the stage prior to the investment of capital and provides technological facilities. It is the global network of the U.N. and is an organisation advocating for change and connecting countries to knowledge, experience and resources to help people built a better life. The United Nations Development Programme is on the ground in 166 countries working with them on their own solutions to global and development challenges. As they develop world leaders pledged to achieve Millennium Development Goals, including the overarching goal of cutting poverty in half by 2015.

(3) *The United Nations Industrial Development Organisation.*[15]—It was established by the General Assembly on January 1, 1967. Its function is to establish co-ordination among the works of industrial agencies. It became a specialized agency of the U.N. in 1966. It promotes industrialization throughout the world in cooperation with 171 member States. Its headquarter's is in Vienna. The present Director General is Li-Yong. Its parent Organisation is Economic and Social Council of the United Nations.

N.B.—For more details see the chapter on "The Specialized Agencies".

(4) *The United Nations World Food Programme* (UNWFP).—The United Nations World Food Programme was started in 1963 in collaboration of the United Nations and Food and Agricultural Organisation (FAO). It performs the important task of encouraging social and economic development by giving assistance in the form of food-stuffs, etc.

It is the food arm of the U.N. and is oriented towards the objective of eradicating hunger and poverty consistent with its mandate WFP uses—(i) food to support economies and social development; (ii) meets refugees and other emerging needs and provides associated logistics support and (iii) promote world food security in accordance with the recommendations of the U.N. and Food and Agricultural Organisation. The core policies and strategies which govern the activities are to provide food aid (i) to save lives in refusee and other emergency situations; (ii) to improve the nutrition and quality of life of the most vulnerable people at critical times; and (iii) to help build assets and promote the self reliance of the peoples and communities particularly through labour intensive works programme.

UNICEF was created by the U.N. in 1946 to help children after World War II. It protects children and their rights by providing service and supplies as well by helping to shape policy. It has a staff of 7000 people working in 155 countries around the world. On 2nd May, 2005, the new Executive Director, Ann M. Veneman joined and pledged to play a key role in helping to meet the Millennium Developmental goals.

(6) *United Nations High Commissioner for Refugees.*—It was established by the General Assembly on January 1, 1961. Its main function is to give legal protection to the refugees and to provide them material assistance.

The above list is not exhaustive but is simply illustrative of the varied and manifold functions which are performed by United Nations, particularly with the assistance of the General Assembly in collaboration with Economic and Social Council.

Council of the Twenty-first Century

The Economic and Social Council at its first restructured substantive session, held at New York from 29th June to 31st July 1992 adopted more than 130 resolutions and decisions on human rights, social development, crime, narcotic drugs, the acquired immune deficiency syndrome (AIDS), women, international economic co-operation, humanitarian aid and other issues. The diversity of matters addressed by the Council was interwoven by strong common threads ; that poverty is the biggest challenge facing the international community; that peace and security are inextricably linked to economic and social development; and U.N. activities must be reshaped to achieve the integrated approach mandated by the interdependence of those issues. Stressing these important linkages, Secretary-General Boutros Boutros Ghali said he hoped "the Economic and Social Council will become an active and important organ as the Security Council and will become *the Council of the twenty-first century*". [16]

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[14] In short called UNDP.

[15] In short called UNIDO.

As pointed out by Under-Secretary-General for Economic and Social Development, Ji Chaozhu, "Future peace and security and global stability will depend on world's collective ability to improve the living standards and economic and social prospects for the majority of men and women throughout the world". Secretary-General, Mr Boutros Boutros Ghali also aptly remarked, "All humanity's hopes—for peace and security, for health and prosperity, for justice and opportunity—rest upon sustainable, equitable and dynamic development".[17]

In this session, the Economic and Social Council took following important decisions and works :—

(i) Convening a World Summit on Social Development in 1995;

(ii) Adoption of a draft declaration on the Rights of Persons belonging to national, ethnic, religious and linguistic minorities;

(iii) Recommendation to the General Assembly that 1993 be proclaimed a Third Decade to combat Racism and Racial Discrimination; and

(iv) Acceptance of the offer of Egypt to hold International Conference on Population and Development at Cairo from 5th to 13th September, 1994.[18]

Agenda For Development

On 25th May, 1994, Secretary-General of the U.N. Boutros Boutros Ghali released "Agenda for Development", conceived as a counterpart to his 1992 report "An Agenda for Peace"[19] which addressed organization's peace keeping and peace-making activities. "An Agenda For Development" was prepared in response to Assembly resolution 47/181 of 22 December, 1992 *vide* which the Assembly had asked for analysis and recommendations on ways to enhance the U.N. role in promoting international cooperation for development. As pointed out by the Secretary-General, "Development, is still the major activity of the United Nations". He hoped the new "Agenda" would serve "to correct a distorted perception" that the U.N. was dealing only with peace-keeping operations, and to underscore the integral linkage between development and peace.

In an introduction to the "Agenda for Development", Secretary-General maintained, "The concept of development, and decades of effort to reduce poverty, illiteracy, disease and mortality rates, are great achievements of this century". However, he warned that "development as a common cause is in danger of fading from the forefront of our agenda" in the post-cold war era. In Section II entitled "Dimensions of Development", the Agenda sets out five major and interlinked dimensions of development : peace, economic growth, environmental protection, social justice and democracy. In Section IV entitled, "Conclusion". The Promise of Development, Secretary-General states that the U.N. as a "key mechanism" for international cooperation, possesses flexibility, legitimacy and a universal range of action. However, that mechanism is caught in a conflicting cycle, caused by a resistance to multilateralism, a reluctance to provide financial means to achieve agreed ends, and an unwillingness to engage in difficult operations. The only way to progress is with a "new and compelling collective vision".

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[16] U.N. Chronicle, Vol. XXIX, No. 4 (December, 1992) p. 68.

[17] Ibid.

[18] Ibid.

[19] For this please see chapter on "Maintenance of International Peace and Security-Appraisal and New Trends".

The 54-member Economic and Social Council discussed, "An Agenda for Development" at a high level meeting held from 27 to 29 June, 1994, including a policy, dialogue on important developments in world economy between council members and the heads of International Monetary Fund, the U.N. Conference on Trade and Development, International Labour Organisation and the World Bank.[20]

Evaluation*

By launching the above programmes and by establishing different types of institutions, the United Nations has rendered commendable work for the social and economic development of the people of the world. Those who criticise vehemently the United Nations and allege that it has proved to be unsuccessful organization, mainly concentrate on the functions of the United Nations for the maintenance of international peace and security.[21] There is no denying the fact that the United Nations has not achieved the success which was expected from it in regard to the maintenance of world peace. Nevertheless, it cannot also be denied that peace is not simply the negation of war. For establishment of lasting peace, social and economic progress is also necessary. It will be relevant to quote here a few words from the Preamble of the United Nations Educational, Scientific and Cultural Organization (UNESCO): "Since wars begin in the minds of men, it is in the minds of men, that the defences of peace must be constructed".

It has been aptly pointed out, "The United Nations Charter is the first document of international status which concepts the major function of the maintenance of international peace with the function of removal of economic, social and cultural inequalities and the promotion of respect for human rights and fundamental freedoms. It emphasises thereby that international harmony is founded on the material welfare of all peoples, and that wars are the consequence of international political, economic and social inequalities".[22] In this context the ECOSOC and the functions performed by it assume great significance.

The Economic and Social Council (ECOSOC) performs wide variety of economic and social function. It deals with varied functions such as Decolonization, Natural Resources, Transitional Corporations, Industrial Development, Food Problems, Regional Cooperation, Sustainable Development, Reduction of Desertification, human rights etc. It prepares ground for holding of world conferences on subjects such as Welfare of women, Social Development, Prevention of crime and Treatment of offenders, Small Island developing states, Natural Disaster reduction etc. As pointed out by Under-Secretary-General for Policy Coordination and Sustainable Development, "A commitment by the International community to the goals of all of the conferences implies a new vision and a new priority attached to human-centred development".[23]

Thus it is clear that those who are critical of the functions of the United Nations completely ignore its successful functioning in the social and economic fields. Even if we take into account the functions that it has performed and is still performing in social and economic fields, the United Nations has become an institution of inescapable importance and indispensation.[24] As regards ECOSOC, it may be noted that it works as a subordinate organ of the General Assembly. This is evident from Article 60 of the Charter which provides that responsibility for the discharge of the functions of the organisation set forth in the chapter relating to "International Economic and Social Cooperation" (*i.e.* Chapter IX) shall be vested in the General Assembly and under the authority of the General Assembly in the Economic and Social Council which shall have for this purpose the powers set forth in Chapter X (*i.e.* dealing the ECOSOC)".[25]

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[20] U.N. Chronicle, Vol XXXI, No. 3 (September 1994) pp. 58-60.

* See also for C.S.E. (1980), Q. 11(a)—for answer See also Chapter on "Security Council".

[21] As remarked by an eminent author, "During the last couple of Decades, the emphasis in the work of the United Nations has shifted from the maintenance of international peace and security to concern with the problems of major interest to the new and developing countries of the world, the most recently, to a set of problems highlighted by technological developments. This trend will most certainly continue........... What is true of problems in the field of development is equally valid in dealing with other and related global problems that have recently came to be recognized. This includes access to raw materials, population problems, food shortages, environmental protection, and uses of the resources of the sea and outer space".

[22] R.S. Pathak, "The Functioning of International Law in the International System", I.J.I.L., Vol. 24 (1984) p. 1 at p. 9.

[23] U.N. Chronicle Vol. XXXII, No. 1 (March, 1995) p. 82.

[24] Leland M. Goodrich, "The Changing Role of the United States in the United Nations," India Quarterly, Vol. XXXII, No. 1 (January—March, 1976), p. 49 at pp. 65-66, See also "Experts say United Nations System Must Reflect World Realities; 'Call Major Structural Reforms,' U.N. Monthly Chronicle, Vol. XII (June 1975), pp. 40-43.

The growing importance and recognition of human rights has further enhanced the importance of ECOSOC. The ECOSOC has broad responsibility for some 70% of the human and financial resources of the entire UN System including 14 specialized Agencies, 9 financial commission and five regional commission.

During the current session, the UN Development Forum told diverse partnership should be entered into for solving sustainable development challenge. It further urged that debt crisises hitting both rich and poor countries threaten UN development Agenda, stronger joint action of international financial institutions.

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[25] See also Article 66.

CHAPTER 36

THE INTERNATIONAL TRUSTEESHIP SYSTEM AND THE TRUSTEESHIP COUNCIL*

The International Trusteeship System.—Article 75 of the Charter of the U. N. provides that the U. N. shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are referred as trust territories. As regards the basic objectives of the trusteeship system, the Charter provides that in accordance with the purposes of the U. N. laid down in Article 1 of the Charter shall be (a) to further international peace and security; (b) to promote the political, economical, social and educational advancement, of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular or each territory and its peoples and the freely expressed wishes of the peoples concerned and as may be provided by the terms of each trusteeship agreement ; (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the independence of the peoples of the world ; and (d) to ensure equal treatment in social, economic, and commercial matters for all members of the U. N. and their nationals and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.[1]

The Trusteeship system applies to such territories in the following categories as may be placed thereunder by means of trusteeship agreements : (a) Territories held under mandate; (b) Territories detached from enemy States as a result of the Second World War, and (c) Territories voluntarily placed thereunder the system by States responsible for their administration.[2] The trusteeship however, does not apply to territories which become members of the U. N., relationship among which shall be based on respect for the principle of sovereign equality.[3] There may be designated in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies.[4] All functions of the U. N. relating to strategic areas including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

The 11 Territories placed under the Trusteeship system (and their administering powers) were : New Geneva and Nauru (Australia); Rwanda-Urundi (Belgium); Cameroons and Togoland (France); Somaliland (Italy), Western Samva (New Zealand); Cameroons, Togoland and Tanzanyika (U. K.) and the Pacific Islands Trust Territory (United States). It may be noted that the U. N. has also assumed responsibility for South West Africa (Namibia). In 1966 the General Assembly terminated South Africa's mandate over Namibia and in 1967 the Assembly established an 11 member Council for South West Africa to administer the territory until independence. In 1968, the General Assembly declared that the territory of South West Africa would henceforth be known as Namibia and the council was redesignated the U. N. Council for Namibia. Namibia thus became a unique responsibility of the U. N. the only non-self-governing territory for which the U. N. rather than a Member State, assumed responsibility through the Council as the Administering Authority.

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* See also for I.A.S. (1967), Q. No. 5; P.C.S. (1982), Q. 10 (f).

[1] Article 76 of the U. N. Charter.

[2] Article 77 (1).

[3] Article 78.

[4] Article 82.

Since the independence of Papua New Guinea in September 1975 the Trust Territory of the Pacific Islands has been the only remaining U. N. territory. The Trust Territory of the Pacific Islands covers some three million square miles of the Western Pacific Ocean, situated above the Equator. It encompasses some 2100 Islands and islets, which are located in three major archipelagos—the Carolines, the Marshalls and the Marianas. The whole area is called *micronesia* although Guam in the Marianas and Gilbert Islands in the South of the Marshalls are not part of the Trust Territory. It was the only one of the original 11 Territories under the trusteeship system to be designated a "strategic area" under the U. N. Charter. The Trusteeship Council therefore reports on it annually to the Security Council. The 50th session (16th May to 10th June, 1982) of the Trusteeship Council was devoted to examining the conditions in the Trust Territory of Pacific Islands, as well as the question of termination of the Trusteeship Agreement under which the United States governs the territory.[5]

Trusteeship Council

Composition.—As provided under Article 86 of the Charter, Trusteeship Council comprises of the following members of the United Nations : (a) Those members who are administering Trust Territories; (b) The permanent members of the Security Council as are not administering Trust Territories; and (c) As many other members elected for three years' term by the General Assembly as may be necessary to ensure that the total number of Members of the Trusteeship Council is equally divided between those members of the United Nations which administer Trust Territories and those which do not. At present, trusteeship Council members are the United States as the Administering Authority and China, France, the Russian Federation and the United Kingdom serving as permanent members of the Security Council.

Voting.—Each member of the Trusteeship Council possesses one vote. The decisions of the Trusteeship Council are made by a majority of the members present and voting.[6] That is to say, no member possesses veto power in the Trusteeship Council.

Functions and powers.—Trusteeship Council performs the following functions under the authority of the General Assembly :

(1) It may consider reports submitted by the Administering Authority.[7]

(2) It may accept petitions and examine them in consultation with the Administering Authority.[8]

(3) It may provide for periodic visits to the respective Trust Territories at times agreed upon with the Administering Authority.[9]

(4) It may take these and other actions in conformity with the terms of the Trusteeship Agreements.[10]

(5) The Trusteeship Council shall formulate a questionnaire for each Trust Territory within the competence of the General Assembly and shall make annual report to the General Assembly upon the basis of such questionnaire.[11]

(6) The Trusteeship Council may avail itself of the assistance of the Economic and Social Council and of the specialised agencies in regard to matters with which they are respectively concerned.[12]

Problem of the Independence of Trust Territory of the Pacific Islands or Micronesia.[13]—Micronesia is one of the original Trust Territories under the Trusteeship System and is designated a "strategic area" under the U. N. Charter. Article 83 of the Charter provides that all functions of the U. N. relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the Security Council. Trusteeship Council therefore reports to the Security Council about conditions in the Territory.

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[5] See U. N. Chronicle Vol. XX. of 1983, pp. 17-19.

[6] Article 89 of the U. N. Charter.

[7] Article 87 (a).

[8] Article 87 (b).

[9] Article 87 (c).

[10] Article 87 (d).

[11] Article 88.

[12] Article 91.

[13] See U. N. Chronicle, Vol. XXV, No. 3 (September 1988), pp. 49-51.

The Trust Territory of Micronesia consists of three archipelagoes—the Marshalls, the Carolines and the Marianas. The Trust Territory consists of 2,100 Islands and atolls which are scattered over an area of about 7.8 million square kilometres of the Western Pacific, North of Equator. Its combined land area is 1,854 square kilometres.

In 1986 population was estimated at 1,68,431 (Federated States of Micronesia 94,534; Marshall Islands 30,060; Northern Mariana Islands 21,065; and Palau 13,772). The Territory has four administrative entities—the Federated States of Micronesia consisting of Islands of Yap, Truk, Ponape and Kosrae (within the carolines); the Marshall Islands; Palau and the Northern Mariana Islands—which in 1976 were administratively separated from the Government of the Trust Territory of the Pacific Islands.

On 27th May, 1988, the Trusteeship Council recommended that the process of the approval of the compact of Free Association for Palau be completed at the earliest possible. The Council noted that the people of Micronesia in exercise of their right to self-government, as set out in the U. N. Charter, had elected to assume full responsibility for administration in the economic, social and educational fields. The Council also noted with satisfaction the assurances given by the Administering Authority (*i.e.*, the United States of America) that it would continue to fulfil its responsibilities under the Charter and the Trusteeship Agreement.

The Trusteeship Council considered it "appropriate" for the Trusteeship Agreement to be terminated on entry into force of the compacts of Free Association for the Federated States of Micronesia, the Marshall Islands and Palau, and the Commonwealth Covenant in respect of the Northern Mariana Islands. While the Marshall Islands compact entered into force on October 21, 1986, the Federated States of Micronesia Compact and the Northern Mariana Islands Covenant both entered into force on November 3, 1986. Thus only the entry into force of the Compact of Free Association of Palau remains.

The Compact of Free Association for Palau provides for the U. S. to exercise defence responsibilities for the entity. However, because the Palau Constitution prohibits nuclear activity in the area, local courts ruled that the compact must be approved by the same margin as required for the Constitutional amendment (*i.e.*, 75%). A Visiting Mission was sent by the Trusteeship Council to observe a plebiscite on the Compact in June 1987. It reported that 67.59% of the voters favoured the Compact. Palau subsequently enacted legislation authorizing a referendum on a Constitutional amendment to permit adoption of the Compact by a simple majority. The Constitution amendment was approved on 4 August. A second Visiting Mission was sent to observe a 21 August plebiscite on Compact Approval. It reported that 73.04 per cent of the voters voted in favour.

Eight months later, *i.e.*, on 22 April, 1988, the Supreme Court of Palau declared null and void the Constitutional amendment permitting approval of the Compact by a simple majority, thus invalidating the 21 August plebiscite results. The Government of Palau has appealed against the said Supreme Court ruling.

It may be noted here that on 28 March, 1988, the U. S. Senate authorized entry into force of the Compact as soon as Palau had completed Constitutional procedure to approve the Compact. Similar legislation was then introduced before the U. S. House of Representatives.

The U. S. reported to the Council that the Office of the High Commissioner for the Trust Territory of Pacific Islands had been abolished and its functions trasferred to the Office of Territorial and International Affairs in the U. S. Department of Interior. The Soviet Union has criticized U. S. action and said that the U. S. was trying to impose its internal legislation over the Territory and replace the Trusteeship Agreement with domestic regulations. The once united territory had been divided into island entities, while the Micronesian Congress which had tried to preserve the Territory's unity had been dissolved. According to Article 83 of the Charter all the functions of the U. N. relating to strategic areas should be exercised by the Security Council and naturally that included the question of termination of the trusteeship. Until there was a corresponding decision by the Security Council, the U. S. was obliged to supply the U. N. with all the information required on the situation in the entire Trust Territory. Though the U. S. repudiated all the criticism, there seems to be much force in the criticism of the Soviet Union.

Trusteeship mandate of Palau ends

The people of the last Trust Territory, namely the Trust Territory of Palau, freely exercised their right of self-determination in a 9th November, 1993 plebiscite and had chosen, by a 68 per cent majority vote free association with United States of America, the Administering Authority of the Territory. On 17th October, 1994 the United States informed the U.N. Secretary-General that its compact of Free Association with Palau came into force on 1st October, 1994. On 15th December, 1994 the General Assembly through an unanimous resolution (49/63), admitted the Republic of Palau to the U.N. as its 185th member state. On 1st November, 1994 the Trusteeship Council formally suspended operation after nearly half a century. It would henceforth meet only on extraordinary basis, as the need arose.

Independence of South-West Africa (*i.e.,* Namibia)*.—The problem of Namibia has been a concern of the U. N., since the early days of the organisation. Namibia is a vast territory in the South Western part of the continent of Africa bordered by the Atlantic ocean on the west, by Angola on the north, by Zambia on the north-east, by Botswana on the east and south Africa on the South. It covers, an area of 824,269 square kilometres and has a population of about 1.5 million. It was under German administration from 1884 to 1915. After the outbreak of World War I South African forces invaded and occupied the territory. In 1920, the territory was brought under the mandate system to be governed by South Africa. In 1946, the General Assembly recommended Trusteeship status for South West Africa and invited South Africa to propose agreement. In 1947 South Africa submitted report on the Territory for consideration by Trusteeship Council but in 1949 it informed the U. N. that it would no longer transmit information on the territory. The General Assembly, therefore, referred the matter to the International Court of Justice. In its advisory opinion on *the International Status of South West Africa,*[14] the Court found that South West Africa was still a territory under International mandate and that South Africa continued to have international obligations under the League of Nations covenant and mandate, including the obligation to submit reports on and transmit petitions from the territory, the court further declared that the supervisory functions of the League were to be exercised by the U. N. that the General Assembly was the organ legally qualified to exercise those functions previously entrusted to the Council of the League and that South Africa was bound to submit to the supervision and control of the Assembly. The International Court of Justice ruled that under the mandatory system of the League of Nations, the territory of the South West Africa was conferred upon an international status which could not be modified unilaterally by South Africa. Despite this clear verdict of International Court of Justice, South Africa has been defying all resolutions, directives, etc., of the Trusteeship Council, General Assembly and above all Security Council of the United Nations. Nevertheless it may be noted that so far as the legal position is concerned South-West Africa still has international status, and its status cannot be modified unilaterally by South Africa. Its status can be modified only with the concurrence of the United Nations which has succeeded to the functions and powers of the mandatory system of the League of Nations.

In order to implement the above opinion of the World Court, the General Assembly appointed a committee in 1953 and directed it to examine the petitions, as far as possible, according to the mandate system. In this connection the General Assembly once again in 1955 requested the International Court of Justice to give its opinion as to whether or not the said committee had the power to hear oral petitions. In its advisory opinion in 1956, the Court by a majority of 8 to 5 votes, opined that the said committee had power to hear oral petitions.[15]

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* See also for I.A.S. (1955), Q. No. 3.

[14] I.C.J. Reports (1950), p. 128. The facts of the case have been discussed in Chapter "State Succession".

[15] See I.C.J. Reports (1956), p. 23.

In 1960, Liberia and Ethiopia filed a case in the International Court of Justice requesting the Court to declare that the policy of *apartheid* pursued by South Africa was a violation of the mandate. In a judgment regarding preliminary objections of 21 December, 1962, the Court rejected the plea of Liberia and Ethiopia. In 1966, the Court rejected the request on the ground that Ethiopia and Liberia were not directly concerned with the matter and hence they could not claim such rights to be enforced as they do not belong to them.[16] This decision has been subjected to severe criticism. When the decision of the International Court of Justice and the resolution of the General Assembly did not have any effect upon South Africa, the Security Council in 1970, passed a resolution against South Africa. But even this resolution was disregarded by South Africa. Consequently the International Court of Justice was again requested to give its advisory opinion. In its *advisory opinion concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia South-West (Africa). Notwithstanding Security Council Resolution*, 276 (1970),[17] the International Court of Justice held the following :

(1) That the continued presence of South-Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory.

(2) That States members of the United Nations are under obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia and refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to its presence and administration.

(3) That it is incumbent upon States which are not Members of the United Nations to give assistance in the action which has been taken by the United Nations with regard to Namibia.[18]

Thus the presence of South Africa in Namibia is completely illegal and cannot be justified on any grounds. Delay in the solution of the problem is due to the attitude of Western Powers.[19] Therefore, the problem of Namibia is not the problem of pressurising South Africa alone to secure the independence of the territory, or to threaten it with dire consequences in case of its non-compliance, on the contrary, it poses the paradoxical question of how to pressurise the group of western powers who in their turn are able to pressurise South African Government to free Namibia.[20]

General Assembly's Ninth Special Session on Namibia.—From 24th April to 3rd May, 1978, the General Assembly held its ninth Special Session on Namibia. The General Assembly expressed full support for the armed struggle to the Namibian people under the leadership of the South-West People's Organization (SWAPO), its sole and authentic representative, and stated it was imperative that any negotiated settlement be arrived at with the agreement of SWAPO and within the framework of the resolutions of the U. N. The General Assembly adopted resolution S 9/2 containing the Declaration on Namibia and Programme of Action in support of self-determination and national independence for Namibia. The Assembly reiterated that Namibia was the direct responsibility of the U. N. until genuine self-determination and national indepedence were achieved and called for South Africa's complete, immediate and unconditional withdrawal from the entire territory.

South Africa Debarred from 35th Session of the General Assembly.—On 2nd March, 1981, the General Assembly resumed its 35th session to take up the question of Namibia, and voted on the same day to debar the delegation of South Africa from attending the session. The Assembly took this decison on the report of its credential committee which recommended that the Assembly reject the credentials of the delegation of South Africa to the thirty-five session. The Assembly approved it by 112 votes in favour to 22 against, with 6 abstentions. Since then South Africa has not been allowed to attend the session of the Assembly.

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[16] See South West Africa cases I.C.J. Reports (1966), p. 6.

[17] I.C.J. Reports (1971), p. 16.

[18] Ibid, at pp. 315-16.

[19] See S. C. Saxena, "Namibia and the Western Powers", F.A.R. Vol. XXVII, No. 4 (April 1978), p. 58.

[20] Ibid, at pp. 76-77. See also Henry J. Richardson III, "Constitutive Questions in the Negotiations For Namibian Independence." A. J.I.L., Vol. 78 (1984) p. 76 at p. 119.

General Assembly's call for total sanctions against South Africa.—On 6th March, 1981, the General Assembly condemned South Africa for its continued illegal occupation of Namibia and called upon the Security Council to convene urgently to impose comprehensive mandatory sanctions against South Africa in order to ensure its immediate compliance with United Nations resolutions realting to Namibia. At the same time, the Assembly decided to consider whatever action was necessary in accordance with the United Nations Charter in the event of the Council's inability to adopt concrete measures to compel South Africa to end its illegal occupation by withdrawing from Namibia.

Paris Declaration on Sanctions against South Africa.—On 2nd May, 1981, the International Conference on sanctions against South Africa declared that the Security Council should recognize that the situation in Southern Africa, arising from the policies and actions of the racist regime of South Africa, was characterised by constant breaches of the peace and a growing threat to international peace and security, and hence measures under Chapter VII of the United Nations Charter must be taken. The International Conference was organized by the United Nations in co-operation with the organization of African Unity (OAU) and was held at the Paris headquarters of the UNESCO from 20 to 27 May, 1981.

The International Conference in support of the Struggle of the People for Independence (Paris, 25-29, April, 1983).—The Paris Declaration on Namibia was adopted by acclamation on 29 April as the International Conference in support of the struggle of the Namibian People for Independence completed its five-day meeting in Paris. The conference affirmed the inalienable right of the peoples of Namibia to self-determination and national independence in a United Namibia in accordance with the purposes and principles of the Charter of the U. N., the Declaration on the Granting of Indepenedence to Colonial Countries and Peoples, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U. N., and other relevant resolutions of the General Assembly and the Security Council. It noted with deep concern that sixteen and a half years after the termination of South Africa's Mandate over Namibia and twelve years after the advisory opinion of the International Court of Justice of 21 June, 1971, South Africa continues its illegal occupation of Namibia in disregards of the wishes of the international community expressed in numerous resolutions of the General Assembly and of the Security Council. The persistent refusal by South Africa to comply with its obligations under the Charter constitutes a challenge to the international legal system. The repeated use of the veto by the western permanent members of the Secutiry Council to prevent the adoptions of sanctions against South Africa has not only encouraged the South African regime in the lawlessness but has provoked increased acts of defiance to the authority of the U. N. The Conference called upon all States as well as the specialised agencies and other international organizations associated with the U. N., to render increased material assistance to the oppressed people of Namibia and to SWAPO in the struggle for liberation. The conference expressed its dismay at the failure of the Security Council to discharge effectively its responsibilities for the maintenance of international peace and security owing to the opposition of western permanent members of the Security Council. It considered that sanctions under Chapter VII of the Charter, if universally and effectively implemented were the only available means to ensure South Africa's compliance with the decisions of the U. N. and to prevent the intensification of the armed conflict in the region.[21]

Namibia Day.—It may be noted that with a view to draw the attention of the international community to the responsibility of the U. N. for the territory as well as the struggle of the Namibian people for self-determination, freedom and independence in a

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[21] See U. N. Chronicle, Vol. XX, No. 6 of 1983, pp. 55-58.

United Namibia, 26 August is observed at the U. N. every year as Namibia day. Under a 1973 General Assembly decision, the U. N. Council for Namibia was requested to observe annually Namibia Day until Namibia became free and genuinely independent.[22]

Emergence of Namibia as an Independent State.—On 14 July, 1988, the U. S., Angola, South Africa and Cuba reached an agreement to free Namibia from 73 years of South African rule and to provide for the withdrawal of Cuban troops from neighbouring Angola. The U. S. acted as a mediator. The agreement contained a basic set of principles for black majority rule in Namibia. The Secretary-General of the U. N. set 1990 as the year of final independence of Namibia.

On 14 December, 1988, the Protocol on the independence of Namibia was signed at the capital of Congo, Braziville. This Protocol was signed by Angola, Cuba and South Africa. The Protocol provided for withdrawal of Cuban Troops from Angola and the beginning of the first phase of the independence of Namibia on 1 April, 1989. It also provided for the establishment of a Joint Commission in which both the U.S. and U.S.S.R. would be represented. According to the Protocol a tripartite treaty would be signed at Newyork on 22 December, 1988. On the said date, Angola, Cuba and South Africa signed on the treaty. This was indeed an historical day.

As noted above, the first phase of the independence of Namibia began on 1 April, 1989. The roots of imperialism in Namibia were so deep that conflict was inevitable in uprooting them. Despite the presence of U. N. observers, conflicts continued between troops of South Africa and SWAPO. Even the U. N. expressed over the bloodshed thus caused. The situation however improved through the mediation of the U. N. and paved way for elections in Namibia. The second phase of the independence of Namibia began on 22 May, 1989. The third phase began on 1 July, 1989. Under it elections were to be held in November 1989. Though ten parties were fighting elections, SWAPO was expected to emerge victorious.

On 30 August, 1989, the United Nations Security Council voiced unanimous concern at the harrassment of Namibian voters by the racist South African forces and demanded Pretoria's strict compliance with its independence plan for South West Africa (*i.e.*, Namibia). SWAPO urged the international community and the Security Council to help in holding elections without intimidation or interference to enable people to determine their own destiny.

Finally, the elections were held and as expected SWAPO emerged victorious but its hope of winning a two-thirds majority could not be realized. Out of the 72 seats of the Constituent Assembly SWAPO won 42 seats and 21 seats were won by Democratic Turnhalla Alliances, a party of white settlers and black chieftains. The elections were held under the U. N. Speaking at his first Press Conference after South West African People's Organisation (SWAPO) leader, Mr. Sam Nujoma, committed his party firmly to a "mixed economy, emulating Indian example and translating the inspirations received from India during its liberation movement.

Thus on the midnight of 21st March, 1990 Namibia became an independent country. U. N. Council on Namibia held its first session in the Capital of Namibia *i.e.*, Windhoek from 9 to 11 April, 1990 and passed resolution recommending the dissolution of the Council.

The last to become independent was Palau and became a member of the U.N. in December, 1994. Since its work was completed, the Trusteeship Council suspended its operation on November 1, 1994. Though it continues to exist its future role and even existence remains uncertain.

Difference between mandatory system and trusteeship system.*— "The trusteeship system is the successor of the League experiment but it would be a mistake to consider it as simply a prolongation of the mandate system."[23] In the history of the International Organisation, the mandatory system of the League of Nations, through which certain territories which were under-developed and backward were entrusted to some developed countries for their administration and development, was the first experiment of its kind. The chief objective of this system was to improve the lot of inhabitants of such territories so that in the course of time they might become capable of governing their territories by themselves and might achieve eventual independence. It was clearly provided in Article 22 of the Covenant of the League of Nations that the best way of improving the lot of such people was to entrust such territories for administration and development, to certain developed countries. Consequently certain territories which were brought under the control of mandatory system of the League of Nations were entrusted to some developed countries for their administration and development.

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[22] U. N. Chronicle, Vol. XX, No. 9 of 1983, p. 81.

* See also for P.C.S. (1970), Q. No. 2(e) ; I.A.S. (1958), Q. No. 4 ; I.A.S. (1955), Q. No. 3.

[23] Stephen S. Goodspeed, "The Nature and Functions of International Organisation", Second Edition, p. 529.

So far as the comparison between the mandatory system of the League of Nations and trusteeship system of the United Nations is concerned, it may be noted that the scope of the trusteeship system is much wider than the former. The trusteeship system exercises more effective control over the territories under its control. So far as strategic areas or territories of the trusteeship system are concerned, the Security Council of the United Nations exercises effective control over them. It is clearly provided in the trusteeship system of the United Nations that the inhabitants of such territories cannot be recruited in the armed forces of the administering countries, *i.e.*, countries which administer such territories. The administering authority has, in this respect, to act in accordance with the provisions of the collective security of the United Nations.[24] So far as functions and achievements of two systems are concerned, as compared to mandatory system, the trusteeship system has done commendable work. The greatest proof of its success is that it has almost finished its work. It is the only principal organ of the United Nations which may be said to have almost completed its work. Most of the trust territories under the trusteeship system have now attained independence. Leaving aside the case of South-West Africa, it has achieved signal success in respect of all other territories.

The basic objectives of the mandatory system were not clearly defined under the Covenant of the League of Nations. The basic objectives of the trusteeship system are far more advanced than that of the mandatory system and have been described in Article 76 of the Charter. Last, but not the least, "With the League, actual administration was in the hands of mandatory States"; under the U. N. while the direct administration is commonly in the hands of States singly or jointly as 'administering authorities', the U. N. itself may take direct control as it did in Eritrea.[25]

It may, therefore, be concluded that the Trusteeship system of the U. N. is much better and more effective than the mandatory system of the League of Nations.

Evaluation.—The Trusteeship Council has done commendable work. It is the only principal organ of the U.N. which has successfully completed its work. On 15th December 1994, the last Trust Territory, namely the Trust Territory of Palau, was admitted to U.N. as its 185th member. On 1st November, 1994 the Trusteeship Council suspended its operations after nearly half a century. On 10th November, 1994 the Security Council, through an unanimous resolution, terminated the Trusteeship Agreement of Palau. Thus the objective of the Trusteeship Council have been fully achieved. Since the work of the Trusteeship Council is now almost completed, it should now be dissolved. It is suggested that the U.N. Charter be amended and with the dissolution of the Trusteeship Council simultaneously a new Principal organ entitled "Human Rights and Environment Council" be established.

In March, 2005, the U.N. Secretary-General, Kofi Annan, while proposing a sweeping restructuring of the U.N., proposed the complete elimination of the Trusteeship Council. The Trusteeship Council is headed by Michael Duclos with Adam Thomson as Vice-President and the sole current duty is to meet once annually with the heads of other U.N. agencies.

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[24] Article 83.

[25] Norman D. Palmer and Howard C. Perkins, International Relations—The World Community in Transition (Third Indian Edition), 1970, p. 374.

CHAPTER 37

THE SECRETARIAT

As pointed out by Prof. L.M. Goodrich,[1] "The concept of International Civil Service is not new. It was started by the League of Nations. The United Nations has expanded and perfected the League of Nations."

Composition.—The Secretariat is one of the principal organs of the United Nations.[2] The Secretariat comprises of a Secretary-General and such staff as the Organisation may require. The Secretary-General is appointed by the General Assembly upon the recommendation of the Security Council. He is designated as "The Chief Administrative Officer of the Organisation." [3] He is thus not only the Chief Administrative Officer of the Secretariat, but of the whole Organization. The practice of the United Nations shows that the Secretary-General is appointed from a smaller and neutral State. As pointed out earlier, the recommendation of the Security Council is necessary before the General Assembly is able to appoint a Secretary General. The appointment of Secretary-General being a substantial matter, the concurrence of the 5 permanent members is, therefore, necessary for the appointment of the Secretary-General. Only that eminent person of a neutral State may be appointed who can be acceptable to all the five-permanent members of the United Nations. Trigve Lie was the first Secretary-General of the United Nations. He was succeeded by Dag Hammarskjold. Dag Hammarskjold proved to be the most powerful and influential Secretary-General that the United Nations has ever had. He was succeeded by U. Thant of Burma. After Mr. U. Thant, Mr. Kurt Waldheim of Austria became the next Secretary-General of the United Nations. Mr. Kurt Waldheim of Austria was succeeded by Mr. Avier Perez De Cuellar of Peru. He took up the charge of his post on January 1, 1982. His term expired on 31 December, 1986. He was re-elected for another term. On 11 August, 1988, India bestowed upon him the Jawaharlal Nehru Award for international understanding for 1987. After U. Thant, he is the Second U.N. Secretary-General to be chosen for this prestigious Award. The second term of Mr. Avier Perez De Cuellar ended on 31 December, 1992. He was succeeded by Mr Boutros Boutros Ghali of Egypt who took over as the Secretary General of the U.N. on 1st January, 1992. The seventh and the present Secretary-General of the U.N. is Kofi Annan of Ghana aged 59 years. Kofi Annan has become Secretary-General when the U.N. is confronted with formidable problems and challenges. The most formidable problem that he has to confront with is the financial crisis of the U.N. within a short period. Kofi Annan has demonstrated his diplomatic skills and capability. He was instrumental in preventing the Gulf War between the United States of America and Iraq over the participation of American Inspectors to search weapons in Iraq. Kofi Annan was selected the U.N. Secretary General for the second term also. His second term started from January 1, 2002. Before Kofi Annan completes his second term a new Secretary-General will have to be selected. This time India nominated her candidate for this prestigious post. India nominated her writer-diplomat Shashi Tharoor for the prestigious post of Secretary-General of the U.N. Shashi Tharoor was, however, defeated by Ban Ki Moon. Thus Ban Ki Moon became the eighth Secretary-General of the U.N. on the recommendation of the Security Council the General Assembly adopted a resolution on 13 October, 2006 through which Ban Ki Moon was formally appointed the eighth Secretary-General of the U.N. Ban Ki Moon assumed his charge on 1 June, 2007. His first term expired on 31st December, 2011. He was re-elected unopposed for the second term on 21st June, 2011. His second term began on 1st January, 2012. The present Secretary-General of the U.N. is Antonio Guterres. He is on this post since 1 January, 2017. He was appointed by the General Assembly of the U.N.

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1. L.M. Goodrich, The United Nations, p. 131; see also Stephen S. Goodspeed, The Nature and Functions of International Organisation, pp. 364-366.
2. Article 7 of the U.N. Charter.
3. Article 97.

on 13 October, 2016. In Order to maintain the international character of the Secretariat and to make it impartial, the Charter clearly provides that the Secretary-General and his staff shall not take direction from any Government and the member-State of the United Nations shall also respect the exclusively international character of the responsibilities of the Secretary-General and the staff and shall not seek to influence them in the discharge of their responsibilities.[4] Asked for his view on the belief of international commentators that in him, third world had acquired a standard-bearer at the U.N., the Secretary-General, Mr. Perez De Cuellar replied : "I am very gratified that, that is being said, but at the same time I want to make it clear that the Secretary-General of the United Nations is an international figure who must stand apart from any causes, however noble they may be. This means that, although I am, of course, at heart a member of the third world, my work will consist essentially of trying to maintain the dialogue between the third world and the second and first worlds, since the function of the United Nations is precisely to be the major forum for understanding and consultation among the parties." The staff of the Secretariat is appointed by Secretary-General in accordance with the rules determined and established by the General Assembly. According to the Charter, the paramount consideration in the employment of the staff and in the determination of the condition of service shall be the necessity of acquiring the highest standards of *efficiency, competence and integrity.*[5] The Charter provides only these guidelines. The terms and conditions of service of staff are governed by the rules established by the General Assembly. Article 101 further provides that due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. That is to say, the first thing that is to be ensured is the highest standards of *efficiency, competence and integrity*. Thereafter as far as possible the staff should be recruited on geographical basis so as to make the International Civil Service, International in the real sense of the term.

The International Civil Service Advisory Board, an 11-member body was established in 1949. The decision to replace it with the International Civil Service Commission was taken by the General Assembly in 1972.[6] The Commission was to have been set up on 1st January, 1974, but in December, 1973, the General Assembly decided to defer action and to have the draft Statute referred to Governments for comment. Thereupon, the General Assembly adopted the Statute of the Commission in December 1974. The Commission held its first Session at Headquarters from 19th to 30th May, 1975. It is concerned with a wide range of salary and of other questions affecting the nearly 40,000 staff members of the United Nations of Organisation.[7]

As pointed out above, the Secretary-General is appointed by the General Assembly on the recommendation of the Security Council. In 1961 Soviet Union refused to contribute her share in the expenses incurred by the U.N. in Congo operations. She doubted the independence and impartiality of the Secretary-General. The Soviet Union demanded that instead of one, there should be three Secretary-Generals—one from Communist States, one from Western States and one from the neutral States. This is known as 'Troika' demand. If Soviet Union had succeeded in her design she would have procured the right of veto in respect of U.N. Forces and administrative matters. But other States did not agree with this and rejected the Soviet demand.[8]

Functions of the Secretary-General[9]

The Secretary-General performs the following functions :

(1) The Secretary-General is the Chief Administrative Officer of the Organisation.[10]

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[4] Article 100; see also S.M. Schwebel "International Character of the Secretariat of the United Nations", B.Y.B.I.L., Vol. XXX (1953), p. 71.

[5] Article 101.

[6] See Gen. Ass. Resolution 3042 (XXVII).

[7] See U.N., Monthly Chronicle, Vol. XII, No. 6 (June, 1975), p. 39.

[8] Richard N. Gardner, "The Soviet Union and the United Nations", in the Soviet Impact on International Law (Dobbs Ferry, New York, 1965), edited by Hans W. Baade, p. 1 at p. 4.

[9] For detailed study see also S.K. Kapoor, "Constitutional and Legal Norms Governing the Role of Secretary-General and His Functions", (1973) S.C.J. 1st March, 1973, p. 5.

[10] Article 97.

(2) The Secretary-General acts in the capacity of the Chief Administrative Officer of the Organisation in all meetings of the General Assembly, the Security Council, the Economic and Social Council and of the Trusteeship Council and performs such other functions as are entrusted to him by these organs.[11]

(3) Secretary-General makes annual report to the General Assembly on the work of the Organisation. In fact, the Annual Session of the General Assembly begins with the discussion of the report of the Secretary-General on the work of the Organisation as a whole.

(4) The Secretary-General may bring to the notice of the Security Council any matter which in his opinion threatens the maintenance of International Peace and Security.[12]

(5) The Secretary-General gets collected all the statistics in regard to the economic condition of the whole world and submits those datas to the Economic and Social Council.

The Report of the Preparatory Commission listed the functions of the Secretary-General under the following six headings : (i) general administration; (ii) technical functions; (iii) financial function; (iv) the organisation and administration of the secretariat; (v) political functions; and (vi) representational functions.[13] Thus the office of the Secretary-General "was presented as one demanding qualifications of a high order, political as well as technical." [14]

The constitutional basis for the role of the Secretary-General is contained in Articles 97 to 101 of the Charter, Article 97 deals with the composition of the Secretariat, designation of the Secretary-General and his appointment.

Article 98 is the first of the two articles which lay down the political responsibilities of the Secretary-General. It provides that the Secretary-General shall act as the Chief-Administrative Officer of the Organisation in all the meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and the Trusteeship Council, and "shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make annual report to the General Assembly on the work of the Organisation." As pointed out by the former Secretary-General, U. Thant, "this is a radical departure from the non-political concept of Secretary-Generalship to be found in the Covenant of the League of Nations. Article 98 by providing that the Security Council; the General Assembly and other organs may entrust the Secretary-General with unspecified other function has brought him and the Secretariat into the arena of political conflict." [15] Prof. Goodspeed has also remarked, "Much more significant has been the use of an unheralded clause of Article 98 of the Charter which directs the Secretary-General to perform such other functions as are entrusted to him by the major organs of the United Nations. In addition to carrying out routine assignments within this grant of authority, the Secretary-General has been invested with political tasks never foreseen by the framers of the Charter." [16] It was probably on this basis that the Uniting for Peace Resolution which was adopted by the General Assembly on 3rd November, 1950, established a Collective Measures Committee and directed it in consultation with Secretary-General and with member States as the Committee finds appropriate, to study and make a report to the Security Council and the General Assembly on methods which might be used to maintain and strengthen International Peace and Security. The establishment of UNEF, ONUC and UNFICYP are other examples of the grant of powers to the Secretary-General in the politico-Military field. In its advisory opinion on *Certain Expenses of the United Nations*, the International Court of Justice on 20th July, 1962 "voiced the opinion that the

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[11] Article 98.

[12] Article 99.

[13] Report of the Preparatory Commission of the U.N. (PC/20, 23rd December, 1945), pp. 81-103.

[14] H. Leland M. Goodrich, "The United Nations". p. 136.

[15] "The Role of Secretary-General", U.N. Monthly Chronicle, Vol. VIII, No. 9 (October, 1971), p. 178 at 182.

[16] The Nature and Function of International Organisation, page 374.

Organisation may do what it is not prohibited from doing. It lent great strength to the role of the Secretary-General and construed his powers under Article 98 in a most comprehensive manner."[17]

Article 99 of the Charter gives the Secretary-General political responsibility in his own right. As aptly remarked, "The opportunity for political initiative by the Secretary-General of the United Nations is seen as founded upon Article 99 of the Charter, which empowers the Secretary-General to bring to the attention of Security Council any matter which in his opinion may threaten the maintenance of international peace and security."[18] While elaborating on Article 99, the Preparatory Commission of the United Nations stated, it is impossible to foresee how this article will be applied; but the responsibility it confers upon the Secretary-General will require the exercise of the highest qualities of judgment, tact and integrity.[19] This is the only official guidance which is available to the Secretary-General on the implications of Article 99. It is really surprising to note that it was adopted with very little debate at San-Francisco. As pointed out by former Secretary-General, U. Thant, "The right to bring matters to the attention of the Security Council implies a watching brief and a broad discretion to conduct inquiries and to engage in informal diplomatic activity in regard to matters relating to the maintenance of international peace and security."[20]

Article 99 is thus vague as well as of far-reaching significance. "It has been specifically invoked only once. Nothing could be more divisive and useless than for the Secretary-General to bring a situation publicly to the Security Council when there is no practical possibility of the Council agreeing on effective or useful action. On the other hand, a quiet approach which avoids a public confrontation may often hold some hope of success."[21] While explaining the reason as to why he did not act under Article 99 when he convened the Security Council to hear one appeal from Laos to halt aggression, Dag Hammarskjold said that to have done so, "would necessarily involve a judgment as to the facts on which in the prevailing situation, he did not have a sufficient basis."[22] A similar observation was made by him in 1961 with respect to the dispute between France and Tunisia.

In the view of former Secretary-General, U. Thant, "The drafters of the Charter were over-obsessed with political and military conflict."[23] He, therefore, suggested that in the world of today, it might be useful to add an Article 99 (a) which would authorize the Secretary-General to bring to the attention of the membership global threats to human well-being other than those to peace and security."[24] That is to say, the Secretary-General's obligations under Charter must include any humanitarian action that he can take to save the lives of large number of human beings."[25]

The Charter also provides that in the performance of their duties the staff shall not seek or receive instructions from any Government or other authority external to the Organisation, and that each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the

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17. The Nature and Function of International Organisation, p. 374.
18. Robert W. Cox, "The Executive Head : An Essay on Leadership in International Organisation". International Organisation, Vol. XXIII (1969), p. 205 at 208.
19. Report of the Preparatory Commission of the U.N. (PC/20, 23rd December 1945) pp. 81-103.
20. "The Role of the Secretary-General". U.N. Monthly Chronicle, Vol. VIII, No. 9 (October, 1971), p. 178.
21. Ibid, p. 184, Recently it was invoked for the second time for Iran-American conflict.
22. Stephen Bailey, "The Secretariat of the U.N.", p. 35.
23. "The Role of the Secretary-General", U.N. Monthly Chronicle, Vol. VIII, No. 9, p. 178 at 185.
24. Ibid.
25. Ibid.

staff and not to seek to influence them in the discharge of their responsibilities.[26] Last but not the least, Article 101 confers upon the Secretary-General the power to appoint the staff under regulations established by the General Assembly. Thus "the independent international character of the Secretariat is specially safeguarded by the provisions of Articles 100—101 of the Charter, which are expressed to bind both member States and officials of the Secretariat." [27]

The Secretary-General of the United Nations has assumed an increasingly active and influential diplomatic role because of the three major factors : (i) the legal norms governing the office ; (ii) certain practices of the member States; and (iii) the political attitudes of the members towards the office.[28] It may be noted here that the most important factor which has led the States to use the Secretary-General as an agent for peaceful settlement has been the legal authority granted to him under Articles 98-100. Besides this, "A legal norm which has encouraged the mediator activities of the Secretary-General but which is not related to any specific provision of the Charter is that resolution of the General Assembly and Security Council are binding on the Secretary-General." [29] It was on this assumption that the successive Secretary-General supported the resolutions of the General Assembly and Security Council. Dag Hammarskjold stated in unequivocal words that they were "law for the Secretary-General." [30] As regards another aspect of the legal norms that has been influential in changing member's attitude concerning the kinds of action that are politically desirable or acceptable, Prof. Mark W. Zacher, has aptly stated, "By their handling of the problems presented to them, the Secretary-Generals have changed those aspects of the international environment (the attitude of States which most crucially determined the activities and effectiveness of their office." [31] As a matter of fact, the office of the Secretary-General has been shaped by the character of its successive incumbents and especially by the outstanding achievements of Secretary-General Dag Hammarskjold.[32]

The responsibility for grappling with the initial administrative problems necessarily fell upon Trygve Lie, the first Secretary-General of the United Nations. His main contribution was that he established the expectations that his office would be a diplomatically active one. However, his major failure was that he failed to create for the office an image of an effective instrument of peaceful settlement. The appointment of Dag Hammarskjold as Secretary-General in 1953 "brought to that office a person who soon demonstrated a capacity for performance that won for him the confidence of Governments and led to their vesting unprecedented responsibilities in him." [33] The members recognised his superior diplomatic skills and his ability to achieve diplomatic success. His mediation of the dispute between the United States and Communist China over the imprisonment of a number of American fliers by the latter may be marked watershed in the development of the role of the Secretary-General. Later in 1956, his handling of the Suez Crisis further strengthened the Member's new outlook on the office. U. Thant also commanded high respect but was not regarded by most observers as having the unusual fitness and physical energy of Hammarskjold. Nevertheless he has been regarded as an influential diplomatic figure and has performed different kinds of activities which were originated by his predecessor.[34] Dr. Kurt Waldheim also proved to be an active Secretary-General. He offered to mediate in Vietnam but both sides indicated that they did not want to accept his good offices.[35] This however, illustrates that "Most frustrating to a Secretary-General is the failure of his continuing attempt to bring together the disputants in a truly serious conflict. The war in Vietnam is undoubtedly the best example of this type of problem which is a grave threat to peace." [36] The Secretary-General, Mr. Avier Perez De Cuellar of Peru who took up the charge of the Secretary-Generalship of the United Nations on January 1, 1982, has also been performed a wide variety of functions.

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[26] Article 100.

[27] J.G. Starke, "An Introduction to International Law", Seventh Edition (1972), p. 622.

[28] Mark W. Zacher. "The Secretary-General and U.N. Function of Peaceful Settlement". International Organisation, Vol. XX (1966), p. 724 at 727.

[29] Ibid., p. 730.

[30] Ibid., pp. 730-731.

[31] Ibid., p. 731.

[32] Charles Winchmore, "The Secretariat: Retrospect and Prospect", International Organisation, Vol. XIX, No. 3, (Summer 1965), p. 622.

[33] Leland M. Goodrich, "The Maintenance of International Peace and Security", International Orgnisation, Vol. XIX, No. 3 (1965), p. 429 at 437.

[34] See also K.P. Saxena, "The Secretary-General", India Quarterly (1975), p. 342.

Two practices of the Members, *viz.* the creation of peace-keeping operation under the executive direction of the Secretary-General and the establishment of permanent diplomatic mission at the United Nations have made a significant impact on the peaceful settlement activities of the Secretary-General. As aptly remarked by Prof. Leland M. Goodrich and Anne P. Simons, "The Charter of the United Nations, although open to much justifiable criticism of its details, has generally shown a remarkable flexibility in practice and a capacity for being interpreted and applied in such a manner as to remedy its inherent weaknesses and deficiencies and to provide the basis for healthy institutional development." [37] The experience has shown that the United Nations is legally capable of growth and development to meet needs which were unforeseen when the Charter was drawn up in 1945 and is legally competent to deal with situation which were either not envisaged or imperfectly appreciated. The failure or inability of the Security Council to implement Chapter VII of the Charter made it necessary for the United Nations to supplement the resources for the maintenance of peace. This was done by the establishment, on the one hand, of the United Nations Field Service as a permanent basis on the other hand, of special peace-keeping forces such as UNEF and ONUC. Secretary Generalships of both Dag Hammarskjold and U. Thant have demonstrated that members feel obliged to make use of the Secretary-General for any negotiations relating to the use of United Nations observers or peace-keeping forces in the settlement of disputes. Negotiations leading to the establishment of the United Nations Operations in Egypt, the Congo, West Iran, Yemen, and Cyprus are prominent examples. All these cases lent strength to the mediatory role of the Secretary-General.[38]

As regards the establishment of permanent delegation, Charles Winchmore has aptly stated, "It has become an essential function of the Secretary-General himself to act as a channel for communication and for consultation between delegations." [39] Moreover, "The establishment of permanent delegation has exercised considerable influence on the role of the highest officials of the Secretariat.[40] The presence of the permanent representatives of different countries at the Headquarter has enabled the Secretary-General to discuss alternative approaches to problems before the United Nations and to ensure that his own views are placed before the Governments. Consequently, a considerable responsibility has developed on the Secretary-General in the formation of consensus of views among delegations on specific issues which are under the considerations of the United Nations.[41] The Advisory Committees on UNEF and Congo evidence, the special relationship of the Secretary-General to the delegations. Thus the practice of Members relating to the establishment of permanent delegations has made the Secretary-General in a very real sense the "Chief Administrative Officer of the Organisation." [42]

It will not be out of place to make a brief reference to the devotion of the Secretary-Generals to the ideas of the Charter. While all the Secretary-Generals showed their devotion to the ideas of the Charter, Dag Hammarskjold has outshone all others in this respect. While offering to resign after the Anglo-French vetoes in the Security Council during the Middle East crisis in 1956, he remarked, "The principles of the Charter are, by far, greater than the Organisation in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people........... He must also be a servant of the principles of the Charter, and its aims must ultimately determine what for him is right and wrong." [43] What followed was "a dramatic and unusual display of international unanimity as the members of the Security Council one by one, rose to express their support of the unsmiling Secretary-General." [44]

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[35] The Poineer, dated 28th April, 1972.

[36] Stephen S. Goodspeed, "The Nature and Function of International Organisation", p. 646.

[37] The U.N. and the Maintenance of International Peace and Security, p. 627.

[38] Mark W. Zacher, "The Secretary-General and the U.N. Function of Peaceful Settlement", International Organisation, Vol. XX (1966), p. 724 at 734.

[39] "The Secretariat: Retrospect and Prospect", International Organisation, Vol. XIX, No. 3 (September 1965), p. 622 at p. 635.

[40] Ibid.

[41] Andrew Cordier, "The Role of the Secretary-General", Annual Review of U.N. Affairs, (1966) 61, pp. 1-14.

[42] Article 97.

As regards the political attitudes of the members toward the office, it may be noted that "it has also become increasingly recognised that in most instances the mediatory functions could only be performed by an individual—not a committee or group." [45] For instance, "The Kashmir, Korea, Palestine and Balkan Commissions and the Indonesians" Good Offices Committee were slow, ponderous, indecisive, and sometimes inept......... There was the constant possibility of serious division of opinion within the commission which would render it incapable of firm and clear action." [46] Thus the States wanted an individual who would be viewed as politically impartial. Yet another factor that led to the development of the role of the Secretary-General was that the States wanted an agent who was always available to them and who was familiar with their problems.

The political responsibilities of the Secretary-General also include functions such as drawing up the provisional agenda for the Assembly, the Security Council and the Trusteeship Council and proposing items for inclusion in the agendas for such bodies. He also submits an annual report to the Assembly on the work of the Organisation. Apart from the political functions, he also performs technical functions such as the preparation of studies, reports, legal briefs, and surveys on different questions. In the meetings of the different organs of the Organisation, he answers question on technical matters.

The Secretary-General also performs important financial functions such as the preparation of United Nations budget, the allocation of funds, the collection of all contributions from members and the control over expenditure. Besides this, the Secretary-General performs various functions concerning the organisation and administration of the Secretariat. It is he who is mainly responsible for creating and maintaining a team spirit in the body of officials who are recruited from many countries. Last but not the least, he performs representational functions. It is he who "represents the Organisation in all its negotiations with the Governments of members and non-members alike and with outside agencies. His press conferences, public addresses, and press releases speak authoritatively for the United Nations." [47]

The extensive use of the formal powers by the Secretary-General and the development of his role in peaceful settlement activities have had considerable effect on the United Nations as a whole. The most important procedural change that has taken place in the peaceful activities of the United Nations since its inception "has been the emergence of the Secretary-General as an active diplomatic agent." [48] The development of the role of the Secretary-General as an effective instrument of conciliation at the disposal of the Security Council and the General Assembly and the consent availability of his assistance to the members have been to a great extent instrumental in converting the United Nations into a more effective centre for the resolution of international disputes.[49]

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[43] Referred in Stephen S. Goodspeed, "The Nature and Function of International Organisation", p. 376.

[44] Ibid., p. 377.

[45] Mark W. Zacher, "Secretary-General and the U.N. Function of Peaceful Settlement", International Organisation, Vol. XX (1966), p. 724 at 728.

[46] Phillip E. Jacob and Alexine L. Atherton, "The Dynamics of International Organisation : The Making of World Order, p. 315.

[47] Stephen S. Goodspeed, The Nature and Function of International Organisation, p. 372.

[48] International Organisation, Vol. XX (1966), p. 724 at 735.

[49] Ibid., p. 736.

Yet another important effect ensuing from the development of the Secretary-General's role is that it has given the Organisation a certain nascent autonomy from its members. This is an indicator of the process of political integration in the international system.[50] Thus as remarked by a British Scholar, in the late 1950's there emerged "the growth of the notion of the United Nations not merely as a centre for the harmonization of conflicting interests but as an international person with authority over and above that accorded to it by its Members." [51]

There is every likelihood that the importance of the Secretary-General's position will continue to increase so long as the opposing groups within the United Nations tend to balance and neutralise each other.[52] Prof. Leland M. Goodrich has also aptly remarked, "there are factors present which make it almost inevitable that the office of the Secretary-General will continue to be important in the future and which if discreetly used will contribute to the continuing growth of the Secretary-General and his staff." [53] He points out three reasons for this. In the first place, "the Secretary-General is the only leading personality who is in a position to represent the United Nations continuously." Secondly, with the exception of the President of the Assembly, "the Secretary-General is the only topline official who represents all the interests and activities of the United Nations, and who is, therefore in the position to represent the United Nations before the world." Thirdly, "the Secretary-General has at his command a trained and experienced staff which is familiar with the structure, procedures, and functions, of the Organisation."[54] Besides this, the main significance of the evolution of the role of the Secretary-General lies in the fact that it provided means for relatively smooth and fast action, which might otherwise not have been open to the Organisation. Lastly, the mediatory activities of the Secretary-General are bound to expand with the continued drift toward supernationality.

It may, however, be noted that even an outstanding Secretary-General is not an adequate substitute for agreement of the major powers on critical issues. This conclusion can fairly be drawn from the Congo experience." [55] In fact, "The combination of great powers failure to agree among themselves and the belief of the United Nations' majorities that it was necessary that the United Nations should intervene to prevent the deterioration of situation in the Middle East and Congo resulted in devolution of substantial political and administrative responsibilities on the Secretary-General." [56] Thus, it is evident that the Secretary-General is not an adequate substitute for agreements of the major powers on critical issues or the assumptions of the great powers unity upon which the whole fabric of International Peace and Security envisaged the Charter is based.

The Secretary-General is the servant of the principles of the Charter and its aims determine for him what is right and wrong. He should be impartial but not necessarily neutral.[57] He must have that political judgment, tact and integrity which the Preparatory Commission mentioned. Moreover, he must usually operate within highly realistic limits if he is to achieve any useful results at all for as the former Secretary-General, U. Thant has pointed out, "The United Nations as an Organisation is often an ideal recipient of the buck, and it follows that the Secretary-General can easily become a scapegoat in dangerous situations where no solution can be found." [58] In his view, "The Secretary-Generalship is at the same time an absorbing, a thrilling and a deeply frustrating task"[59] and it is the most varied, most interesting and most challenging political job on earth.[60] The Secretary-General is in fact, "the most highly qualified representative of international spirit...... he must proceed with caution. He must strike a sensitive balance between the ideal with which he is charged and the reality with which he is confronted. The ideal could not be higher nor the reality harsher." [61]

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[50] Ernest B. Haas, Beyond the Nation State : Functionalism and International Organisation, p. 132.

[51] Geoffery L. Goodwin, "The Political Role of the U.N. : Some British Views", International Organisation, Vol. XV (1961), No. 4, p. 59.

[52] Elsmore Jackson, "The Developing Role of the Secretary-General", International Organisation, Vol. XI (1957), pp. 431-45.

[53] The United Nations, p. 142.

[54] Ibid.

[55] Leland M. Goodrich, "The Maintenance of International Peace and Security", International Organisation, Vol. XIX, No. 3 (September, 1965), page 429 at 441.

[56] Lawrence S. Finkelstein, "The United Nations; Then and Now", International Organisation, Vol. XIX, No. 3, p. 367 at 386.

[57] Editorial entitled "Secretary-General" , "Herald", 23rd December, 1972.

[58] "The Role of Secretary-General", U.N. Monthly Chronicle, Vol. VIII, No. 9 (October, 1971), p. 178 at 186.

Thus the constitutional and legal norms governing the role of the Secretary-General along with certain practices of the Member States and the political attitudes of the members towards the office have led to the devolution of important responsibilities on the office of the Secretary-General of the United Nations. He considers the problems of peace and war and the problems of the present and the future of mankind. The United Nations has become a forum of inescapable importance and no problem of world-wide significance can be settled without its association in some way or other. With the constant increase of the importance of the United Nations as a world forum, the importance of the office of the Secretary-General is bound to increase. Though there are certain clear limitations the Secretary-General of the United Nations will continue to wield immense power and influence in respect of various activities associated with the United Nations, especially the United Nations function of peaceful settlement. Much will, however, depend upon the character of the individuals who hold the office and the political circumstances of the day. With the constant increase in the range of human problems in the social, economic and political area, it has become urgent to pursue effectively these problems on a global scale and hence the significance of the office of the Secretary-General must also grow correspondingly. Moreover, as an effective instrument of conciliation in the hands of principal organs of the United Nations such as the Security Council and the General Assembly and as a mediator for the member States, the office of the Secretary-General has become indispensable. The nuclear arms race, division of world into opposing groups and other facts of international politics are other factors which have added to the importance of his office.

It may be noted here that pursuant to Article 96 (2) of the U.N. Charter, the General Assembly has authorized the Trusteeship Council, ECOSOC, the Interim Committee of the General Assembly and the Committee on the Application for Review of Administrative Tribunal Judgments as well as 14 specialized agencies and the IAEA to request advisory opinions of the International Court of Justice. It has been suggested, and rightly too, that the Secretary-General should also be authorized to seek advisory opinions of the Court.[62]

Last but not the least, reference may be made to a special report entitled, "An Agenda for Peace" in which Secretary-General Boutros Boutros Ghali has offered a multi-faceted plan to enable the United Nations to take a wider mission in the pursuit and preservation of world peace. His plan includes proposals on 'Preventive diplomacy', 'Peace-making', 'Peace-Keeping' and 'Post-conflict peace-building'. His plan will undoubtedly require a greater and more active role of the Secretary-General. His plan relating to 'Preventive Diplomacy' deserves a special mention here. According to his plan, the most desirable and efficient use of diplomacy is to ease tensions before they result in conflict to foster preventive diplomacy. He proposed the following :

(i) Measures to increase fact-finding and build good faith between States;

(ii) Establishment of an early warning system for assessing possible threats to peace ;

(iii) Identification by the Council of economic and social situations that might pose a threat to international peace and security ;

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[59] "The Role of Secretary-General", U.N. Monthly Chronicle, Vol. VIII, No. 9 (October, 1971), p. 178 at 186.

[60] Ibid., p. 187.

[61] Stephen M. Schwebel, "The Secretary-General of the United Nations", p. 47.

[62] See also Stephen M. Schwebel, "Authorizing the Secretary-General of the U.N. To Request Advisory opinion of the I.C.J.", A.J.I.L., Vol. 78 (1984) p. 869 at p. 878.

(iv) Creation of a new technique—"preventive deployment"—whereby U.N. forces could be sent to an area to deter cross-border attacks or prevent hostilities within a country, rather than wait until after armed conflict had occurred; and

(v) Consideration of demiliarized zones in a preventive, rather than post-conflict, context to separate potential belligerents. Such zones would serve as "symbols of international community's concern that conflict be prevented".[63]

Whereas preventive diplomacy is to avoid a crisis "post-conflict peace-building is to prevent a recurrence." The plan of Secretary-General envisages various post-conflict measures designed to foster confidence between parties to an armed dispute. On 28 May, 1993, the Security Council concluded a nine-month review of Secretary-General Boutros Boutros Ghali's wide-ranging strategy. "An Agenda for Peace" and urged all States to make participation in and support for international peace-keeping a part of their foreign and national security policy.

The suggestions of the Secretary-General on Preventive Diplomacy, peace-making, peace-keeping and post-conflict peace building are really very useful and timely. Even though initial political decision will have to be taken by the Security Council and Secretary-General. Besides this, they will require sound financial position of the organization. As remarked by Secretary-General, Boutros Boutros Ghali, "If the organization is to respond effectively to the hopes placed in it by the peoples of the world, the Member States have to be as innovative in devising new financial approaches as they are in devising new tasks for the organization to perform." [64]

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63. U.N. Chronicle, Vol. XXIX, No. 3 (September, 1992) p. 3.
64. U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 2.

CHAPTER 38

THE INTERNATIONAL COURT OF JUSTICE*

Introduction.—As pointed out by late Dr. Nagendra Singh, who was one of the judges and also served as President of the International Court of Justice, "Two basic pillars are necessary for the establishment of public order : the existence of a proper law and the machinery for enforcing it, including the sanctions behind the law. In the Inter-State sphere, order can be maintained if there is no existence of a well-defined and well-codified International law and an effective agency to enforce it."[1] In the view of Dr. Nagendra Singh, the establishment of the rule of law in the world is necessary because it is only through this that peace and public order can be established in the international field. Consequently, in his view, besides the need to strengthen the United Nations, it is also necessary to strengthen the International Court of Justice.

The credit of beginning the system of settling international disputes through judicial decisions goes to the Permanent Court of International Justice which was established under the League of Nations. The Permanent Court of International Justice was based upon the Statute which was called, *The Statute of Permanent Court of International Justice.*

According to Article 36 of the Statute the Court was competent to decide following cases : (i) which were entrusted by State Parties; and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force ; (ii) States could also confer jurisdiction through a treaty or convention; and (iii) State Parties to the statute at any time, without special agreement, confer compulsory jurisdiction. The Court could also give advisory opinion on the request of the League Council and Assembly. Thus, ".........the idea of advisory opinions, designed to aid International Organisations on questions of international law was conceived and provided for in the same Article. They are now a permanent feature in international legal system."[2] The Permanent Court of International Justice contributed much for the development of international law. For example, in *S. S. Wimbledon case,*[3] the Court developed the rule relating to strict interpretation of international instruments and their validity; in*Tunis and Morocco Nationality Decrees,*[4] the Court dwelt upon the change in the meaning and scope of domestic jurisdiction; in *Danzing Official Railway case,*[5] the Court developed the law relating to rights of individuals under International Agreements and in *Eastern Greenland case,*[6] the Court developed the law relating to occupation. Thus, "From its experimental beginning, it established the point that the permanent judicial organ is both feasible and necessary even without going so far as to be accompanied by any true compulsory jurisdiction."[7] The U.S.S.R. and the U.S.A. did not become parties to the statute of the Court. Even those States who became parties to its statute, did not submit their important disputes to it. But "the importance of its work is not to be measured by the gravity of disputes submitted to it. Legal precedents of lasting significance may be established in the adjudication of cases where the immediate stake is small, and the judgments and advisory opinions of the Permanent Court of International Justice, while not formally binding upon that or any other tribunal (Article 59 of the Statute), stand among the most authoritative statements of the Law of Nations."[8]

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* *See* also for P.C.S. (1976), Q. No. 9; I.A.S. (1959), Q. No. 11.

[1] Dr. Nagendra Singh, "International Court of Justice—Watchman of the World Peace and Order." Special Number of 'Yojna' (18 October, 1970), p. 87.

[2] E. K. Nantawi, The Enforcement of International Decisions and Arbitral Awards in Public International Law (1967) p. 11.

[3] P.C.I.J. (1923), Series A, No. 1 (IWCR 163).

[4] P.C.I.J. (1923) Series B. No. 4.

[5] P.C.I.J. (1928) Series B, No. 15.

[6] P.C.I.J. (1933) Series A/B 53.

[7] Shabtai Rosenne, The World Court—What it is and How it Works, Second Edition (1963) p. 27.

[8] P. E. Corbett, the Growth of World Law (1971) p. 45.

After the dissolution of the League of Nations, the Permanent Court of International Justice was also dissolved. But it was immediately succeeded by the International Court of Justice. As aptly pointed out by Prof. Goodspeed : "The new Court stepped into the shoes of the old and began its work in the same city, in the same place and in the same hall in which the previous Court delivered its high judgments." [9] The Permanent Court of International Justice performed commendable functions and therefore, its judgments and decisions contributed much to the progressive development of International Law. It broadened the scope of the rule of Law in the international field. Its advisory opinions rendered signal service in the development of international organizations. Probably the greatest proof of its creditable performance is the fact that the present International Court of Justice is based on the Statute of the Permanent Court of International Justice and the provisions of the Statute of the International Court of Justice are more or less the same as those of the previous Statute of the Permanent Court of International Justice. Under Article 92 of the United Nations Charter, it has been provided that the Statute of the International Court of Justice is based on the Statute of its predecessor, the Statute of Permanent Court of International Justice.

Composition*.—According to Article 7 of the United Nations Charter International Court of Justice is one of the principal organs of the United Nations. It is the chief judicial organ of the United Nations and is based upon a Statute which is an integral part of the United Nations Charter.[10] All members of the United Nations are *ipso facto* the members of the Statute of the International Court of Justice. Any State which is not a member of the United Nations may also become a party of the Statute of the International Court of Justice on the recommendation of the Security Council and on the conditions laid down by the General Assembly.[11] The International Court of Justice consists of 15 Judges which are elected by the General Assembly and the Security Council separately. These Judges are elected for a term of 9 years and can also be re-elected after the expiry of their term.[12] It may be noted here that Dr. Nagendra Singh of India had been re-elected as one of the Judges of the International Court of Justice for a fresh term of nine years beginning from 6 February, 1982. On 14 February, 1985, the Court elected Dr. Nagendra Singh as its President. He remained President of the Court until February 1988. His term as a Judge of the Court was upto February, 1991. But unfortunately he could not complete his term for he died on 11 December, 1988 in the Hague. As remarked by Dr. Balram Jakhar, the then Speaker of the Lok Sabha, Dr. Singh was "one of the most distinguished jurists India produced" and that he "brought us international honour and recognition." On 18 April, 1989, the Chief Justice of India, Mr. R. S. Pathak, was elected to serve on the International Court of Justice till February 1991, filling a vacancy caused by the death of Dr. Nagendra Singh. Justice Pathak got absolute majority in the very first round of polling in the U. N. General Assembly and the Security Council, defeating rival Judges from Pakistan, Sri Lanka and Thailand by wide margins. He secured 84 votes out of 154 votes cast in the General Assembly (*i.e.,* two more than the minimum required) for a win the first round. He obtained nine votes in the 15 nation Security Council. All the decisions of the Court are on the basis of the majority of the judges. The President of the Court is empowered to give casting vote in the case of a tie.

Peter Tomka as the President of the Court, began his tenure on 6th February, 2012. His position ended on 5 February, 2015.

Currently the President of the International Court of Justice is Abdul Qawi Yusuf. He joined as President of the World Court on 6 February, 2018. His tenure will end on 5 February, 2021. The Vice-President of Court currently is Xue Hanqin. He also joined on 6 February, 2018. His tenure will also end on 5 February, 2021.

It has become a custom that five judges are from the five permanent members of the Security Council. The Court is constituted in such a way that Latin America, Europe, Africa and Asia are represented in it so as to represent 'the main forms of civilization and the principal legal systems of the world.'[13] The seat of the Court is at the Hague. This, however, does not prevent the Court from sitting and exercising its functions elsewhere whenever the court considers it desirable.[14] The Court remains permanently in session except during the judicial vacation, the dates and duration of which are fixed by the court.[15] Judge of the nationality of the each of parties shall retain their right to sit in the case before the court. If the court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge.[16] For example, in the case of *Pakistani Flights over Indian Territory*, 1972,[17] India appointed Dr. Nagendra Singh as *ad hoc* judges of the Court because at that time the Bench did not have any judge of Indian nationality.

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[9] Stephen S. Goodspeed, The Nature and Functions of International Organisation, Second Edition, p. 329.

* *See* also for P.C.S. (1981), Q. No. 6 ; P.C.S. (1982), Q. No. 3 ; P.C.S. (1985), Q. 7 ; P.C.S. (1988), Q. 3(b) ; UPPCS (2002) Q. 8(b) ; UPPCS (2007) Q. 7.

[10] Article 92 of the U. N. Charter; *see* also Shabtai Rosenene, The World Court—What it is and How it Works, Second Edition (1963), p. 31.

[11] Article 93 of the Charter.

[12] Article 13 of the Statute of the International Court of Justice.

[13] See J. E. S. Fawcett, the Law of Nations (1968)_, p. 118.

Indian Judge Elected to ICJ.—After more than two decades the Indian Judge, Justice Dalveer Bhandari, Senior Judge in the Supreme Court of India was elected to ICJ in New York. He obtained 122 votes in the General Assembly and an absolute majority in the Security Council procuring 13 out of 15 votes. Justice Bhandari will serve the remaining term, 2012-2018. The vacancy was created by the resignation of Judge Awn Shoukat Al Khasawreh of Jordan from the Asian Pacific Region at the end of 2011.

Law applied by the International Court of Justice.—According to Article 38 of the Statute of the International Court of Justice, the Court shall decide the disputes submitted to it in accordance with International Law and shall use the sources of International Law in the following order :

(1) International Conventions;
(2) International Customs;
(3) General Principles of Law recognised by civilised nations;
(4) Judicial decisions, the works of jurists, etc., as a subsidiary means for determining the rules of international law. This is subject to the provisions of Article 59.[18]

Ex aequo et bono.—Article 38 (2) further provides : "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto."* As pointed out by Manley O. Hudson,[19] "the phrase *ex aequo et bono* has its roots in Roman Law. In a case where the parties agreed that the Court may decide *ex aequo et bono,* the provision of the Statute enables the court to go outside the realm of law for reaching its decision. It relieves the court from the necessity of deciding in accordance with law. It makes possible a decision based upon considerations of fair dealing and good faith, which may be independent or even contrary to the law. Acting *ex aequo et bono,* the court is not compelled to depart from applicable law, but it is permitted to do so, and it may even call upon a party to give up legal rights. Yet it does not have a complete freedom of action. It cannot act capriciously and arbitrarily to the extent that it goes outside the applicable law, or acts where no law is applicable, it must proceed upon objective considerations of what is fair and just. Such considerations depend in legal measure, upon the judge's personal appreciation, and yet the court would not be justified in reaching a result which could not be explained on rational grounds. As rightly remarked by Ian Brownlie, "The exercise of the power, which has not yet occurred, may not be easy to reconcile with the judicial character of the tribunal."

Binding force of the decisions of the International Court of Justice*.—According to Article 59 of the Statute of the International Court of Justice, the decisions of the Court shall not have a binding force except upon the parties to a dispute, and only in respect of a particular dispute between them. This Article, therefore, means that the previous judgments of the court are not binding either upon the States or upon the court itself. In other words, they are not precedents yet it would be wrong to conclude that they have no value at all. In fact, the previous decisions influence the future decisions of the Court.[20] States are under no compulsion to recognize its jurisdiction or confer the same on it, but once their consent to it has been established it is incumbent upon them to comply with its decisions. A judgment of the court is final and without appeal.

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[14] Article 22 of the Statute of the Court.

[15] Article 23 of the Statute of the Court.

[16] Article 31 of the Statute of the Court.

[17] Appeal Relating to the Jurisdiction of the International Civil Aviation Organisation Council (*India* v. *Pakistan*), I.C.J. Reports (1972), p. 46.

[18] For detailed study of each of the four sources *see* chapter on "Sources of International Law."

[19] *See* Manley O. Hudson. The Permanent Court of International Justice, 1920-1942 (New York; The Macmillan Company, 1943).

* *See* also for P.C.S. (1988), Q. 3(b) ; UPPCS (2002) Q. 8(b).

Jurisdiction*

It may be noted at the out-set that consent of the States is the basis of jurisdiction of the court. "By 'jurisdiction' we mean the power or authority of the court to render a binding decision on the substance, or merits, of a case placed before it. The International Court receives this power only from the consent of the States concerned that it should so act. Neither the Charter of the United Nations, nor any general rule of contemporary International Law, imposes on States the obligation to refer their legal disputes to the court." [21]

International Court of Justice is a World Court in true sense of the term because it is open for all States of the World. However, there is a great limitation as provided under Article 34 of the Statute that only States may make use of the court or file their cases in it. That is to say, individuals cannot be a party to a dispute and even the States can use the Court in only limited circumstances. It has been aptly pointed out by Dr. Nagendra Singh : "Individuals as such have no access to the Court. Only a sovereign State can make use of the International law and that too in very limited circumstances such as when the dispute arises or parties have already agreed by a treaty prior to the dispute." [22]

It may be noted here that in one respect at least individuals have acquired indirect access to the Court. In 1955 the General Assembly established a Committee on Applications for the Review of U. N. Administrative Tribunal's Judgments for presenting requests to the International Court of Justice for an advisory opinion of the Committee found that there was substantial basis for an objection to the judgment of the Tribunal by a member state. It was also provided that when necessary the Tribunal would be obliged to revise its judgments in conformity with the opinion of the court. "Thus this procedure has two novel features : it allows a *de facto* appeal from the judgments of the Tribunal and it gives individuals indirect access to the International Court of Justice." [23]

Besides the States, the organs of the International Organization and specialised agencies may also request the Court to give its advisory opinion on legal matters within the competence of such Organisation or specialised agencies as the case may be.

Method of conferring jurisdiction upon the Court.—According to Rosenne,[24] jurisdiction can be conferred upon the Court through any of the following four methods : (a) Two or more States may confer jurisdiction upon the Court through special agreements. (b) It may be provided in a multilateral treaty that the matters relating to the interpretation of the treaty shall be entrusted to the court. (c) Jurisdiction in respect of any specific matter may also be conferred upon the Court by a bilateral treaty. (d) Jurisdiction may also be conferred upon the court in an informal way after the proceedings have commenced in the court. For example, when the defendant contests the case on merits but does not accept the jurisdiction of the court, the court gets the jurisdiction since the defendant gets involved in the merits of the court and subsequently this argument cannot be accepted that the court has jurisdiction in the case.

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[20] It has been rightly observed : "............previous decisions of the Court are, as a matter both of legal principle and of actual experience, one of the enduring factors which influence its future decisions. They are evidence of what the Court considers to be are the law; they are reliable indication of the future attitude of the Court; for most practical purposes they show, therefore, what international law is. In fact they are to be a substantial degree incidental with the sources of law enumerated in the first three paragraphs of Article 38. In form they may be merely a subsidiary means for determining what these sources are. The effect is the same." Hersch Lauterpacht. The Development of International Law by the International Court (1958), p. 22.

* *See* also for I.A.S. (1961), Q. No. 7; P.C.S. (1985), Q. 7; P.C.S. (1988), Q. 3(a) ; C.S.E. (1990) Q. 5(a) ; UPPCS (2002) Q. 8(b) ; UPPCS (2007) Q. 7.

[21] Shabtai Rosenne, The World Court—What it is and How it Works, p. 73.

[22] Nagendra Singh, *see* supra note 1, p. 87.

[23] Louis B. Son, "Broadening the Advisory Jurisdiction of the International Court of Justice," A.J.I.L., Vol. 77 (1983) p. 124 at p. 126.

[24] Rosenne, *see* supra note 21 at pages 76-80.

According to Brownlie,[25] jurisdiction may be conferred upon the court in any of the following ways :

(a) *Matters specially provided for in the Charter of the United Nations.*—"Article 36 (1) of the Statute includes within the jurisdiction 'all matters specially provided for in the Charter of the United Nations.' These words were inserted during the drafting of the present Statute in the expectation that the Charter would contain some special provision for compulsory jurisdiction." [26] But as pointed out by Rosenne (and noted earlier) that "Neither the Charter of the United Nations, nor any general rule of contemporary International law, imposes on States the obligation to refer their legal disputes to the court."

(b) *Consent ad hoc : Jurisdiction by special agreement and unilateral application.*—"The consent of the parties may be given *ad hoc* to the exercise of jurisdiction over a dispute which already exists.[27]

(c) *Consent ad hoc : Treaties and conventions.*—"Article 36 (1) of the Statute refers also to 'all matters specially provided for.........in treaties and conventions in force'......Although the jurisdiction is by consent of the parties like all types of jurisdiction in the present context, it can be described as compulsory in the sense that agreement in binding form, is given in advance of the appearance of particular disputes. However, the label 'compulsory jurisdiction' is often used to describe simply jurisdiction arising under Article 36 (2) of the Statute." [28]

(d) *Transferred jurisdiction.*—This will be discussed in a little detail later on in this Chapter.

(e) *Consent ante hoc : declarations under the optional clause.*—This has also been discussed in detail later on in this Chapter under the heading "Optional Clause or Jurisdiction."

(f) *Consent post hoc : form proregatum.*—"Lauterpacht writes that exercise of jurisdiction by virtue of the principle of *form proregatum* takes place whenever, after the initiation of proceedings by joint or unilateral application, jurisdiction is exercised with regard either as to the entire dispute or to some aspects of it as the result of an agreement, express or implied......... The principle operates because the statute and rules of the Court as interpreted contain no mandatory rules as to specification of the formal basis on which the applicant founds jurisdiction nor as to the form in which consent is to be expressed." [29]

(g) *Jurisdiction to decide ex Aequo et bono.*—This has been discussed earlier under the heading "Law applied by the International Court of Justice."

(h) *Advisory opinion of the Court.*—This has also been discussed in detail later on in this chapter.

It need not be over-emphasized here that except the last (*i.e.,* advisory opinion which is not binding) in all other types of jurisdiction of the court consent of States is the basis of the jurisdiction.

Main Heads of Court's Jurisdiction

Broadly speaking, the jurisdiction of the court may be divided into the following two main heads :—

(A) *Contentious jurisdiction* ; and

(B) *Advisory Jurisdiction.*

(A) Contentious Jurisdiction.—Contentious Jurisdiction may be further divided into the following two heads :

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[25] Ian Brownlie, Principles of Public International Law, Second Edition (Clarendon Press, Oxford, (1973), pp. 696-705.

[26] Ibid at p. 696.

[27] Ian Brownlie, "Principles of Public International Law, Second Edition (Clarendon Press, Oxford, 1973) at p. 696.

[28] Ibid, at pp. 697-698.

[29] Ibid. at p. 704.

(a) Voluntary Jurisdiction; and
(b) Optional Jurisdiction.

(*a*) *Voluntary Jurisdiction.*—According to Article 36 (1) of the Statute of the International Court of Justice, the jurisdiction of the court comprises of all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. Thus if the parties to the statute refer a dispute to the courts, the court gets jurisdiction and by virtue of Article 59, decision of the Court shall be binding upon the parties.

(*b*) *Optional Jurisdiction or compulsory Jurisdiction based on optional clause**.—Article 36 (2) of the Statute confers optional jurisdiction upon the Court which provides that the State parties to the Statute may confer compulsory jurisdiction upon the Court by making such declaration in respect of any other State which also accepts similar obligations. This can be done without any special agreement to the same effect. This is called optional jurisdiction of the Court. Under this provision, the State party to the Statute may confer compulsory jurisdiction upon the Court in respect of the following matters : (i) Interpretation of a Treaty; (ii) Any question of International law; (iii) The existence of any fact which if established would constitute a breach of international obligations; and (iv) The nature and the extent of the reparation to be made for the breach of an international obligation. Forty seven states have so far recognized the compulsory jurisdiction of the circuit.

Article 36 (3) further provides that the declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time. Thus the parties making declaration under Article 36 (2) (or option clause) may make certain reservations. But as remarked by Brownlie,[30]......reservations as to reciprocity in acceptances are superfluous, Article 36 (3), rather confusingly, refers to a condition of reciprocity which is optional and not a party of the statute; declarations may contain a suspensive condition referring to acceptance of compulsory jurisdiction by other States. An important point is that reciprocity applies when a case is submitted to the court and not before : Thus in the *Right of Passage* case (Preliminary objections),[31] India was unsuccessful in her contention that reciprocity applied so as to allow the respondent to take advantage of a reservation in the declaration of the applicant, Portugal, of a right to exclude any given category or categories of disputes, no notification to the Secretary-General. Portugal had filed her application only three days after depositing her declaration." The most common reservations which have been made by States parties to the statute while making declarations conferring compulsory jurisdiction upon the court are in respect of matters of domestic jurisdiction, time limits and reservations *ratione temporis* and reservations of past disputes.[32] As regards the reservation in respect of matters of domestic jurisdiction as determined by the State, Brownlie has very aptly remarked : "In principle this form of reservation is incompatible with the statute of the court, since it contradicts the power of the court to determine its own jurisdiction and is not a genuine acceptance of jurisdiction *ante hoc*.[33] This remark has been made with reference to the reservation made by the United States of America.[34] In her declaration dated 14th August, 1946, for acceptance of compulsory jurisdiction of the Court under

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* *See* also for P.C.S. (1968), Q. No. 10 (b) ; I.A.S., (1961), Q. No. 7 ; P.C.S. (1983), Q. 7(a) ; P.C.S. (1987), Q. 7(b) ; C.S.E. (1996) Q. 8(b).

[30] Ian Brownlie, supra note 25, at p. 702.

[31] I.C.J. Reports (1957), p. 125, at pp. 143-4, 147-8.

[32] See Brownlie, supra note 25, at pp. 703-704.

[33] Ibid, at p. 703.

[34] As regards the reservation made by America with respect to "Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." Another writer has rightly remarked : "The automatic" or "self-determined" reservation introduced through the Connally amendment is said to have "smuggled a veto power into our acceptance of the compulsory jurisdiction of the Court which clearly runs counter to the clear provision contained in Article 36, paragraph 6, of the Statute. It has therefore, been persuasively argued that this reservation may be declared invalid and may, in fact, legally invalidate the United States' declaration itself." R. P. Anand, Studies in International Adjudication (1969) pp. 31-32.

Article 36 (2) of the Statute of the Court, America made the following reservations[35] :

"............Provided, that this declaration shall not apply to—

(a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters which are *essentially within the domestic jurisdiction of the United States as determined by the United States of America*; or

(c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court or (2) the United States of America specially agrees to jurisdiction[36] ; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."

The reservation made by the U. S. that the court will not have jurisdiction over matters *"which are essentially within the domestic jurisdiction of the United States as determined by the United States"* is known as 'Connally Amendment" or "Connally reservation". It operates as a double-edged weapon because, in the first place, it limits the jurisdiction of the court by providing that the court shall have no jurisdiction in respect of matters which are essentially within the jurisdiction of the U. S., secondly it further limits the jurisdiction of the court by adding "as determined by the United States." It is incompatible with the statute of the court for Article 36 (6) clearly provides, "In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court."

As regards reservation relating to matters of domestic jurisdiction as determined by the United States, other States such as India, France, Liberia, Mexico, Pakistan, South Africa, U. K. and Sudan emulated America's example in their declaration under the optional clause of the Statute. However subsequently India, France, Pakistan and the U.K., withdrew this reservation.

It will be relevant here to refer India's declaration under the optional clause of the Statute of the International Court of Justice.

*India's Declaration Under the optional clause of the Statute of the World Court**.— India's declaration of the acceptance of compulsory jurisdiction of the court was filed on 15th September, 1974. The declaration[37] signed by the then Minister of External Affairs reads as follows :

"I have the honour to declare, on behalf of the Government of the Republic of India, that they accept in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory, *ipso facto* and without special agreement and on the basis of reciprocity, jurisdiction of the International Court of Justice over all disputes other than—

1. disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement;

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[35] *See* Year book of the International Court of Justice, (1963-1964), p. 225.

[36] In respect of this reservation, Prof. Louis B. Sohn has proposed that the U. S. should confer compulsory jurisdiction on the court in all legal disputes relating to the interpretation or application of the U. N. Charter on the basis of reciprocity. (See A.J.I.L. Vol. 69 (1975), pp. 852-54; Strengthening the International Court of Justice—Hearings before the Senate Committee on Foreign Relation 93rd Congress, 1st Cess., at 188 (1973); For contra see Dan Ciobanu, "Could The Use of the Contentions Procedure of the International Court of Justice have any significant Impact upon the Practice of the United Nations ? A Reply to Professor Louis B. Sohn," A.J.I.L., Vol. 70 (1976), pp. 328-338.

* *See* for I.A.S. (1977), Q. No. 6 ; For answer see also matter discussed above and also that which follows this heading ; *see* also I.A.S. (1975), Q. No. 3(b). For answer of this question *see* also matter relating to domestic jurisdiction discussed in Chapter on "Intervention" : *See* also for I.A.S. (1967), Q. No. 4.

[37] Adopted from I.J.I.L., Vol. 14 (1974), pp. 450-51.

2. disputes with the government of any State which is or has been a Member of the Commonwealth of Nations;
3. *disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of India* ;
4. disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective action taken in self-defence or resistance to aggression, fulfilment of obligations imposed by international bodies and other similar or related acts, measures or situations in which India is, has been or may in future be involved;
5. disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for and in relation to the purpose of such disputes or which the acceptance of the court's compulsory jurisdiction on behalf of a party to a dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court;
6. disputes where the jurisdiction of the Court is or may be founded on the basis of a treaty concluded under the auspices of the League of Nations, unless the Government of India specially agree to jurisdiction to each case;
7. disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction;
8. disputes with the Government of any State with which, *on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations or which has not been recognized by the Government of India;*
9. disputes with non-sovereign States or territories;
10. disputes with India concerning or relation to—
    (a) the status of its territory or the modification of delimitation of its frontiers or any other matter concerning boundaries,
    (b) the territorial sea, the continental shelf and the margins, the exclusive economic zone, and other zones of national maritime jurisdiction including the regulation and control of marine pollution and the conduct of scientific research of foreign vessels,
    (c) the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it,
    (d) the airspace superjacent to its land and maritime territory, and
    (e) the determination and delimitation of its maritime boundaries;
11. disputes prior to the date of this declaration, including any dispute, the foundations, reasons, facts, causes, origins, definitions, allegations, or basis of which existed prior to this date, even if they are submitted brought to the knowledge of the court hereafter;
12. this declaration revokes and replaces the previous declaration made by the Government of India on 14th September, 1959............"

It may be noted here that reservations 1, 2, 3, 5, and 8, of the above Declaration are similar to the reservations 1, 2, 3, 5 and 6 of the Declaration of 14th September, 1959, which has been revoked by this declaration. Five more reservations have been added and one has been modified. Commenting upon India's declaration of 14th September, 1959, it has been aptly observed : "there has been left wide freedom in the hands of Government to refuse to submit to the Court any dispute arising in the future, and her most important existing disputes have specifically been excluded from any such jurisdiction." [38] Further, "From the very beginning of her independence, India, like most other States of the world, has not shown much interest in arbitration and judicial settlement as peaceful means for settling international disputes. In general, she has preferred the less formal procedures of negotiation, conciliation and mediation, which do not involve an element of compulsion, to any third party binding judgment as is involved in arbitration and judicial settlement....... But this, as we have seen, is the position with almost all the States in the present day world"[39] These remarks still hold good, nay, they are more relevant and true of India's Declaration of 15th September, 1974. Reservations 4 and 7 further show India's apathy in respect of acceptance of any obligation arising out of international judicial settlement. It will make the optional clause "an extremely weak instrument for judicial settlement and an institution very different from that envisaged by those who devised it." [40] While the Declaration of 14th September, 1959, was more progressive than the 1956 Declaration because in respect of reservation relating to the matters of domestic jurisdiction the latter Declaration did not use words *"as determined by the Government of India,"* the present declaration may be termed as "retrogressive" for it has added several new reservations of sweeping range although in respect of reservation relating to domestic jurisdiction, it follows the 1959 Declaration.

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[38] R.P. Anand, *see* supra note 34, at p. 52.

Is the acceptance of jurisdiction under the optional clause really compulsory jurisdiction ?.— Under the optional clause *i.e.* Article 36, paragraph 2, States may accept the compulsory jurisdiction of the Court in following two ways :

(a) States parties may include a provision in a treaty or convention that in case of any dispute in respect of its interpretation, the court shall have compulsory jurisdiction.

(b) State Parties may accept compulsory jurisdiction under optional clause as discussed above.[41]

As pointed out by Prof. Kelsen, the jurisdiction conferred upon the Court under Article 36(2) is not, in fact "compulsory jurisdiction, because for the creation of such jurisdiction the prior consent of the party is necessary." Judge Hudson has also expressed the view that the term "compulsory jurisdiction" used in the Statute of the International Court of Justice is "misleading." Prof. Schwarzenberger has also remarked that it is in fact the limited jurisdiction. In the view of Judge Philip C. Jessup, the term "compulsory" is superfluous. As rightly pointed out by Corbett, "An international legal order without compulsory jurisdiction comes very close to being a contradiction in term.[42]

Transferred Jurisdiction.—In addition to the above types of jurisdiction, the court also has yet another type of jurisdiction, known as "transferred jurisdiction." According to Article 36(5) of the Statute of the Court, *"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present statute, to be acceptance of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.* For example, if A and B States conferred jurisdiction upon the Permanent Court of International Justice of a period of 15 years and the Permanent Court was dissolved after the expiry of five years, the present Court would have the jurisdiction for the remaining period of 10 years.

In *Case Concerning Military and Para Military Activities in and against Nicaragua (Nicaragua v. United States of America),*[43] the International Court of Justice has given in detail the interpretation of Article 36(5). This case concerned the dispute between Nicaragua and the U.S. regarding certain military and para military activities in and against Nicaragua. In the present phase the case concerned the jurisdiction of the court. Nicaragua contended that the Court has jurisdiction in terms of declaration of Nicaragua of 24 September, 1929 under Article 36(5) and the declaration of the U.S. of 14 August, 1946 under Article 36(2) of the Statute of the Court. The U.S.'s said declaration was "to remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate the declaration." On 6 April, 1984, the Government of the

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[39] R.P Anand, *see* supra note 34 at p. 52.

[40] *Ibid.*

[41] Article 36(2) of the Statute of the court.

[42] Percy E. Corbett, The Growth of World Law (1971), p. 30.

[43] Judgment of the I.C.J. dated 26 November,.1984.

U.S. deposited with the Secretary-General of the U.N. a notification stating "the aforesaid declaration shall not apply to disputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree." Further, "Notwithstanding the terms of the aforesaid Declaration, this proviso shall take effect, immediately and shall remain in force for two years......."

It may be noted that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty consequently the Declaration made by Nicaragua in 1929 had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice. The International Court of Justice pointed out that while the declaration had not acquired binding force, at any time between the making of Nicaragua's declaration and the day on which the new court came into existence, if not later, ratification of the Protocol of Signature would have sufficed to transform the content of 1929 Declaration into a binding commitment. It follows that such a declaration as that made by Nicaragua had a certain potential effect which could be maintained indefinitely. In sum, Nicaragua's 1929 Declaration was valid at the moment when Nicaragua became a party to the Statute of the New Court; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly restrained from doing so.[44]

The Court then compared the characteristics of Nicaragua's declaration with the conditions of applicability of Article 36, paragraph 5, as laid down in that provision. In this connection, the Court observed the following—

(1) The first condition concerns the relationship between the declaration and the Statute. Article 36, paragraph 5, refrains from stipulating that declarations must have been made by State Parties to the Statute of the Permanent Court: it is sufficient for them to have been made under (in French, "en application de") Article 36 of the Statute. The chosen wording therefore does not exclude but, on the contrary, covers a declaration made in the circumstances of Nicaragua's declaration.[45] The court made clear that it must interpret Article 36, paragraph 5, on the basis of actual terms used, which do not include the word "binding".[46]

(2) Secondly, Article 36, paragraph 5, in no way excludes, a valid declaration of unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of binding character.[47] The court quoted its following observation in the case of *Aerial Incident of 27 July, 1955 (Israel* v. *Bulgaria)*[48] :

"the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances to avoid that the creation of a new court should frustrate progress already achieved". The world court further observed[49]: The general system of devolution from the old court to the new thus lends support to the interpretation, whereby Article 36, paragraph 5, even covers declarations that had not previously acquired binding force. In this connection it should not be overlooked that Nicaragua was represented at the San Francisco conference, and duly signed and ratified the charter of the U.N. At that time the consent which it had given in 1929 to the jurisdiction of the Permanent Court of International Justice had not become fully effective in the absence of ratification of the Protocol of signature; but taking into account the interpretation given above, the court may apply what it stated in the case of the *Aerial Incident of 27 July, 1955*, "Consent to the transfer to the International Court of Justice of a declaration the jurisdiction of the Permanent Court be regarded as effectively given by a state which, having been represented at the San Francisco conference, signed and ratified the charter and thereby accepted the statute in which Article 36, paragraph, appears." [50]

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[44] Para 27 of the Judgment of the I.C.J.

[45] Para 28.

[46] Para 30.

[47] Para 31.

[48] I.C.J. Reports 1959 p. 145.

[49] Para 35 of the Judgment dated 26 Nov, 1984.

(3) It is difficult for the court not to consider that the U.S. letter of 6 April, 1984 implies that at that date the U.S., like other states, believed that Nicaragua was bound by Court's jurisdiction in accordance with the terms of its 1929 declaration.[51] The most important question relating to the 1984 notification is whether the U.S. was free to disregard the clause of six-month notice which, freely and by its own choice, it had appended to its 1946 Declaration. In this connection, the court held : In sum, the six-month notice clause forms an integral part of the U.S. declaration and it is a condition that must be complied with in case of either termination or modification. Consequently, the 1984 notification, in the present case, cannot override the obligation of the U.S. to submit to the compulsory jurisdiction of the Court *vis-a-vis* Nicaragua a state accepting the same obligation.[52]

Though Judge Nagendra Singh voted in favour of the above majority judgment, he also appended a separate opinion wherein he emphasized "that the jurisdiction of the Court as based on the Treaty of 1956 is clear, convincing and reliable." [53]

Besides this, Article 37 of the present Statute provides that whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present statute, be referred to the International Court of Justice. On the basis of this provision, the International Court of Justice acquired jurisdiction in *Ambatlelos (Preliminary Objections) case,*[54] *South-West African cases (Preliminary Objection) case,*[55] and *Barcelona Traction (Preliminary Objections) case.*[56] It will be relevant to refer here *Aerial Incident (Preliminary Objections) case,*[57] in connection with Article 37. In this case the main issue was whether or not the Declaration of Bulgaria made in 1921 for acceptance of compulsory jurisdiction under Article 36(2) of the statute of the Permanent Court was valid. It may be noted here that Bulgaria did not become the member of the present Statute of the Court in 1945. She became a party to the present statute in 1955. Israel argued that Bulgarian Declaration of 1921 became valid when she joined the United Nations in 1955 and consequently became the party to the present statute. But by a majority decision the Court held that Article 36(5) applies only in respect of those States who became parties to the present statute before the dissolution of the Permanent Court of International Justice. It will not apply to Bulgaria because she became the party to the present statute after a lapse of ten years. The International Court of Justice added that any other interpretation would be contrary to the principle that jurisdiction of the court is based upon the consent of States.[58] But in *Barcelona Traction* case, Spain had not become the party to the present statute before the dissolution of the Permanent Court yet the International Court of Justice, in its decision, considered the date on which a State became the party to the present statute as immaterial. The court distinguished the *Aerial Incident* case on the basis of following grounds : (a) there a different category of instrument was involved in Article 37 ; (b) the phrase 'in force' in Article 37 bore on the instrument containing the jurisdictional clause and not the clause; (c) the *Aerial Incident* case was *sui generis* and could have gone in favour of Bulgaria on other grounds.[59] Moreover, "as a further reason for not allowing the *Aerial Incident* decision, the Court pointed out that a decision concerning Article 37 must affect a considerable number of treaties and general multilateral Conventions, on the plane of formal logic the distinctions offered are not in all respects impressive, and the Court would seem to have tempered consistency with expediency.[60] Whatever may be controversy in a case or two, it may be concluded that on the basis of Article 36(5) and 37, the International Court of Justice has acquired jurisdiction over the declarations, treaties and conventions over which the predecessor Court exercised jurisdiction.

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[50] I.C.J. Reports 1959, p. 142.

[51] Para 41 of the Judgment of the I.C.J., dated 26 November, 1984.

[52] Paras 61 and 65.

[53] *See* I.J.I.L., Vol. 25 (1985) p. 126.

[54] I.C.J. Reports (1952) p. 28.

[55] I.C.J. Reports (1962), p. 319 at pp. 334-335.

[56] I.C.J. Reports (1959) p. 6.

[57] I.C.J. Reports (1959), p. 127.

[58] *Ibid.*, at p. 142.

Interim Measures or Relief.—Article 41 of the Statute of the Court provides that the court shall have power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. Further, pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council. As pointed out by Author,[61] "The principle underlying the concept of interim or provisional measures of protection of the interests of litigant parties pending the final disposal of a suit has emerged from the very nature and function of courts of law as the chief bulworks of justice in all civilized legal order. A court, seized of a case should not precipitate injustice in consequence of the delay in pronouncing the final judgment, thereby leaving the legal interests involved in the case entirely at the mercy of unfavourable intervening circumstances.[62] Hence the device of interim measures of protection, evolved for the purpose of ensuring 'interim justice' pending the final judgment."

As pointed out by the International Court of Justice on September 11, 1976 in the *Aegean Sea Continental Shelf* case *(Greece* v. *Turkey)*,[63] the Court may not indicate interim measures where it finds that the alleged breach if established "is one that might be capable of reparation by appropriate means" and if the court is unable to find in that alleged breach "a risk of irreparable prejudice to right in issue before the court as might require the exercise of its powers under Article 41 of the Statute to indicate interim measures, for their preservation"[64] and "whereas it is not to be presumed that either State will fail to heed its obligations under the Charter of the United Nations or fail to heed the recommendations of the Security Council addressed to them with respect to their present dispute." [65] Further, "whereas, accordingly, it is not necessary for the Court to decide the question whether Article 41 of the Statute confers upon it the power to indicate interim measures of protection for the sole purpose of *preventing the aggravation or extension of a dispute."*[66]

The Court grants interim relief only when there is likelihood of such injury to the rights of the parties as cannot be compensated and the aim of granting such relief is to protect and secure the rights of the parties. The International Court of Justice is one of the Principal organs of the United Nations. Therefore, when two State Parties jointly file a case before the Court or its Chamber for peaceful settlement of disputes under Article 33 of the United Nations and thereafter incidents occur which may either aggravate the dispute or there is apprehension of the dispute becoming serious or grave, the Court may order interim measures or grant interim relief. For example, in *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*[67] the Upper Volta (which is now known as Burkina Faso) and Mali Republic entered into a special agreement on 16th September, 1983, to refer their boundary dispute to International Court of Justice and requested the Court to constitute the present Chamber. The World Court accepted their request and by its order of 3rd April, 1985 constituted the present chamber. Thereafter, in the end of 1985 some incidents took place on the borders of the both the said states and there was apprehension that the conflict might not aggravate but cease-fire was made due to the mediation of some states. Therefore, Burkina Faso requested the Court to order interim relief subsequently, Mali also made a similar request.

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[59] Ian Brownlie, *see* supra note 25, at p. 700.

[60] *Ibid.*

[61] V.S. Mani, "Interim Measures of Protection; Article 41 of the I.C.J. Statute and Article 94 of the U.N. Charter", I.J.I.L., Vol. 10 (1970), p. 359.

[62] E. Dumbauld, Interim Measures of Protection in International Controversies (The Hague, 1932), p. 7.

[63] Reported in I.J.I.L., Vol. 17 (1977) pp. 83-92.

[64] Para. 33, Ibid. at pp. 89-90.

[65] Para 41, Ibid. at p. 91.

[66] Para 42, Ibid.

[67] I.C.J. Reports (1986), decided on 10 January, 1986.

On 10th January, 1986, the Court ordered following interim measures :

(a) Burkina Faso and Mali should not do any thing which may aggravate the dispute referred to Chamber or may adversely affect the decision of the Chamber.

(b) Both the Governments should not do any thing which may obstruct the collection of evidence for the present dispute.

(c) Both the Governments should comply with the agreement to not to fire.

(d) Both the Governments should withdraw within 20 days their armed forces to such a situation as may be determined by the said Governments.

(e) The situation which existed in the administration of the disputed areas before the request for grant of interim measures should not be modified or changed.

(f) The court also directed both the Governments to give information to the Court without delay about the agreement referred in (d) above.

In 1992, Libya filed a case before the world court requesting it to order as interim relief that the sanctions announced by the Security Council of the U.N. be not enforced. The International Court of Justice rejected the request of Libya.

Reference may also be made here to a recent case, namely *Case Concerning the Vienna Convention on Consular Relations (Germany* v. *United States of America).*[68] This case was filed by Germany against America alleging that America while launching prosecution against two German Nationals, Karl and Walter La Grand had violated Vienna Convention on Consular Relations by not informing them of their right to get consular assistance. In its Application Germany Stated that in 1982 the authorities of the State of Arizona detained two German Nationals, Karl and Walter La Grand. These individuals were tried and sentenced to death without having been informed as is required under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, of their rights under that provision; whereas it is specified that the competent authorities of a state party is required to advise "without delay" a national of another state party whom such authorities arrest or detain of the national is right to consular assistance guaranteed by Article 36. It was alleged that the failure to provide the required notification precluded Germany from protecting its national's interests in the United States under Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the United States Courts.

It was further stated on behalf of Germany that Karl and Walter La Grand, finally with the assistance of German Consular officers, did claim violations of the Vienna Convention before the Federal Court of First Assistance. But the Court, applying the municipal law doctrine of "procedural default," decided that, because the individuals in question had not asserted their rights under the Vienna Convention in the previous legal proceedings at state level, they could not assert them in the Federal *habeas corpus* proceedings and whereas the immediate federal appellate court, last means of legal recourse in the United States available to them as of right, affirmed the said decision.

Whereas, the Federal Republic of Germany asked the World Court to adjudge and declare :

(1) that the United States, in arresting, detaining, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention;

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[68] Decided by the International Court of Justice on 3rd March, 1999.

(2) that Germany is therefore entitled to reparation;

(3) that the United States is under an international legal obligation not to apply the, doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or, criminal proceedings against any other German National in its territory whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter La Grand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl and Walter La Grand on 24th February, 1999.

(3) the United States should restore the *status Quo ante* in the case of Walter La Grand, that is, reestablish in the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international obligation took place; and

(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts.

Further, Germany pointed out that the date of execution of Walter La Grand in the State of Arizona has been set for 3rd March, 1999. Germany, therefore, requested the Court for urgent indication of provisional measures in the interest of Walter La Grand. Germany emphasized that :

"The importance and sanctity of an individual human life are well established in International Law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law."

Germany requested the International Court of justice to indicate that :

"The United States should take all measures at its disposal to ensure that Walter La Grand is not executed pending the final decision in these proceedings, and it should inform the Court of all the measures which if has taken in implementation of this order."

The International Court of Justice found that the circumstances require it to indicate, as a matter of the greatest urgency and without any other proceeding provisional measures in accordance with Article 41 of its statute and with Article 75, paragraph 1, of its Rules. The World Court unanimously indicate the following provisional measures :

(a) The United States of America should take all measures at its disposal to ensure that Walter La Grand is not executed pending the final decision in these proceedings and should inform the Court of all the measures which it has taken in implementation of this order.

(b) The Government of the United States of America should transmit the order to the Governor of the State of Arizona.

The court also decided that, until the Court has given its final decision, it shall remain seized of the matters which form the subject matter of this order.

But in another recent case, namely, *Case Concerning the Legality of Use of Force (Yugoslavia* v. *United States of America)*[69] the World Court refused the request of Yugoslavia to indicate provision measures. It was alleged by Yugoslavia that alongwith other allied member states of NATO, the United States of America used force against Yugoslavia in violation of international law. Yugoslavia claimed that in accordance with Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 and Article 38, paragraph 5 of the Rules of the Court, the Court has jurisdiction over this matter on the other hand America claimed that the International Court of Justice has no jurisdiction over this matter because while rectifying the Genocide Convention America had made the reservation that the Court would have jurisdiction only if in the specified case if America consented to its jurisdiction. The Court does not possess jurisdiction because America has not consented to its jurisdiction in this specific case. America also invited the attention of the Court and reminded it that in accordance with the Charter of the U. N. and the Statute of the Court, it has responsibility to maintain international peace and security. The World Court accepted this argument of the United States of America and held that in the absence of the consent of America, it has no jurisdiction. Thus the Court rejected the request for indication of provision measures by its orders dated 2nd June, 1999.

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[69] Decided by the International Court of Justice on 2nd June, 1999.

However, the Court observed "whereas there is a fundamental distinction between the question of the acceptance by a state of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full arguments by both parties."

"Whereas, whether or not states accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties;

"Whereas in this content the parties should take care not to aggravate or extend the dispute"; "whereas, when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter."

Reference may be made here to Article 94, paragraph 2, which provides that if any party to a case fails to perform the obligations incumbent upon it under a *judgment* rendered by the court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. Under Article 94, paragraph 1, members of the United Nations have undertaken to comply with the decision of the International Court of Justice in any case to which it is a party. As remarked by Rosenne, "since Article 94 (2), in distinction with from Article 94 (1), speaks only of *judgments,* it cannot be invoked directly in respect of decisions of the Court which are not judgments, such as, orders indicating interim measures of protection"[70] and "......... non-compliance with an interlocutory decision indicating provisional measures, of protection...... does not expose the recalcitrant State of any procedural disadvantages in so far as the court concerns." [71]

Preliminary objections.—"The procedure on preliminary objections is a peculiarity of international procedural law, not known in most municipal legal systems. It was first established in the court's practice, and later on written provisions of a very general character were enacted in the Rules of the Court. But the procedure continued to develop in the court's practice." [72] A party to a dispute before the court may make preliminary objections. For example, the defendant State may submit that the matter is within its domestic jurisdiction. In the *Interhandel case* (*preliminary objections* case),[73] the

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[70] Shabtai Rosenne, The Law and Practice of International Court (Leyden, 1965) Vol. I. p. 156.

[71] Ibid, at p. 125; Further a decision of the Court not to exericise power under Art. 41 of the statute to indicate interim measures of protection "shall not prevent the party which has made (a request) from making a fresh request in the same case based on new facts",. Aegean Sea Continental Shelf case (*Greece* v. *Turkey*), I.C.J. Rep. (1976) reprinted in I.J.I.L., Vol. 17 (1977), pp. 83-92 at p. 91.

[72] V. D. Degan, "Preliminary Objections in the Hague Court's Contentions Procedure : A Re-examination", I.J.I.L., Vol. 10 (1970), p. 425 at p. 456.

[73] I.C.J. Reports (1959), p. 6.

International Court of Justice held that an international dispute relating to a treaty or custom cannot be regarded as matter within the domestic jurisdiction of a State. If the preliminary objection is such that requires detailed and full investigation into the case, the Court shall not decide it at that time and shall decide it at the time of final decision of the case.[74] It may also be noted here that while giving the final decision in a case, the court shall not be bound by its decision on preliminary objection in that case.[75]

Reference may be made to the case of *Application for the Revision of the Judgment of 11th July, 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Harzegovina v. Yugoslavia), Preliminary objection (Yugoslavia v. Bosnia, Harzegovina)*—In this case, the International Court of Justice decided on 3rd February, 2003 that the application for revision, under Article 61 of the Statute of the court of the judgment given by Court on 11th July, 1996 is inadmissible.

Court's Power to Allow a State to intervene in case to which it is not a party.—Article 62 of the Statute of the Court of International Justice provides the following :

"1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the court to be permitted to intervene.

2. It shall be for the Court to decide upon this request".

In *Case concerning the continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*),[76] by a letter dated 28th January, 1981, Malta, invoking Article 62 of the statute, submitted to the International Court of Justice a request for permission to intervene in the case which concerned delimitation of the continental shelf between Tunisia and Libya. Malta contended that its legal interests might be affected by the court's appreciation of certain geographical and geomorphological features in the area and by its assessment of their legal relevance and value as factor in the delimitation of areas of the continental shelf which are adjacent to its own continental shelf. Malta, however, added, "it is not Malta's object, by way, or in the course of intervention in the *Libyan/Tunisia* case, to obtain any form of ruling or decision from the court concerning its continental shelf boundaries with either or both of those countries." As the court pointed out, "In effect, therefore, Malta in its request is asking the court to give a decision in the case between Tunisia and Libya which in some measure would prejudice the merits of Malta's own claims against Tunisia and against Libya, in its separate disputes with each of those states." [77] Further, "Yet Malta attaches to its request an express reservation that its intervention is not to have the effect of putting in issue its own claims with regard to those same matters *vis-a-vis* Tunisia and Libya. This being so, the very character of intervention for which Malta seeks permission shows, in the view of the court, that the interest of legal nature invoked by Malta cannot be considered to one 'which may be affected by the decision in the case' within the meaning of Article 62 of the statute." [78] Moreover, "To allow such a form of 'intervention' would, in the particular circumstances of the present case, also leaves the parties quite uncertain as to whether and how far they should consider their own separate legal interests *vis-a-vis* Malta as in effect constituting part of the subject-matter of the present case. A state seeking to intervene under Article 62 of the statute is, in the view of the court, clearly not entitled to place the parties to the case in such a position, and this is more so since it would not be submitting its own claims to decision by the court nor be exposing itself to counter claims. ....It follows that no conclusions of inferences may legitimately be drawn from those findings or that reasoning with respect to rights or claims of other states not parties to the case." [79] For these reasons the court unanimously held that permission to intervene in the proceedings under Article 62 of the statute cannot be granted to Malta.

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[74] Right of Passage over Indian Territory case (Preliminary objection), I.C.J. Report (1957), p. 125.

[75] South West Africa cases, (Second Phase), I.C.J. Reports (1966), p. 6 at pp. 36-37.

[76] Judgment of I.C.J. of 14 April, 1981.

[77] Para 31 of the Judgment.

[78] Para. 33.

[79] Paras 34 and 35.

It may be noted here that an application to intervene under Article 62 is required by Article 81, paragraph 1, of the Rules of court to be filed "as soon as possible, and not later than the closure of the written proceedings" and by Article 81, paragraph 2, to specify the case to which it relates and to set out :

"(a) the interest of legal nature which the state applying to intervene considers may be affected by the decision in that case ;

(b) the precise object of the intervention ;

(c) any basis of jurisdiction which is claimed to exist as between the state applying to intervene and the parties to the case."

Reference may also be made here to *Case Concerning continental Shelf* (*Libyan Arab Jahahiriya/Malta*)[80]. In this case, which concerned the delimitation of continental shelf between Libya and Malta, by application dated 23rd October, 1983, Italy, invoking Article 62 of the statute, submitted to the Court a request for permission to intervene. Both Libya and Malta opposed Italy's application on the ground that the absence of what the Court in 1981 called "a valid link of jurisdiction with the parties to the case"[81] constitutes a ground on which the Application of Italy for permission to intervene must be refused or found to be inadmissible.

Before proceeding further in the case International Court of Justice said[82] that it would emphasize, as it did in the Judgment of 14th April, 1981, on the application of Malta to intervene in the *Continental Shelf* case between Tunisia and Libya, that "it does not consider paragraph 2 (of Article 62 of the statute) to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary, in the view of the court the task entrusted to it by that paragraph is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the statute." [83]

Italy contended that, so far as it was acquainted with the claims of Libya and Malta to the areas of continental shelf in the central Mediterranean, it was of the view that those claims extended to areas which would be found to appertain to Italy if a delimitation were to be effected between Italy and Libya and between Italy and Malta, on the basis of international Law. Further, "the Government of Italy, once permitted to intervene, will submit to decision as the court may make with regard to the rights claimed by Italy, in full conformity with the terms of Article 59 of the Statute of the Court." It was suggested that its status would be that of "intervening party" entitled to make submissions.

As pointed out by the court, the Italian Application to intervene tends inevitably to produce a situation in which the court would be seized of a dispute between Italy on the one hand and Libya and Malta on the other, or each of them separately, without the consent of the latter states ; Italy would thus become a party to one or several disputes which are not before the court at present. In this way the character of the case would be transformed.[84] The consequences of the Court's finding that to permit the intervention would involve the introduction of a fresh dispute, can be defined by reference to either of the two approaches to the interpretation of Article 62 of the statute, both of which result in the court being bound to refuse the permission to intervene requested by Italy, and both of which will give to Article 62, its full effectiveness. There are in effect two facets of a single reality, namely the basic principle that the jurisdiction of the court to deal with and judge a dispute depends on the consent of the parties thereto.[85]

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[80] Judgment of the I.C.J. of 21st March, 1984.

[81] I.C.J. Reports 1981, p. 20, para 36.

[82] Para 12 of the Judgment of 21st March, 1984.

[83] I.C.J. Reports 1981, p. 12, Para 17.

[84] Para 41 of Judgment of I.C.J., dated 21st March, 1984.

[85] Para 34.

The first way of expressing this reality would be to find that, having thus reached the conclusion that Italy is requesting it to decide on the rights which it has claimed and not merely to ensure that these be not affected, the Court must state whether it is competent to give, by way of intervention procedure, the decision requested by Italy. Italy contended that once it is established that a state seeking to intervene has a legal interest which is *en cause*, "the operation of Article 62 itself suffices to create the basis of jurisdiction of the court to the extent necessary for the admission of an application for permission to intervene". To this contention, the court replied : It appears to the court that if it were to apply this argument to an intervention having the object as that of Italy, it would be admitting that the procedure of intervention under Article 62 would constitute an exception to the fundamental principles underlying its jurisdiction : primarily the principle of consent, but also the principle of reciprocity and equality of states. According to the court, an exception of this kind could not be admitted unless it were clearly expressed. Article 62 of the statute contains no such express derogation, and neither its position in the statute, nor the *travaux preparatories* of its adoption, serve to support an interpretation of the Article as intended to effect such derogation.[86] According to the second approach, Article 62 would not derogate from the consensualism which underlies the jurisdiction of the court, since the only cases of intervention afforded by that Article would be those in which the intervener was only seeking the preservation of its rights, without attempting to have them recognized, the latter objective appertaining rather to direct action.[87]

The court also observed that there can be no doubt that the court will, in its future judgment in the case, take account, as a fact, of the existence of other states having claims in this region.[88] On the basis of above reasons, the International Court of Justice held, by a majority of eleven votes to five, that permission to intervene under Article 62 of the statute of the court cannot be granted to Italy.

Judge Ago, who gave a dissenting opinion, observed : The Court had a unique opportunity to grant permission to intervene to country which was seeking to state its case in a proceeding in progress between two other countries and which is, in fact, physically common to all three. Further, the decision on the present case may well sound the knell of the institution of intervention in international legal proceedings, at any rate of this institution as it was intended and defined by the relevant texts. The court seems to prefer a prudent confinement within the sheltered precincts of a purely bilateral, and relativist, notion of its task.

But as aptly pointed out by Judge Nagendra Singh, who voted with the majority but also appended separate opinion that there are certain aspects of the case which need to be emphasized. They are :

(i) If the intention was to apprise the Court of the areas of Italian concern of which the court should be cautioned and warned, so that the Judgment does not trench on the sovereign rights and claims of Italy, such a purpose has been effectively served by the exercise of which the court has undertaken under Article 62 of the Statute by giving a hearing not only to Italy but also to the Parties to the dispute. The court has been made fully aware of Italian interests and where they lie so that there should be no possibility of it even inadvertently encroaching upon or undermining Italian claims and interests in the case.

The second aspect of the Italian pleading noted by the court related to the role of the court which Italy seemed to be asking the Court to undertake in "defining", "safeguarding", "protecting" and "recognizing" the rights of Italy which gives the appearance that the Court is required to undertake an exercise in adjudication. *This would certainly need a jurisdictional link between the intervener and the Parties to the dispute,* and he is in agreement with the Court's finding that this aspect of the object of the Italian intervention could not be met without a proper jurisdictional link between Italy and Malta and Italy and Libya.

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[86] Para 35.

[87] Para 37.

[88] Para 43.

(ii) *Secondly,* it is in the interests of justice that the would-be intervener should have access to the pleadings of the parties to a dispute.

(iii) *Lastly,* despite the two negative decisions of the court in 1981 and in this case, the institution of intervention which exists as enshrined in Article 62 of the statute is still very much available to the community, provided it is sought within the limits prescribed by that Article. The Court has now made it abundantly clear that if the intervener expects determination of any of its claims, which involves an exercise in adjudication, this would *necessitate a jurisdictional link between the parties to the dispute and the intervener.* However, as far as cautioning the court of the interests of the third party is concerned, this can always be achieved by an application under Article 62 without establishing any jurisdictional link. The said provision of the Statute has therefore a utility of its own, however limited it may be.[89]

In *Land, Island and Maritime Frontier Dispute case (El Salvador* v. *Honduras),*[90] the dispute was relating to the Gulf of Fovesca. This Gulf is an the coasts of these states—North-West coast is the territory of El Salvodor; South-East Coast is the territory of Nicaragua and the territory of Honduras is in between these two coasts. The present case had been brought before the Court by a special Agreement between El Salvador and Honduras. Nicaragua filed an application for permission of the Court to intervene in this case. While Honduras did not object, El Salvador objected to Nicaragua's intervention. The Chamber of the Court unanimously decided that Nicaragua can intervene in respect of the waters of the Gulf.

Clarifying the legal position, the Chamber observed that if a state satisfies the Court that it has an interest of the legal nature in the dispute, the Court may allow it to intervene in respect of its interests in dispute but such a state cannot intervene in other aspects of the case the Chamber also made it clear that the onus to prove the interest is of legal nature which may be affected is on the state which wants to intervene. The interest should be such as may be affected; it is not necessary that it must be affected. The Chamber also clarified that for intervention it is not essential that there must be some relation in respect of the jurisdiction of the Court between the state wishing to intervene and parties to the dispute.

(B) Advisory Jurisdiction.*—Besides contentions jurisdiction, the court also possesses advisory jurisdiction. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on legal question. Other organs of the U. N. and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.[91] It may be noted here that pursuant to the above provision, the General Assembly has authorized the Economic and Social Council, the Trusteeship Council, fourteen specialized Agencies of the U.N., the International Atomic Energy Agency, Interim Committee of the General Assembly and Committee on Application for Review of Administrative Tribunal Judgments to request advisory opinions of the Court. Thus among the principal organs only Secretariat has not been authorized to request advisory opinions of the court. It has therefore been rightly suggested that the Secretary-General should also be authorized to request advisory opinions on legal questions within the scope of his activities.[92] Several other suggestions have been made to widen the scope of advisory jurisdiction of the Court. Among such suggestions the suggestion to develop a procedure to allow national tribunals to refer complex issues of international law for advisory opinion of the court merits serious consideration. Building on the precedent of the establishment of a Committee on Applications for Review of Administrative Tribunal's Judgments in 1955, it has been suggested that the General Assembly should create *an organ of the U.N. specially for the purpose of requesting advisory opinions in defined circumstances.* It has been pointed out that while the International Court of Justice would provide a uniform interpretation of rules of international law, it would be for the national tribunals to decide how to apply that rule, if at all, in a particular case before it.[93] This suggestion has been recently served by American Bar Association. As pointed out by Louis B. Sohn, "The novel feature of the procedure proposed by the American Bar Association is that requests from national courts would not go directly to the International Court of Justice but would be filtered through the special committee of the General Assembly. While entitled to submit the questions to the Court, the special Committee would not be obliged to do in every case. It does not seem desirable to give unrestricted access to the court to possibly hundreds or even thousands of national courts, as such access might overwhelm the court with 'trivial, inappropriate, needlessly involved, unripe and politically sensitive cases'...... The various issues raised by the ABA proposal are being explored now in Congress and at the U.N. Although there are obstacles to be overcome before this proposal is realized, the task is not impossible, it may however, take a while." [94] It may be noted that while in case of the Committee on Applications for Review of Administrative Tribunal's Judgments it has been agreed in advance that the U.N. Administrative Tribunal would be obliged to revise its judgments "in conformity with the opinion of the Court", the same might not be possible in case of national tribunal obviously on account of the concept of national sovereignty which the states continue to be jealously guarding.

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[89] *See* I.J.I.L., Vol. 24 (1984) pp. 435-437.

[90] I.C.J. Reports (1990).

* *See* also for P.C.S. (1983), Q. 7 (b) ; IAS (2006) Q. 6(a) ; IAS (2007) Q. 6(a).

[91] Article 96 of the U.N. Charter.

[92] *See* Stephen M. Schwebel, "Authorizing the Secretary-General of the U.N. To Request Advisory Opinions of the I.C.J.", A.J.I.L., Vol. 78 (1984) 869 at pp. 876-878.

According to Article 65 of the Statute of the International Court of Justice :

1. The Court may give an advisory opinion on any legal questions at the request of whatever body may be authorized by or in accordance with the charter of the U.N. to make such a request.
2. Questions upon which the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

The Statute of the Court further provides that the court shall deliver its advisory opinions in open Court, notice having been given to the Secretary-General and to the representatives of Members of the U.N., of other states and of international organizations immediately concerned.[95] Besides this, in the exercise of its advisory functions the Court shall further be guided by the provisions of the present statute which apply in contentious cases to the extent to which it recognizes them to be applicable.[96]

In the *Interpretation of Peace Treaties case (First Phase)*[97], the International Court of Justice observed in its advisory opinion : "The consent of states to a dispute, is the basis of court's jurisdiction in the contentious cases. The situation is different in regard to an advisory proceedings even where the request for an opinion relates to a legal question actually pending between states. The court's reply is only of an advisory character as such, it has no binding force. It follows that no state, whether a Member of the U.N. or not can prevent the giving of an advisory opinion which the United Nations considered to be desirable in order to obtain enlightenment as to the course of action it should take. The court's opinion is given not to the states, but to the organ of the United Nations, represents its participation in the activities of the organization, and in principle should not be refused."

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[93] *See* Louis B. Sohn, "Broadening the Advisory Jurisdiction of the International Court of Justice", A.J.I.L., Vol. 77 (1983) 124 at p. 127.

[94] *Ibid.*, at pp. 128-129.

[95] Article 67 of the Statute of the Court.

[96] Article 68.

[97] I.C.J. Rep. 1950 p. 65.

Thus the advisory opinion itself does not constitute *"per se* a "decision" with which anyone is legally bound to comply"[98]. According to Corbett, "Advisory opinions are of course not binding but they do embody the most authoritative possible statements of existing norms .... To disregard them is not outright defiance of the principal judicial organ of the U.N. ...... it does however, diminish the prestige of tribunal, and that it is a disservice to the cause of world law." [99] According to Judge Nagendra Singh of the ICJ, advisory opinions are authoritative statements of the existing law and their disregard will lower the prestige of the court. They are of great value in building public opinion.[100] In his view the statute of the Court should be amended to broaden the advisory jurisdiction for it will contribute immensely to the development of international law.

If the provisions of Article 96 of the U.N. charter are strictly interpreted, the ICJ is not bound to give an advisory opinion. But as noted above since the court itself is an organ of the U.N., the reply of the court *i.e.* advisory opinion "represents its participation in the activities of the organization, and in principle, should not be refused". But the court can be requested to give advisory opinion "on any legal question" only and hence if the question referred to it is not "legal", the court may refuse to give its opinion. The Court may also refuse to give advisory opinion if the provisions of the U.N. charter and the statute of the court referred above are not complied with. In its advisory opinion concerning the *Interpretation of the Agreement of 25th March, 1951 between the WHO and Egypt,*[101] the International Court of Justice observed :

> "......... if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request.[102] .... Furthermore, ... a reply to questions of this kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting organization. For this reason, the court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter in which the questions are addressed."

Court's competence in respect of determination of its own Jurisdiction.—In the event of a dispute as to whether the Court has jurisdiction, matter shall be settled by the decision of the Court.[103] For example, in *case concerning the Aerial Incident of 4th September,* 1954 (US v. USSR),[104] the Court held : "......... it has not before it any acceptance by the Government of Union of Soviet Socialist Republic of the jurisdiction of the court to deal with the dispute which is subject of the application submitted to it by the Government of the United States of America and that, therefore, it can take no further steps upon this application." Similarly, in *Anglo Iranian Oil Company case,*[105] the court held that it had no jurisdiction to decide the case as it was related to territorial sovereignty of Iran. In a more recent case, *Fisheries Jurisdiction (U.K. v.*

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[98] Shabtai Rosenne, The World Court—What it is and How it Works, p. 89.

[99] P.E. Corbett, The Growth of World Law, (1971) pp. 104-105.

[100] Dr. Nagendra Singh, note 1.

[101] I.C.J. Reports 1980 p. 88, para 35. *See* also Advisory Opinion on Application For Review of Judgment No. 273 of the U.N. Administrative Tribunal of 20th July, 1982, paras 46-48.

[102] Cf. Admissibility of Hearings of Petitions by the Committees on South West Africa, Advisory opinion, I.C.J. Reports 1956 p. 26 and *see* also p. 37 ; Certain Expenses of the U.N. (Art. 17, para 2 of the Charter), Advisory opinion, I.C.J. Reports, 1962, pp. 156-158.

[103] Article 36, paragraph 6.

[104] I.C.J., Reports (1958), p. 158.

[105] I.C.J. Reports (1952), p. 93; ; *see also* Legality of the Use of Force (*Serbia & Montegero* v. *Belgium* (1999-2004); Judgment of 15th December, 2004 and certain property (*Liechtenstein* v. *Germany*), Judgment of 10th February, 2005.

Iceland) case,[106] the Court, by majority of 14, held that it had jurisdiction to decide the case. This case concerns the declaration of Fisheries jurisdiction by Iceland. Britain filed the case against Iceland but the latter had contended that the court had no jurisdiction to decide the case.

In a recent case, namely, *Fishories Jurisdiction case (Spain* v. *Canada),*[107] the International Court of Justice pointed out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it,[108] and this has no relevance for the establishment of the Court's jurisdiction, which is a question of law to be resolved in the light of the relevant facts"[109]

That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather it is for the Court to determine from all the facts and taking into account all the arguments advanced by the parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an' intention on the part of parties exists to confer jurisdiction upon it."[110]

In the instant case, *i.e. Fisheries Jurisdiction case (Spain* v. *Canada),* [decided by the World Court on December 4th, 1998], Spain had filed the case on 28 March 1995 instituting proceedings against Canada in respect of a dispute relating to the amendment, on 12th May, 1994, of the Canadian coastal Fisheries Protection Act, as well as to specific actions taken on the basis of the amended Act and its regulations, including the pursuit, boarding and seizure on the high seas, on 9th March, 1995, of a fishing vessel—the *Estai* —flying the spanish flag—Spain invoked as the basis of the jurisdiction of the Court the declarations whereby both states have accepted its compulsory jurisdiction in accordance with Article 36, paragraph 2, of its statute. Canada, on the other hand, took the stand that the Court lacked jurisdiction to entertain the application because the dispute was within the plain terms of the reservation in paragraph 2 (d) of the Canadian declaration of 10th May, 1994. The International Court of justice accepted the stand of Canada and held that "it has no jurisdiction to adjudicate upon the dispute brought before it by application filed by the Kingdom of Spain on 28th March, 1995.

Reference may be made here to the case of *Armed Activities on the Territory of Congo (New Application, 2002) (Democratic Republic of Congo* v. *Rwanda),* (2002-2006) decided by the International Court of Justice on 3rd February, 2006. In this case the Court found that it had no jurisdiction to entertain the application filed by the Democratic Republic of Congo. The Court also pointed out the fundamental distinction between the acceptance by states of the Court's jurisdiction and the conformity of their acts under international law. The Court observed that it has stated in numerous previous occasions that there is a final distinction between the question of acceptance of the Court's jurisdiction and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the court they are required to fulfil their obligations under the U.N. Charter and the other rules of international law including international humanitarian and human rights law and they remain responsible for acts attributable to them which are contrary to international law.

Problem of the enforcement of the Judgments of the International Court of Justice.—As noted earlier under Article 94 of the United Nations Charter, the Security Council is empowered to implement the judgments of the World Court in case one of the parties fails to implement it and other party to the dispute brings the matter to the Security Council. The problem of enforcement of judgment of the International Court which came before the United Nations was not experienced by the League of Nations.[111] That is to say, States refused to accept obligations arising out of the judgment of the Court. This happened particularly in the *Corfu Channel case*.[112] A recent case in which also this problem arose was the *Nuclear Test case*.[113] The framers of the Charter were of the view that this was not the function of the Court and hence they entrusted this work to the Security Council. According to Fawcett, except in the *Corfu Channel case*, the problem of the enforcement never seriously arose and even in that case on the refusal of Albania to pay compensation England had confiscated Albanian money in England.[114] A brief reference may be made here to the case of *Monetary Gold Removed from Rome in* 1943 (*Italy* v. *France, U.K. and U.S.*). In 1943 a certain quantity of monetary gold was removed by the Germans from Rome. Later on it was recovered in Germany and found to belong to Albania. The 1946, agreement on reparation from Germany provided that monetary gold found in Germany should be pooled for distribution among the countries entitled to receive a share of it. The U.K. claimed that the gold should be delivered to it in partial satisfaction of the Court's judgment of 1949 in the *Corfu Channel case*. But Italy claimed that the gold should be delivered to it in partial satisfaction for the damage which it alleged it had suffered as a result of an Albanian law of 13th January, 1945. In the Washington statement of 25th April, 1951, the Governments of France, the U.K. and the U.S. decided that the gold should be delivered to the U.K. unless within a certain time limit, Italy or Albania applied to the Court requesting it to adjudicate on their respective rights. No action was taken by Albania. Italy, however, made an application to the court. But later on, Italy raised the preliminary question as to whether the court had jurisdiction to adjudicate upon the validity of the Italian claim against Albania. In its judgment of 15th June, 1954, the court held that without the consent of Albania, it could not deal with a dispute between that country and Italy and that it was, therefore, unable to decide the questions submitted. Thus we see that there was partial enforcement of the judgment of *Corfu Channel case*[115] against Albania. In the words of an Author, "there are not more than a few cases out of many hundreds which have involved the refusal by the losing party to give effect to an award rendered." [116] According to Michael Akehurst,[117] "Most judgments by International Courts and arbitral tribunals have been obeyed by the States concerned; a few cases of disobedience have received a lot of publicity, but the cases in which judgments have been obeyed, although receiving less publicity, are far more numerous. Sometimes States reject a judgment at first, but obey it later." "The basis of International Adjudication is thus, the consent of States parties to a dispute. This consent gives rise to certain obligations of a legal character which constitute the basis of the obligation to comply with the resultant judgments of international tribunal. Thus refusal to comply with the judgments of an international tribunal is *ipso facto* a breach of an international legal obligation." [118] It may also be noted that the problem of Sovereignty of States does not come in the way of the enforcement of judgments of the Court.[119] Recently, the problem of the enforcement of judgments of the court has once again assumed serious magnitude in the case *Concerning Military and Para-military Activities in and against Nicaragua (Nicaragua* v. *U.S.*). The U.S. has refused to compel with the decision of the court.

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[106] I.C.J. Reports (1973), Interim Measures Order of 12th July, 1973.

[107] Decided by the ICJ on 4th December, 1998.

[108] *See* military and Paramilitary Activities in and against *Nicaragua* v. *United States of America (Jurisdiction and Admissibility Judgment,* I.C.J. Reports 1984, p. 437, para 101.

[109] Border and Transborder. Armed Actions (*Nicaragua* v. *Honduras*) Jurisdiction and Admissibility Judgment, ICJ Reports 1988 p. 76, para 16.

[110] *Ibid* at p. 76, para 18; *see* also Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9, p. 32.

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[111] Shabtai Rosenne, "The Court and Judicial Process", Int. Organ, Vol. XIX, No. 3 (1965), 518 at p. 530.

[112] I.C.J. Reports (1949), p. 4.

[113] *See* I.C.J. Reports (1973), p. 106.

[114] J.E.S. Fawcett, "The Law of Nations (1968), p. 122.

[115] I.C.J. Reports (1949), p. 4.

[116] Oscar Schachter, "The Enforcement of International Judicial and Arbitral Decisions," A.J.I.L., Vol. 54 (1960), p. 2 : *see* also C.W. Jenks' The Prospects of International Adjudication (New York, 1964), p. 664; Philip C. Jessup, "The International Court of Justice and Legal Matters," Illinois Law Review, Vol. 42 (1947), pp. 273-274.

[117] Nicaragua v. United States of America", I.J.I.L., Vol. 27, No. 4 (Oct.-Dec. 1987), p. 357, p. 383.

[118] E.K. Nantwi, The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law (1967), p. 188.

[119] *Ibid.,* As remarked by Lauterpacht, "The true relation between the exercise of jurisdiction by the Court and the Sovereignty of States is expressed by the fact that as a result of such jurisdiction the rights of are determined not by a unilateral assertion of their adversaries but by arbitrament of the law. However, in so far as the Sovereignty is, inaccurately, identified with the traditional legal right of States to be judged in their cause : submission to the jurisdiction of the Court does imply a surrender of Sovereignty". Hersch Lauterpacht. The Development of International Law by the International Court (1958), p. 394.

Contribution of International Court of Justice in the codification and progressive development of International Law[120]—It is one of the functions of the United Nations to make the progressive development of International Law and its codification.The International Court of Justice as the principal Judicial Organ of the United Nations has done commendable work in this connection. The World Court has contributed much in the progressive development of International Law. The International Court of Justice has been able to make the progressive development of International Law in the following 3 ways :

(i) When there is no international treaty or convention on a particular point in dispute, the Court, as provided under Article 38 of the Statute of the International Court of Justice, can apply the general principles of law recognized by the civilized States and thereby contribute to the progressive development of International Law.

(ii) It clarifies the vague rules of International Law. "The International Court of Justice has directly contributed towards ensuring respect for International Law ; it has gone a long way to remove lacunae and to clear up obscurities and doubts, and to say the least the merit of many of its decisions has been to fully emphasize the role of law in present day international relations." [121] In the *Reparation for injurios case,*[122] the court said : "it is here faced with a new situation. The questions which it gives rise to can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the right of the principles of International Law." In another case the court observed : "In seeking to determine the law applicable to this case, the court has to bear in mind the continuous evolution of international law." [123] In *Fisheries Jurisdiction case,*[124] it observed, "The possibility of the law changing is ever present." In *Western Shahara case*[125] the World Court observed more emphatically : "The reference in those questions to a historical period cannot be understood to fetter or hamper the Court in the discharge of its judicial function. That would not be consistent with the Court's judicial character : for in the exercise of its functions it is necessarily called upon to take into account existing rules of international law." Similarly in its judgment of 3 June 1985 *in case concerning* the continental shelf (Libyan Arab Jamahiriya/Malta) the court observed "......... that convention (*i.e.* 1982 Convention on the Law of the Sea) has not yet come into force, and therefore not operative as treaty law .... Nevertheless, it cannot be denied that the 1982 convention is of major importance, having been adopted by an overwhelming majority of states, hence it is *clearly the duty of the court even independently of the references made to the convention by the Parties, to consider in what degree any of its relevant provisions are binding upon as a rule of customary* international law."[126] In an earlier case, the court held "that the exclusive economic Zone may be regarded as part of modern international law."[127] This was quoted with approval in the above case.[128]

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[120] "Even within the limited sphere of its activity, hedged in by the sacrosanct limits of consent and curbed by the absence of any execution machinery, the International Court has done a remarkable job in building up a body a case law which is evidence of existing International Law of the highest value. Its role in the development of International Law, though limited, has been important .... It is of course not denied that Courts are not always the most suitable agencies for developing the law in the present dynamically changing times, and we must establish some other agencies for this purpose. Any such times, and we must establish some other agencies for this purpose. Any such agencies, however, even if established, will not exhaust the usefulness of the Courts." R.P. Anand, Studies in International Adjudication (1969), pp. 189-190.

[121] Judge Nagendra Singh, "Codification and Progressive Development of International Law. The Role of the International Court of Justice," I.J.I.L., Vol. 18 (1978) p. 1 at p. 8.

[122] I.C.J. Reports (1949), p. 182.

[123] Barcelona Traction case, I.C.J. Rep. (1970), p. 33.

[124] I.C.J. Reports (1974), p. 19.

[125] I.C.J. Reports (1975), p. 30.

(iii) Although Article 59 of the Statute of the International Court of Justice undermines or even prohibits doctrine of precedent by providing that the decisions of the Court shall not be binding except upon the parties to a dispute and only in that dispute, yet the Court does not ordinarily deviate from its past decisions.

In order to understand properly the progressive development of International Law by International Court of Justice it will be necessary to discuss briefly some of the cases decided by the Court. A brief discussion of those cases is given below :

Cases decided under contentious jurisdiction

Following are the main cases decided by the Court under its contentious jurisdiction :—

(i) *Anglo-Norwegian Fisheries case.*[129]—In this case the Court held : "A Norwegian decree of 1935 delimiting an exclusive Norwegian fishing zone by reference to a straight base line drawn through 48 selected points on the main line or Island or rock at a considerable distance from the coast, from which base line, of the breadth of the territorial sea was to be measured was not contrary to International Law." Thus the Court clarified the law relating to the determination of fisheries zone by the States. In this case the Court also made it clear that it is not bound by the past decisions and precedents and is free to make the progressive development of International Law.

(ii) *The Corfu Channel Case.*[130]—In this case the court clarified law relating to self-defence, intervention and innocent passage.

N.B.—For details of the case see chapter on "Intervention".

(iii) *The Asylum (Colombia* v. *Peru) case.*[131]—In this case the court clarified the law relating to asylum.

(iv) *Minquiers and Ecrehos (France* v. *U.K.)*[132].—In this case, the court emphasized that for acquisition of territory through occupations what was of decisive importance was not indirect presumption based on matters in Middle Ages, but *direct evidence of possession and the actual exercise of sovereignty.*

(v) *Nottebohm (Liechtentein* v. *Guatemala).*—In this case the court propounded the principle of effective nationality.

N.B.—For the facts and principles laid down in this case see chapter on "Nationality".

(vi) *North Sea Continental Shelf Case.*[133]—In this case, the court interpreted Article 6 of the Geneva Convention on continental shelf and held that the principle of equidistance was not obligatory in all cases of delimitation of continental shelf. The court also clarified the general concept of continental shelf which made a great impact on state practice and development of international law in this respect.

(vii) *Nuclear Tests case (June 22, 1973).*[134]—In this case court clarified law relating to state responsibility in respect of conduct of nuclear tests. (For details of the case see chapter on "Laws of Aerial Warfare".)

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[126] Paras 26 and 27 of the Majority Judgment.

[127] I.C.J. Reports 1982, p. 48, para 47 and p. 74, para 100.

[128] Note 17, para 31.

[129] I.C.J. Rep. (1951), p. 116. For more details *see* also Appendix II.

[130] I.C.J. Rep. (1949), p. 4.

[131] I.C.J. Reports 1950, p. 266 ; for facts of the case *see* Chapter on "Asylum".

[132] I.C.J. Reports 1953, p. 47.

[133] I.C.J. Reports (1955) p. 4.

[134] I.C.J. Reports (1969), p. 3.

(viii) *Fisheries Jurisdiction (Merit) case (U.K. and Northern Ireland* v. *Iceland.*[135]—In this case the Court clarified the law relating to validity of the establishment of the fisheries jurisdiction by Iceland, and the concept of preferential rights. The Court held : "The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States and particularly a State, which like the applicant, has for many years been engaged in fishing in the waters in question, such fishing activity been important to the economy of the country concerned. The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds. Accordingly, the fact that Iceland is entitled to claim preferential rights does not suffice to justify its claim unilaterally to exclude the applicant's fishing vessels from all fishing activity in the waters beyond the limits agreed to in the 1961 exchange of Notes." [136]

(ix) *Aegean Sea Continental Shelf Case (Greece* v. *Turkey)*[137] *decided on September 11, 1976.*—In this case the Court clarified law relating to grant of interim measures of protection. This has been referred earlier under the heading *"Interim Measures or Relief."*

(x) *Case concerning United States Diplomatic and Consular Staff in Tehran.*—In this case, the court interpreted and applied Vienna Convention on Diplomatic Relations, 1961 and Vienna Convention on Consular Relations, 1963. This case related to the taking of employees of American Embassy and Consular in Tehran by Iran. The court held Iran guilty of violation of the above-mentioned conventions and directed Iran to pay compensation to America. The world court reaffirmed the cardinal importance of international law relating to privileges and immunities of diplomatic envoys.

(xi) *Case Concerning the Continental shelf (Tunisial-Libyan Arab Jamahriya) Judgment dated 24th February, 1982*[138]—This case dealt with the delimitation of continental shelf between adjacent states. The court clarified the law in this connection, principles to be applied, relevant circumstances to be taken into account and the practical method for the application of the principles.[139]

(xii) *Case Concerning Military and Para--military Activities in and against Nicaragua (Nicaragua* v. *U.S.)*[140]—In this case the court on 10th May, 1984 indicated provisional measures asking the U.S. to immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaragua ports, and in particular, the laying of mines." The court also dwelt upon the principles of non-use of force and non-intervention.[141]

(xiii) *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya-Malta), Judgment dated 21st, March, 1984.*—In this case the court clarified the law relating to application to intervene under Article 62 of the Statute of the court. This case has been discussed in a little detail earlier in this chapter.

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[135] In this case the Court had indicated interim measures. Subsequently on the assurance of France not to conduct atmospheric tests, the case was removed from the list of the Court. [See Nuclear Text case (*Australia* v. *France*) Judgment of December 20, 1974, I.C.J. Rep. (1974), p. 233 ; Nuclear Test case (Newzealand v. France), Judgment of December 20, 1974, I.C.J. Rep. (1974), p. 457].

[136] I.C.J. Reports (1974), p. 3, para 62 of the Judgment ; The International Court further observed : "that Iceland's extension of its exclusive fishery jurisdiction beyond 12 miles is not opposable to the United Kingdom, that Iceland may on the other hand claim preferential right in the distribution of fishery resources in the adjacent waters; that the United Kingdom also has established rights with respect for the fishery resources in question ; and that the principle of reasonable regard for the interests of other States enshrined in Article 2 of the Geneva Convention on the High Seas 1958 requires Iceland and the United Kingdom to have due regard to each other interests, and to the interests of other States, in those resources" *Ibid.*, para 68.

[137] I.C.J. Reports (1980) p. 3. For the facts and decision please *see* also chapter on "Diplomatic Agents."

[138] I.C.J. Reports (1982) p. 21.

[139] For details of the case *see* Chapter on "The Law of the Sea".

[140] I.C.J. Rep. (1984) p. 169.

[141] For details, *see* Appendix II.

(xiv) *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada* v. *U.S.) Judgment of 12th October, 1984.*—In this case the court clarified the law relating to delimitation of continental shelf between two states. This case has also been discussed in detail in chapter on "The Law of the Sea".

(xv) *Case Concerning Military and Para-military Activities in and Against Nicaragua (Nicaragua* v. *United States of America) Judgment of 26th November, 1984.*—In this case the court interpreted Article 36, paragraphs 2 and 5 and clarified law relating to admissibility of application. This case has been discussed earlier in this chapter under the heading "Transferred Jurisdiction".

(xvi) *Case Concerning the Continental Shelf (Libva* v. *Malta) Judgment of 5th June, 1985.*—This case deals with the delimitation of continental shelf between opposite coasts and has been discussed in a little detail in chapter on "The Law of the Sea".

(xvii) *Case concerning Military and Para-Military Activities in and Against Nicaragua (Nicaragua* v. *United States of America) [ICJ Reports 1986 p. 14].*—In this case the Court clarified rules relating to intervention and collective self-defence. This case has been discussed in Chapter on "Intervention".

(xviii) *Case concerning Electronica Sicula S.P.A. (Elsi) [United States of America* v. *Italy], Judgment of 20th July, 1989.*—In this case the World Court expounded the principles relating to the applicability of the Rule of Exhaustion of Local Remedies. This case has been discussed in detail in Chapter on "Treatment of Aliens".

It may be noted that the *Case Concerning Military Activities in and Against Nicaragua* is the fifty-second contentious case brought before the court.

N.B.—For facts and details *see* also Appendix II.

(xix) *Land, Island and Maritime Disputes case (El Salvador* v. *Honduras).*[142]—This case deals with the right of a third state which is not a party to the dispute to intervene in dispute in which its interests may be affected. This has been discussed earlier in this chapter.

(xx) *Fisheries Jurisdiction case (Spain* v. *Canada).*[143]—This case deals with "Interim Measures or Interim Relief" and has been discussed in this chapter.

(xxi) *Case Concerning the Vienna Convention on Consular Relations (Germany* v. *United States of America).*[144]—This case deals with the competence of the Court to determine whether it has jurisdiction in the case or not.

(xxii) *Case Concerning the Legality of Use of Force (Yugoslavia* v. *U. S.).*[145]—This case also deals with the competence of Court to determine whether it has jurisdiction or not.

(xxiii) *Arrest warrant of 11th April, 2000 (Democratic Republic of Congo (2002).*—In this case, the World Court clarified the law relating to immunity from criminal jurisdiction and the inviolability of Minister of Foreign Affairs while visiting other countries. This case has been discussed in detail in chapter on "Diplomatic Agents".

(xxiv) *Application for the Revision of the Judgment of 11th July, 1996 in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia* v. *Harzegovina* v. *Yugoslavia) (2003).*—In this case, the International Court of Justice clarified the legal position relating to preliminary objections. In its judgment dated 3rd February, 2003. The Court ruled that once it is established that the request for revision fails to meet one of the conditions for admissibility, the Court is not required to go further and investigate whether the other conditions are fulfilled.

(xxv) *Avena and other Mexican Nationals (Mexico* v. *United States of America), (2004).*—In this case, the court ruled that the United States of America had breached its obligations to Mr. Avena and 50 other Mexican nationals and to Mexico under Vienna Convention on Consular Relations.

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[142] I.C.J. Reports (1990).

[143] Decided on 4th December, 1998.

[144] Decided on 3rd March, 1999.

[145] Decided on 2nd June, 1999.

(xxvi) *Certain Property (Liechtenstein* v. *Germany) (2005).*—This case is related to the question whether the Court has jurisdiction or not. The Court found that it had no jurisdiction.

(xxvii) *Armed Activities in the Territory of Congo (Democratic Republic of Congo* v. *Uganda) [2005].*—This case is relating to use of Force, intervention, international human rights law, international humanitarian law. In this case, the court found that Uganda violated the principle of non-use of force in international relations and of non-intervention, that it violated its obligation under international human rights law and international humanitarian law and that it violated other obligations owed to the Democratic Republic of Congo. The Court also found that the Democratic Republic of Congo violated obligation owed to Uganda under the Vienna Convention on Diplomatic Relations of 1961.

(xxviii) *Frontier Dispute (Benin/Niger) [2005].*—In this case the Court determined the boundary between the two States. The Chamber of the court in its judgment of 12 July, 2005, determined on the basis of the course of boundary which of the Island located in the River Niger belong to Benin and which to Niger. It found that the Island Lete Goungou belongs to Niger.

(xxix) *Armed Activities on the Territory of Congo (New Application, 2002) (Democratic Republic of Congo* v. *Rwanda) [2006].*—In this case, the World Court clarified the fundamental distinction between the acceptance of States of the Court's jurisdiction and the conformity of their acts with international law. This judgment was delivered on 3rd February, 2006.

(xxx) *Landmark Ruling on Bosnian Genocide (February 26, 2007).*—In this case, the ICJ ruled that while genocide did occur during the 1992 war in the Balkans, Serbia does not bear direct responsibility for the atrocities, as the Bosnian has charged. However, the Court concluded that Belgrade had violated international law by failing to prevent the Srebrenica massacre and by not earnestly committing to capturing high profile fugitives. While the ICJ's judgment cleared Serbia's government of complicity in the genocide, the UN backed International Criminal Tribunal for Yugoslavia continued its quest to bring alleged perpetrators of the war crimes to justice.

(xxxi) *Paper Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment of 20 April, 2010.*—The ICJ ruled overwhelmingly in Uruguay favour in a case brought by neighbouring Argentina, which had attempted to force the closing and dismantling of a paper pulp mill on the Uruguay River, whose course forms part of the border between the two nations. By a majority of 14 Judges, the Court upheld Uruguay's right to continue operating the plant finding that Argentina failed to prove that it discharges pollutants harmful to river or its surrounding or to the local flora and fauna.

(xxxii) Certain Activities carried out by Nicaragua on the border are (*Costa Rica* v. *Nicaragua*) [2010].

(xxxiii) Frontier Dispute (Burkino Faso/Niger) [2010].

(xxxiv) Whaling in the Arctic (Australia v. Japan) [2010].

(xxxv) Construction of a Road in Costa Rica along with (Nicaragua v. Costa Rica) [2011].

(xxxvi) Request for Interpretation of the Judgment of 15 June, 2012 in the case concerning the Temple of Vihear (*Combodia* v. *Thailand*) (2011).

(xxxvii) Construction of a Road in Costa Rica alongwith the San Juan River [Nicaragua v. Costa Rica, 2011].

(xxxviii) Request for the Interpretation of the Judgement of 15 June, 1962 in the case concerning the Temple of Preah of Vihear [Combodia v. Thailand, 2011].

(xxxix) Request for the Interpretation of the judgement of 15 June, 1962 in the case concerning the Temple of Preah of Vihear [Decision of 11 November, 2013].

The above list is simply illustrative and by no means exhaustive.

From 22 May, 1947 to 23 April, 2010, 146 cases were entered in the General list. So the International Court of Justice has decided 105 cases.

(xl) *Case Relating to South China Sea.*—In this case, International Court of Justice upheld the principle of freedom of sea. The world Court held that China has no special rights over this part of the sea. China, however, refused to follow this decision.

(xli) *Case Relating to Sentencing to Death of Kulbhusan Jhadhav (India v. Pakistan) (2017-2019).*—

N.B.—For this please see Appendix II.

(xlii) *Application for revision of the Judgment of 23 May, 2008 in the case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore) (2017-2018).*

(xliii) *Request for Interpretation of the Judgment of 23 May, 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore) (2017-2018).*

(xliv) *Obligation to Negotiable Access to the Pacific Ocean (Bolivia v. Chile) (2013-2018).*

Advisory opinions of the Court

The advisory opinions of the International Court of Justice have greatly encouraged the progressive development of International Law and have helped the functions and development of the International Organisation.[146] Between 1946 and 1984, the court dealt with 17 requests for advisory opinions, delivering 18 opinions and making 24 orders in the cases concerned. Following advisory opinions of the court deserve special mention in this connection :

(1) *Conditions of admission of a State to the United Nations (1948).*[147]—In its advisory opinions *on the Conditions of Admission of a State to the United Nations,* the World Court ruled that a member State of the United Nations while casting its vote either in the General Assembly or in Security Council, cannot make its consent or vote depending upon the conditions which are not mentioned in the Charter. Thus in view of the Court, in regard to the admission of the State, essential conditions mentioned in the Charter are exhaustive and no other conditions can, therefore, be validly imposed.

(2) *Competence of General Assembly regarding Admission of a State to United Nations (1950).*[148]—After the repeated failure of the Security Council to make its affirmative recommendation in respect of the applications of certain States for the membership of the United Nations, some States expressed the opinion that in such a situation the General Assembly can by its decision admit a State to the United Nations. But in its advisory opinion given in 1950, the World Court ruled that for a State to be admitted to the United Nations both the affirmative recommendations of the Security Council as well as the decision of the General Assembly are necessary. The Court also made it clear that it is competent to interpret the provisions of the Charter.

(3) *Reparation of the injuries suffered in the service of the United Nations (1949).*[149]—In this advisory opinion the International Court of Justice ruled that the United Nations is a legal person and has capacity to claim compensation for injuries suffered by the persons who are in the service of the United Nations.[150]

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[146] "By several of its Advisory opinions the Court has made an important contribution to the development of the legal status of international organizations and international civil servants." Nagendra Singh, note 12, at 14.

[147] I.C.J. Rep. (1948), p. 4.

[148] I.C.J. Rep. (1950), p. 4.

[149] I.C.J. Rep. (1949), p. 174.

[150] The Court also observed, "Under International Law the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as essential to the performance, of its duties." *Ibid.*, at p. 182.

(4) *International Status of South West Africa (1950).*[151]—In this case the Court helped the development of International law relating to succession of International Organisation. The Court ruled that the succession of International Organisation takes place if the objects and nature of the predecessor and successor International Organisations are same. In this case the Court ruled that the trusteeship system of the United Nations succeeded to the rights and duties of the mandatory system of the League of Nations.

(5) *Reservations to the convention on the Prevention and Punishment of the Crime of Genocide.*—In this opinion the court propounded compatibility test relating to reservations to a multilateral treaties which was later on adopted in the Vienna Convention on the Law of Treaties, 1969.

N.B.—For this please see chapter on 'Treaties'.

(6) *Effects of Awards of Compensation made by the U.N. Administrative Tribunal.*[152]—In this case, the court held that though established by the General Assembly, the U.N. Administrative Tribunal was an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions and not merely an advisory or subordinate organ. Its judgments were therefore binding on the U.N. Organization and thus also on the General Assembly. Later in *Application for Review of Judgment No. 158 of U.N. Administrative Tribunal*[153] and *Application for Review of Judgment No. 273 of the U.N. Administrative Tribunal*[154] also, the court upheld the decision of the Tribunal.

(7) *Certain expenses of the United Nations (1962).*[155]—In this case the Court had to decide whether the expenses incurred by the United Nations Suez Crisis 1956 and Congo operations (1960-61) apportioned by the General Assembly among the members were to be regarded the expenses of the Organisation, in accordance with the provisions of Article 17(2). The Court answered in affirmative. The Court also made it clear that the United Nations is capable of doing anything which is not prohibited under the Charter and if done to achieve the purpose contained in Article I of the Charter. Thus the Court indirectly sustained the validity of Uniting for Peace Resolution, 1950.

(8) *Advisory opinion concerning the legal consequences of the continued presence of South Africa in Namibia (i.e. South West Africa), notwithstanding Security Council Resolution* 276 (1970).[156] In this case, the World Court held the following :

(a) That the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory.

(b) That State Members of the United Nations are under obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia and refrain from any acts and in particular any dealings with the government of South Africa implying recognition of the legality of lending support or assistance, to, such presence and administration.

(c) That it is incumbent upon States which are the Members of the United Nations to give assistance in the action which has been taken by the United Nations with regard to Namibia.[157]

(9) *Advisory opinion of the International Court of Justice in the Western Sahara Case.*[158]—In this case the Court dealt with, *inter alia,* the question of decolonization and the principle of self-determination. During, the course of judgment, the Court made it clear

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[151] I.C.J. Rep. (1950), p. 128.
[152] I.C.J. Rep. (1954), p. 47.
[153] Advisory opinion of 12th July, 1973.
[154] Advisory opinion of 20th July, 1982.
[155] I.C.J. Rep. (1962), p. 151.
[156] I.C.J. Rep. (1971), p. 16.
[157] Ibid, at pp. 315-16.
[158] I.C.J. Rep. (1975) reprinted in I.J.I.L., Vol. 15 (1975), pp. 390-441.

that in consequence of General Assembly Resolution 1514 (xv) of 14th December, 1960 and other resolutions, the principle of self-determination has become a binding principle in the context of colonialism. The court concluded : "......... the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity". Thus the court has not found legal ties of such a nature as might affect the application of Resolution 1514 (xv) in the decolonization of Western Sahara and, in particular of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (of paragraphs 54-59 above).[159] The court also clarified its own competence to give advisory opinion.[160] The court observed : "its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them. However, the Court proceeded not merely to stress its judicial character and the permissive nature of Article 65, paragraph 1 of the statute, but to examine, specifically in relation to the opposition of some of the interested States, the question of the judicial propriety of giving the opinion. *In short, the consent of an interested State continues to be relevant, not for the court's competence, but for the appreciation of the propriety of giving an opinion.*[161] *Further, "In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the court's judicial character.* An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." [162] But according to the court, in the present case the object of the request was "to obtain from the Court an opinion which the General Assembly deems of assistance to for the proper exercise of its functions concerning the decolonization of the territory."[163] Further the court observed : [164] "What the Court said in a similar context, in its advisory opinion on *Reservation to the Convention on the Prevention and Punishment of the crime of Genocide,* applies also to the present case : 'The object of this request for an opinion is to guide the United Nations in respect of its own action." [165]

(10) *Interpretation of the Agreement of 25th March, 1951 between the WHO and Egypt.* Judgment of 20th December, 1980.

In this case the court clarified the legal position relating to determination by the court of the meaning and implications of question submitted for advisory opinion and the need to ascertain and formulate legal questions really in issue.

(11) *Application for Review of judgment No. 273 of the U.N. Administrative Tribunal* [Advisory opinion of 20th July, 1982]:—

In this case the Court dwelt upon the competence and propriety of Court's giving advisory opinion, nature and scope of opinion, requested and the need for Court to ascertain and state legal questions really in issue.

(12) *Advisory opinion on Applicability of the obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 23rd June, 1947 (Advisory Opinion of 26th April, 1988):—*

In this advisory opinion the World Court interpreted Section 21 of the Headquarters Agreement in the context of U.S. decision to close down PLO Observer Mission at

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[159] I.C.J. Rep. (1975) reprinted in I.J.I.L., Vol. 15 (1975), para 162 at p. 441.

[160] I.C.J. Rep. (1975) reprinted in I.J.I.L., Vol. 15 (1975), paras 18, 23, 28, 32, 33 and 39 ; see also Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950, p. 72 ; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports, 1971, p. 27 ; Application for Review of Judgments No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports (1973), p. 172.

[161] *See Ibid.*, para 32, emphasis added.

[162] I.C.J. Reprinted in I.J.I.L., Vol. 15 (1975), para 33, emphasis added.

[163] *See Ibid.*, para 39.

[164] *See Ibid.*, para 41.

[165] *See* I.C.J. Reports 1951, p. 19.

Newyork and unanimously held that the U.S. is under an obligation, in accordance with Section 21 of the Headquarters Agreement of 26th June, 1947, to enter into arbitration for the settlement of the dispute between itself and the U.N. This case has also been discussed in Chapter on "Definition, Nature, Functions and Evolution of International Organisation".

(13) *Legality of the use by a State of Nuclear Weapons in Armed Conflict (Decision dated 8th July, 1996) [Request for advisory opinion by WHO]*

By a letter dated 27th August, 1993, filed in the Registry of the International Court of Justice on 3 September, 1993, the World Health Organisation requested the World Court to give an advisory opinion on the following question :

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under International law including the WHO's Constitution ?

Certain nuclear powers, especially United States of America and U. K. contended that the above question is essentially political and is also beyond the scope of the WHO's proper activities, the World Court should, therefore, decline to give an advisory opinion. The International Court of Justice accepted this argument partly and held that the request by the WHO does not relate to a question which arises 'within the scope of activities' of that orgnaisation in accordance with Article 96, paragraph 2 of the U.N. Charter and thus an essential condition of founding the Court's jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested. Thus the International Court of Justice declined to give the advisory opinion which was requested of it by the World Health Organisation.

The World Court's reason for declining to give its advisory opinion does not seem to be convincing and sound. The effect of use of nuclear weapons falls on environment and effect on environment falls on health. Radio-activity emanating from use of nuclear weapons affects environment and jeopardises health of people. WHO is directly concerned with these. It is true that disarmament is a topic with which the General Assembly and the Security-Council are more concerned but WHO is also concerned with the effects of the use of nuclear weapon. It is, therefore, not just and proper to say that the question referred by WHO is not within the scope of proper activities of WHO.

However, it may be noted that on the same date the International Court of Justice gave its advisory opinion on a similar question referred by the General-Assembly of the U.N.

(14) *Advisory opinion on Legality of the Threat or use of Nuclear Weapons—Request for advisory opinion by the General Assembly of the U.N. (Opinion dated 8th July, 1996)*

The General Assembly *vide* Resolution 49/75 dated 15th December, 1994 requested the International Court of Justice to give its advisory opinion on the following question :

"Is the threat or use of nuclear weapons in any circumstance permitted under International law ?" The General Assembly made this request pursuant to Article 96, paragraph 1 of the Charter of the United Nations.

The International Court of Justice unanimously held that there is no specific authorization for the threat or use of nuclear weapons under customary or conventional law. Secondly, a threat or use of force by means of nuclear weapons is unlawful as it is contrary to Art. 2(4) of the U.N. Charter and not vindicated by the requirement of Article 51 of U.N. Charter. Thirdly, a threat or use of nuclear weapons ought to be compatible with the requirement of the International law applicable in armed conflict, especially international humanitarian law including specific obligations under treaties expressly dealing with nuclear weapons. Lastly, there is an obligations of the members of the United Nations to pursue in good faith and conclude negotiations leading to nuclear disarmament under effective International Control.

However, as regards the specific question, "Is the threat or use of nuclear weapons in any circumstance permitted under International law?" the World Court observed :

"Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self defence, in accordance with Article 51 of the Charter, when its survival is at stake."

After holding that in view of the unique characteristics of nuclear weapons the use of such weapons in fact seems scarcely reconcilable with the rules of law applicable in armed conflict, the above observation does not seem to be just and proper. As pointed out by Judge Shahabuddeen in his separate opinion : If International law has nothing to say on the subject of the use of nuclear weapons this necessarily means that international law does not include a rule authorizing such use. Due to absence of such authorization, states do not have a right to use nuclear weapons. As regards right of every state to use nuclear weapons under Article 51 of the Charter, when its survival is at stake, it has to be noted that imperative needs of survival of a state cannot prevail over even more imperative needs of survival and preservation of the entire human race.

(15) *Differences Relating to Immunity from Legal Process of a Special Reporteur of the Commission on Human Rights (1988-1999)*

This case relates to the controversy about the Immunity of a Special Reporteur of the Commission on Human Rights from legal processes.

(16) *Judgment No. 2667 of Administrative Tribunal of the International Labour Organisation upon a complaint filed against the International Fund for Agricultural Development.*

(17) *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (25 February, 2019)*

The World Court opined by 13 votes to 1 the United Kingdom is under obligation to bring to an end the administration of the Chagos Archipelago as rapidly as possible. Finally, the International Court of Justice held that all the Member States are under an obligation to cooperate with the United Nations to complete decolonization of Mauritius

So far the International Court of Justice has rendered 24 advisory opinions.

50th Anniversary of the International Court of Justice.—On 18 April, 1996, the International Court of Justice celebrated 50 years of its establishment. While the 50th Anniversary of the United Nations was celebrated with jubilation all over the world, the 50th Anniversary of the World Court failed to attract much attention. This is despite the fact that the World Court has rendered signal service in developing, interpreting and applying the rules of international law. All these years during 50 years of existence, the International Court of Justice has delivered more than sixty judgments and twenty-one advisory opinions. It is indeed a significant achievement. The decisions of the World Court have helped in clarifying, interpreting, applying and developing the rules of International Law.

60th Anniversary of the International Court of Justice.—The World Court celebrated its 60th anniversary on 18th April, 2006 in a solemn sitting in the Peace Palace (Hague) in the presence of her Majesty.

Evaluation :—It is clear from the above decisions and advisory opinions that the International Court of Justice has contributed much to the progressive development of International Law. But as pointed out earlier, the Court has weaknesses and limitations. "Inspite of its competency, the Court functions today in a world society which is not yet ready to entrust it with disputes of major proportions or even to accord it the role envisaged by the Charter".[166] Unquestionably, then application of the judicial process in the international sphere is highly politicised .... To blame the I.C.J. for not resolving the basic international conflicts of the day is to level unfair charges and to reveal ignorance of its operations.[167] Further, "if the Court has not been too successful in solving disputes because of the policies and views of its clients actual and potential, *it has contributed to the development of legal principles.* This law-making function on a case method approach is all the more important in a community of Sovereign States in which a legislative organ does not exist. In this regard the Court has not been remiss since it handed down the first judgment in the *Corfu Channel case,* and similar observation may be drawn about its advisory opinions. Again while few in number the Court has employed the opportunities presented by the opinions to *participate actively and rather substantially in the development and clarification of international law in general and international constitutional and administrative law in particular. It has exercised its role as the principal judicial organ of the United Nations with dedication and diligence and in this sense has become both a United Nations Court and an International Judiciary.* Further, "In terms of the judicial process the distrust of third party settlement and the manner in which States view their national interest together with the rather poor over all record of the United Nations on settling disputes have been of considerable significance in failing to employ the International Court".[168]

Some writers have expressed the view that the present Statute of the Court, is defective and should, therefore, be amended to increase the jurisdiction and functions of the Court."[169] For example, Prof. Leo Gross has remarked, "Unless we begin to think in terms of some rather drastic reform, the outlook for the court is very dim." [170] For the amendment of the statute he has made the following suggestions :

(1) The relevant articles of the Statute should be amended to make it possible for States to include in a treaty a new form of jurisdictional clause whereby the States would agree that any of the contracting parties could ask the court for an advisory opinion on any question relating to the application on interpretation of that treaty. States should agree in advance to accept the advisory opinion of the Court as binding.

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[166] Stephen Goodspeed : The Nature and Functions of International Organisation p. 359; In his article "Step-by step Acceptance of the Jurisdiction of the International Court of Justice, Proc. A.S.I.L., (1964), p. 131 Prof. Louis B. Sohn has also written : "It is a tragic fact of international life that the International Court of Justice" is sidestepped in most international disputes and is consequently under-employed." He has suggested that "Instead of adopting an all or nothing attitude, we might explore a step-by-step approach which would gradually increase the Court's permanent jurisdiction. Four lines of approach might be explored in this connection :

1. Acceptance of the jurisdiction of the International Court of Justice over disputes relating to the interpretation and application of treaties.
2. Acceptance of the jurisdiction of the International Court of Justice over specified areas of International Law.
3. Acceptance of the jurisdiction of the Court through regional arrangements.
4. Granting to the United Nations the power to make a binding request that parties to a dispute refer the matter to the International Court of Justice. He further added, "In conclusion, it might be useful to emphasize that the proposals made here are purely illustrative and that many other ways of fractioning the obligation to go the Court can probably be devised."

[167] Guenter Weissberg, "United Nations Movements Towards World Law", I.C.L., Vol. 24, Part 3 (July 1975, p. 460 at pp. 518-19 ; emphasis added : see also Rosene The International Court of Justice (Leyden, 1957), p. 13.

[168] *Ibid.*, at p. 519. According to Brownlie, "The following factors explain the reluctance of States to resort to the Court : the political fact that hauling another State before the Court is regarded as an unfriendly act ; the greater suitability of other tribunal and other methods of review the both regional and technical matters : the general conditions of international relations, preference for the flexibility of arbitration in comparison with a compulsory jurisdiction; the lack of representation of Afro-Asia on the Court ; and the distrust of the Court on the part of Communist and other States, [Principles of Public International Law (1973), p. 708].

[169] For the process of amending the Statute of the Court and the reform thereof, *see* : Egyn Schwelb, "The process of Amending the Statute of the International Court of Justice, A.J.I.L., Vol. 64 (1970), p. 880 ; See also Forest L. Grieces, Reform of the Method of Rendering Decisions to the International Court of Justice, A.J.I.L., Vol. 64 (1970), p. 144.

[170] "What Future of the I.C.J." A.J.I.L., Vol. 65 (1971), p. 279.

(2) Yet another type of jurisdictional clause which might be included in treaties or conventions which provide for a procedure of conciliation as the Vienna Convention on the Law of Treaties does. The new feature for such a commission would be to include a clause whereby the contracting parties could agree that the conciliation commission may ask the International Court of Justice for an advisory opinion on the legal aspect of the issues pending before the commission.

(3) The third suggestion relates to jurisdictional clause that States may include in a treaty whereby they would agree to allow their domestic tribunals to refer questions of international law to International Court of Justice for preliminary binding decision on the interpretation of the law." [171]

The last suggestion to broaden the advisory jurisdiction has been discussed earlier in the chapter and merits serious consideration.

It has also been suggested that the Statute should be amended to enable even individuals to bring their cases before the Court. But in view of the present states of international politics and international relations, suggestions for the amendment of the statute of the Court do not seem to be practicable. It has been made clear earlier while discussing the reservations of the Declarations by States of the acceptance of compulsory jurisdiction of the court that the trend is to restrict the jurisdiction of the court rather than to enhance it.[172] As rightly pointed out by the Judge Philip C. Jessup, 'The Court is what the States of the world choose to make it. The court can indeed improve its procedure but it is the States which must take advantage of the potentialities which already exist in the court Statutes.[173] "Further, court under its existing statute is an entirely flexible instrument. There are advantages in making use of it.[174] In his view, therefore, the defect is not of the Statute but the need is that the States should make more use of it. Prof. Leo Gross has also conceded that the flexibility built in the statute have not been sufficiently explored."[175]

As pointed out by Mr. Shigeru Oda, (Judge, International Court of Justice) "in the whole history of the International Court of Justice in only eight cases were the disputes to be settled by the immediate and unconditional will of both parties to appear before the Court. In addition, it should be noted that in four recent cases which were filed by unilateral application *i.e.* the case of *Trial of Pakistani Prisoners of war* which was finally removed from the list in 1973, *the Fisheries Jurisdiction cases of* 1974 and *the Nuclear Tests cases of 1974* and *the Aegean sea continental shelf case* of 1978, all the defendant states declined even to appear before the court. In spite of various allegedly justifiable reasons behind these non-appearances these negative attitudes, which constitute a new phenomenon, appear more disquieting to the eyes of those who are more concerned with the rule of law in the international community."[176]

It may be noted here that by December, 1988, since its inauguration in 1946, the court has delivered 50 judgments, 20 advisory opinions and 247 orders. Seventy-five cases have been presented to the court in its 42 years of existence ; 16 of them have been subsequently withdrawn.[177]

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[171] *Ibid., see* also Leo Gross. "The I.C.J. : Consideration of Requirements for Enhancing its Role in the International Legal Order", A.J.I.L.(1971), p. 253.

[172] Jenks has also aptly remarked : Judicial process is unhappily at a discount in a world in which the width and depth of divergences of ideology and interest have impaired faith in objectivity and narrowed the acceptance of Third party judgment", C.W. Jenks, Social Justice in the Law of Nations—The I.L.O. Impact After Fifty Years (1970), p. 47.

[173] Philip C. Jessup, "Do New Problems Need New Courts?", A.J.I.L., Vol. 65 (1971), p. 261 at p. 262.

[174] Ibid., at p. 263.

[175] Leo. Gross, see Supra note 56 ; Prof. Goodspeed has also remarked : "As long as the members of the United Nations are unable to resolve their basic differences, the Court will continue in a limited role, performing it with distinction but with little effect upon the course of international politics", Supra note 2 at p. 359.

[176] Shigeru Oda, "The Role of the" International Court of Justice, I.J.I.L., Vol. 19 (1979) p. 157 at p. 160.

[177] U.N. Chronicle, Volume XXV, No. 4 (December, 1988), p. 75.

So far the world Court has delivered judgments in more than 105 cases and advisory opinions in 23 cases.

As written by Shabtai Rosenne, "It is the international Court, more than any other organ of the United Nations, which has infused new dynamism into the International law of today."[178] Judge Dr. Nagendra Singh has rightly remarked : "Humanity would, therefore, always lie in the right path so long as it survives to strengthen the International Court of Justice and the United Nations with a view to building up both these institutions for the purpose of maintenance of public order in international community."[179] Thus despite several weaknesses and limitations, the International Court of Justice has performed its functions with distinction and has made a significant contribution for the development and classification of International law in general and international constitutional and administrative law in particular. "The Court is indeed a *sine qua non* for the establishment of Rule of Law in inter-State relations."[180]

To conclude in the words of Judge Shigeru Oda, "...... it can hardly be doubted that the International Court of Justice has contributed a great deal to the development of International law. The content of the actual rules may sometimes be inadequate in international community where customary law rather than written law plays a more important role, so much so that the role of the judiciary in the international community cannot be over-emphasized. The International Court of Justice has played an important role in the past in ascertaining existing customary law and in formulating adequate rules of international law, and it cannot be accused of having failed to keep abreast of the current of times...... the International Court of Justice has been in the van of the development of International Law."[181]

It has been rightly pointed out that generally the Court has been most successful resolving border delimitation of the use of oceans while the Court has, in some instances resolved claimed by one state exposed on behalf of its nationals, the Court has generally refrained from hearing contentious cases that are political in nature due to its lack of enforcement mechanism and its lack of compulsory jurisdiction. The Court has generally found that it did not have jurisdiction to hear cases involving the use of force.

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[178] The World Court—What is and How it Works (1963) p. 174 ; Corbett has also written, "The Permanent Court of International Court of Justice and the present International Court of Justice, may fairly be regarded as major steps in the development of a world legal system" P. E. Corbett, The Growth of World Law (1971), p. 23.

[179] Recent Trends in the Development of International Law and Organisation Promoting Inter-State Co-operation and World Peace (1969), p. 52.

[180] Judge Dr. Nagendra Singh, "Codification and Progressive Development of International Law : The Role of The International Court of Justice" I.J.I.L., Vol. 18 (1978) 1 at p. 14.

[181] *See* note 176 at p. 162.

CHAPTER 39

THE SPECIALIZED AGENCIES*

The specialized agencies are based on inter-governmental agreements and perform vast international functions in the economic, social, cultural, educational and health fields. Article 57 of the United Nations Charter provides that the various specialized agencies established by inter-governmental agreement and having vide international responsibility, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations in accordance with Article 63. Such agencies thus brought into relationship with the United Nations are called specialized agencies of the United Nations. Article 63 provides that the Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations, such agreements shall be subject to the approval by the General Assembly. The Economic and Social Council may co-ordinate the activities of the specialized agencies through consultation with and recommendation to such agencies and through recommendations to the General Assembly and to the members of the United Nations. Article 59 further provides that the Organization shall, where appropriate, initiate negotiations among the States concerned for the creation of any new specialized agencies required for the accomplishment of the purposes setforth in Article 55.

The United Nations thought it proper not to take full responsibility in the various fields and to allow the specialized agencies to perform functions in the Economic, Social, Cultural, Health and related fields. Following were the three reasons for this decision : (i) The framers of the Charter of the United Nations were of the view that it was neither possible nor proper for the United Nations to take full responsibility in these fields. If the United Nations had taken the full responsibility in these fields, the Organization would have become a very complex, complicated and unwieldy; (ii) Since most of the functions in the Economic and Social fields are technical, it was thought to be a wise decision that small (smaller than the U.N.) specialized agencies comprising of the skilled and trained technical experts, should be allowed to perform these functions; (iii) Much of the work of the specialized agencies is administrative which some such agencies had very successfully performed in past for several years.[1] The examples of International Labour Organization and Universal Postal Union deserve a special mention in this connection.

It was also thought proper that these inter-governmental agencies should remain independent of the United Nations, but may be brought into relationship with the United Nations through special agreements. The experience has shown that the above decision was correct for the specialized agencies are now successfully performing manifold functions in the various social, cultural, educational, health and related fields.

The General Nature of the Specialized Agencies.—All the specialized agencies have the following common features :

(i) Their legal existence is the result of inter-governmental agreements and most of the States are the members of these specialized agencies.

(ii) All the specialized agencies have been brought in relationship with the United Nations through special agreements.

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* See also for P.C.S. (1967), Q. No. 7.

[1] Stephen S. Goodspeed, The Nature and Function of International Organization, Second Edition (1967), p. 420.

(iii) Each specialized agency has a Constitution or Charter of its own which describes the duties, functions, constitution, etc., of the Organization.

(iv) Each specialized agency has almost the same general constitution. For example, each specialized agency has an Assembly or Conference which has the representation of all the members ; each has an Executive Council or Committee which performs executive or supervisory functions, and each has a Director or Secretary General whose functions are same to that of the Secretary-General of the United Nations.

(v) Each specialized agency has a Secretariat of its own.[2]

While there are abovementioned common features in all the specialized agencies, there are also some dissimilarities on the basis of their nature and the functions which they perform.[3]

Some specialized agencies

At present there are seventeen specialized agencies. A brief discussion of each of these specialized agencies is being given below :—

(I) International Labour Organization (I.L.O.) [4*]

International Labour Organization was established on April 11, 1919 as an autonomous partner of the League of Nations. Its Head Office is situated in Geneva. It was brought into relationship with the United Nations in 1946 through a special agreement. This special agreement was approved by the General Assembly on 14th December, 1946. and became the first specialized agency of the U.N. The original Constitution of ILO was drafted as Part XIII of the Treaty of Versallies. International Labour Organization functions in close collaboration, with the United Nations.

Objectives, Purposes and Fundamental Principles.—Article 1 of the ILO Constitution provides that a permanent Organization is established for the promotion of the objects set forth in the Preamble of the Organization to the Constitution and in the declaration adopted at Philadelphia on 10th May, 1944, the text of which is annexed to the Constitution. The General Conference of the ILO meeting in 26th session in Philadelphia adopted on 10th day of May, 1944, the declaration concerning the aims and purposes of the ILO and the principles which should inspire the policy of its members.

The conference reaffirmed the fundamental principles on which the Organization is based and, in particular, that :

(a) labour is not a commodity;

(b) freedom of expression and association are essential to prosperity everywhere;

(c) poverty anywhere constitutes a danger to prosperity everywhere;

(d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employer enjoying equal status with these of the governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

Part III of Annexure containing the declaration recognized the obligation of ILO to further among the nation of the world programme which would achieve the following :

(a) full employment and raising of standard of living;

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[2] Stephen S. Goodspeed, The Nature and Function of International Organization, Second Edition (1967), p. 420.

[3] For dissimilarities in different specialized agencies see Ibid. pp. 423-25.

[4] For text of the constitution of I.L.O. see: Basic Documents in International Law (1972), Edited by Ian Brownlie, pp. 45-47; see also Jenks, The International Protection of Trade Union Freedom (1957); Jenks, Human Rights and International Labour Standards (1960), Mc Nair, The Expansion of International Law (1962) and Jenks, Social Justice in the Law of Nations—The I.L.O. Impact After Fifty Years (1970).

[*] See also for I.A.S. (1972), Q. No. 10(d) ; I.A.S. (2002) Q. 8(a).

(b) the employment of workers in the occupation of which they can have full satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;

(c) the provision, as a means of attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration of employment and settlement;

(d) policies in regard to wages and earnings, hours and other conditions of works calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;

(e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productions, efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;

(f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;

(g) adequate protection for life and health of workers in all occupation;

(h) provision for child welfare and maternity protection;

(i) the provision for adequate nutrition, housing facilities for recreation and culture;

(j) the assurance of equality of educational and vocational opportunity.

Composition and Functions.—Its membership is open for all the States. Following are the main organs of the International Labour Organization :

(a) *General Conference.*—Each member-State gets representation in the General Conference. Each State has 4 representatives in the General Conference—two representatives of the State Government and one each representative of the workers and employers. Each representative has one vote. Most of the decisions of the Conference are in the form of Conventions and recommendations and they require the majority of two-third members present and voting.

It is the obligation of the member-State to implement through their State Legislatures the Conventions adopted by the General Conference.[5] All the conventions and recommendations combined together are called International Labour Code which indicates the International standards of policy.[6] It comprises of 130 Conventions and 134 recommendations. As it is made clear in the Code itself, "The International Labour Code is primarily a Code of Internationally approved standards, certain of which are capable of becoming, and have in many cases become, binding upon the States of the relevant International Labour Conventions and in respect of all of which members of the Organization have an obligation to report on the position of their national law and practice at appropriate intervals as requested by the governing body."[7]

According to Article 17 of ILO Constitution, the conference shall elect a President and three Vice-Presidents

(b) *Governing body.*—The Governing body comprises of 56, members (28 government representatives 14 employers representatives and 14 workers representatives) and it is a tripartite body and includes the representatives of Governments, workers and employers. The Governing Body appoints the Director-General and supervises the functions of the Organization. The permanent seats are reserved for 10 States of chief industrial importance return to active participation in the ILO next June by granting it one of the permanent seats reserved for the 10 states of chief industrial importance.

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[5] See M.K. Nawaz and N. Vaidyanathan, "Ratification of I.L.O. Conventions By India", I.J.I.L., Vol. 11 (1971), p. 610 at pp. 610-12.

[6] Goodspeed, see note 1, p. 442.

[7] International Labour Code, (1951) (1952), ilxx adopted from C.W. Jenks, Social Justice in the Law of Nations (1970), p. 9.

(c) *International Labour Offices or Secretariat.*—It is controlled by the Governing Body. The head of the International Labour Office is a Director-General. Its head-office is situated in Geneva and its branches are in New York and in several-countries of Europe and Asia. Its main function is to collect informations related to industrial life and labour and to assist the members to make laws in accordance with the decision of the General Conference.

According to Article 37 of the ILO Constitution, any question or dispute relating to the interpretation of the Constitution or any subsequent convention concluded by members shall be referred for the decision to the International Court of Justice. The advisory opinion of the Court shall be binding upon any tribunals.

Evaluation.—The I.L.O. standards are conventions and recommendations designed to improve working and living conditions, to safeguard human rights such as freedom of association and to encourage job creation.[8] International Labour Organization is a very successful inter-governmental institution and specialized agency. It has done a commendable work to achieve social justice for the workers. In the field of international legislation, International Labour Code is a significant achievement. In the words of C.W. Jenks, "The International Labour Code has become for labour lawyers throughout the world what *corpus juris civiles* is for the civilians or works of authority of the Common Law for the common lawyers." [9] The most significant thing in the constitution of the International Labour Organization is that this Organization has the representation of not only the States, but also of the workers and employers. This tripartite partnership has made this Organization the most representative and democratic in the real sense of the term. Besides this, as pointed out by Jenks, "No less redical and unprecedented an innovation was the obligation to submit Conventions adopted by International Labour Conference by a two-thirds majority for parliamentary consideration, irrespective of the attitude towards the convention of the representatives of the Government concerned." [10]

It may be noted here that the I.L.O. received a setback because the United States of America withdrew from the I.L.O. The U.S.A. had been contributing 25% of the expenses (*i.e.* $ 20 million per year) of the annual budget. Probably American withdrawal from the Organization was because, according to the U.S. the I.L.O. had become a forum for Communist and anti-Israel propoganda. While withdrawing U.S.A. from the I.L.O. on 1st November, 1977, President Carter told that the U.S.A. would rejoin the Organization if the I.L.O. ended its involvement in political issues. U.N. Secretary-General, Dr. Waldheim rightly described the U.S. decision as a "retrogressive step." [11]

So far 187 countries have become Members of the International Labour Organization.

It may be noted that there are a number of mechanism by which the ILO functions to regulate and practice compliance with its standards. These are following :

(i) *Regular Reporting Procedure.*—Each member has to send a regular report to the extent with which its national law is consistent with ILO conventions and recommendations. The reports thus sent are first evaluated by the Committee of Experts and the Application of Conventions and Recommendations consisting of internationally renowned scholars. Then the annual report of the Committee is reviewed at the annual session of the conference by the Conferences Committee on the Application of Standard. Thereafter this Committee makes recommendations to the Conference, which may act to censure particular governments.

(ii) *Special Mechanism to protect Freedom of Association.*—The Governing Body's Committee of ILO has a committee of Freedom of Association which has the competence to review complaints which are brought against member States who allege a violation of the fundamental rights of freedom of association. Such a complaint can be brought against a member State which has not ratified the Organization's Constitution on freedom of association.

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[8] U.N. Monthly Chronicle, Vol. XIII, No. 7 (July, 1976), p. 41.

[9] C.W. Jenks, Social Justice in the Law of Nations—The I.L.O. Impact after Fifty years (1970), p. 80.

[10] Ibid, at p. 25.

[11] The Statesman, Dated, 3rd November, 1977.

If the State to be investigated consents, the Governing Body may refer the complaints to Fact Finding and Conciliation Commission on Freedom of Association for further investigation. After investigation the matter concerning States which have satisfied ILO Constitution are then referred to Committee of Experts.

(iii) *Commission of Enquiry.*—Article 26 of the ILO Constitution provides that an *ad hoc* Commission of Enquiry may be set up to investigate complaints against a member State which has ratified an ILO convention.

(iv) *Representations.*—Under Article 24 of the ILO Constitution, a representation (a kind of complaint) can also be filed against a State alleging violation of an ILO Constitution which has been ratified. A committee appointed by the Governing Body then reviews the report of the Committee.

Some of the conventions namely, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) adopted by the General Conference of ILO in its 76th Session on 7th June, 1989. Merchant Shopping (Minimum Standards) convention 1976; Maternity Protection Convention (No. 183); Workers with Family Responsibilities Convention 1981 (No. 156); Worst Forms of Child Labour Convention, 1999 (No. 182); Safety and Health in Agriculture Convention, 2001 (No. 184); Minimum Wage Convention, 1973 (No. 138); Private Employment Agencies Convention, 1999 (No. 181); Prevention of Major Industrial Accidents Convention) 1993 (No. 174); Tripartite Consultation (International Labour Standards Convention, 1976 (No. 144); Seafarers Identity Documents Convention (Revised), 2003 (No. 188) etc.

(II) World Health Organization (W.H.O.)

As pointed out by Prof. Stephen S. Goodspeed, the World Health Organization "is typical of the specialized agency with multipurposes functions and well defined objectives.[12] For the establishment of the World Health Organization, the Economic and Social Council called an International Health Conference in New York in July 1946. Representatives of 46 States participated in this Conference. On 22nd July, 1946, the World Health Organization adopted its Constitution. In July, 1948, this Organization was brought into relationship with the United Nations finally on 1st September, 1948, it started functioning as a permanent Organization. At present it has 194 (one hundred ninety-four) member States and a multinational staff numbering 4,500.

Objectives and functions.—The main function of the World Health Organization is to raise the standard of health of the people. Preamble of the World Health Organization's Constitution defines health as a state of complete physical, mental and social being and not merely the absence of disease or infirmity. According to the Article 1 of W.H.O. Constitution, the objective of the W.H.O. shall be the attainment by all peoples of the highest possible level of health. In order to achieve its objective this Organization performs many functions such as to assist the State Governments in strengthening their health service ; to give them technical assistance and advice in emergency ; to make plans to eradicate diseases and to implement them ; and to propose international conventions and agreements on matters of health. W.H.O. promotes research, generates and disseminates information and ensures valid and productive technical cooperation. It also serves as a global clearing-house on health matters. It is the "internationally pipeline" for medical and health information of all kinds. It alerts the world's scientists and Governments about new drugs and treatment, new ways to organise health care and train nurses and doctors, safe levels of chemicals in food and water, and high standards of drug and manufacturing practices.

According to Article 1 of W.H.O. Constitution, the objective of W.H.O. shall be the attainment by all people of the highest possible level of health.

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[12] Goodspeed, note 1, at p. 426.

Composition.—The membership of the World Health Organization is open for all States who accept its Constitution. In addition to sovereign States, some other territories and entities as are not States, may also become its members. It may be noted that Bangla Desh became the member of the World Health Organization long before it became the member of the United Nations. As of 16th May, 2005, W.H.O. has as many as 194 (one hundred ninety four) members. The World Health Organization comprises of the following three main organs :—

(a) *Assembly.*—It comprises of all the members. Its session is held every year and each member has one vote. However, each member is entitled to have three representatives in the Assembly. The Assembly lays down the general policy and passes the budget of the Organization.

(b) *Executive Board.*—This is a technical and non-political organ. It comprises of 24 members who possess high technical education in the field of health and who are elected by the Assembly. It holds its session twice in a year and implements the decision taken by the Assembly.

(c) *Secretariat.*—The Chief of the Secretariat is a Director-General who is appointed by the Assembly. He is also the Chief and the Technical Officer of the Organization.

The present W.H.O. Director-General is Tedros Adhanom.

The World Health Organization has rendered signal services by its endeavours to eradicate diseases and to raise the standards of health of the people of the world. It performs both advisory and technical functions. It has performed commendable work in checking diseases as Malaria, T.B. and Influenza. This Organization also gets research work done for the solution of world-wide problems relating to health.[13] It performs very vast functions and has contributed in the development of International Law.[14] W.H.O. has the credit of eradication of smallpox which was responsible for killing, blinding and disfiguring millions of people since the dawn of civilization. Thus, smallpox became the first ever disease to be eliminated by vaccination and its conqueror undoubtedly is W.H.O. Last but not the least, the global strategy to achieve "Health for All by the year 2000" was formulated by W.H.O. member States at the thirty-fourth World Health Assembly in 1981. The strategy aims to provide continuous, progressive improvement of health status of populations through national health systems that provide health promotion, disease prevention, and curative and rehabilitative services to all.

Recently World Health Organisation (WHO) has come up for a lot of criticism for its dubious role in respect of spread of corona virus emanating from China. It is criticized for having sided with China in hiding the facts about corona virus. For example, today is 28th April, 2020, speaking exclusively with India at the E-conclave corona series, Pulitzer Winner writer, Thomas Friedman said that the WHO downplayed China's role in the emergence of the Covid-19 pandemics. WHO's Head not only sided with China but went to the extent of spreading wrong information. As a result of this, the whole world did not get any alerts and the virus spread rapidly adversely affecting the whole world. Greatest super power such as America was caught suddenly and unexpectedly. Amercia with such sophisticated medical infrastructure and system suffered very badly. America found itself helpless as many as nine lakhs American are infected with corona virus and as many as 56,000 Amercian have died because of this deadly virus. So far there is no certain medical cure for this virus. To name only a few countries, other countries who have suffered badly are Italy, Spain, France, Britain and Iran.

So far India is concerned, India took early steps to guard her and fight against the virus. India started from January 2020 screening all the persons coming to India at the airport itself. The persons who were found positive were quarantine and isolated. Then on 7 March, 2020, the Indian Prime Minister announced Janta curfew for one week. Thereafter on 14 March, 2020, India declared lockdown for three weeks. Then a further lockdown of 19 days was announced.

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[13] For a detailed and criticial study see L. Oppenheim, International Law, Vol. I, Eighth Edition, pp. 977-86 and Stephen S. Goodspeed, The Nature and Functions of International Organization, Second Edition, at pp. 426-40.

[14] See George A. Codding, Jr., "Contribution of the World Health Organization and International Civil Aviation Organization to the development of International Law", Proc. ASIL (1965), p. 147; see also pp. 15-18 ante of this book.

(III) United Nations Educational, Scientific and Cultural Organization (UNESCO) *

For the establishment of the United Nations Educational, Scientific and Cultural Organization a Conference was held in London, in November 1945. It was finally established on 14th November, 1946. Thereafter it was brought into relationship with the United Nations through a special agreement which was approved by the General Assembly on 14th December, 1946.

Objectives and functions.—Preamble of the Constitution of the United Nations Educational, Scientific and Cultural Organization provides, "Since wars begin in the minds of men, it is in the minds that the defences of peace must be constructed". It aims to contribute for the maintenance of international peace and security by creating respect for the rule of law, human rights and fundamental freedoms through the medium of education, science and culture. The United Nations Educational, Scientific and Cultural Organization has laid a great emphasis on the development of basic education. It also encourages research work in the field of science. It has rendered signal services for the development of knowledge and its dissemination. In order to achieve these objectives, it assists State and non-State institutions.

Composition.—Each member of the United Nations can become its member. Other States may be made the member of the United Nations Educational, Scientific and Cultural Organization through two-thirds majority of general conference. As of October 2011, UNESCO had 195 (One hundred ninety-five) and 8 associated Members. Following are the main organs of the United Nations Educational, Scientific and Cultural Organization :

(A) *General Conference.*—All the member-States get representation in the General Conference which holds its sessions twice in every year. It is the policy-making organ of the United Nations Educational, Scientific and Cultural Organization. For adopting International Conventions two-thirds majority is required, but only simple majority is required for adopting recommendations. The General Conference elects the members of the Executive Board and appoints the Director-General of the Secretariat. In 2001, UNESCO Universal Declaration on Cultural Diversity was adopted by the General Conference. Further, Universal Declaration on the Human Genome and adopted by the UNESCO in 1997 was endorsed by United Nations.

(B) *Executive Board.*—It comprises of 58 members who are elected by the General Conference for a term of four years. Its chief function is to implement the decisions of the General Conference.

(C) *Secretariat.*—The Chief of the Secretariat is a Director-General who is elected by the General Conference on the nomination of the Executive Board. The Director-General participates in the meetings of the General Conference, the Executive Board's meetings and the meetings of the Technical Committees and performs routine functions of the Organization. Koichiro Matsuura (Japan) had been Director-General of UNESCO since 15 November, 1999 and was reappointed for second term. Since 2009, Irina Bokova has been the Director General of the UNESCO.

In the beginning of 1984, the U.S. State department announced that the U.S. would withdraw from the UNESCO at the end of 1984. The U.S. accused UNESCO of anti-western and anti-US-bias. The U.S. Congress started an investigation into UNESCO through its investigative arm, the general accounting office. The United States of America withdrew from the Organization in 1984.

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* See also for I.A.S., (1961), Q. No. 6(b).

Britain followed the suit and withdrew in 1985. Singapore also withdrew in 1985. The withdrawal of U.S. and U.K. was caused the loss of 30 per cent of its revenues. Japan is also thinking of withdrawing from the UNESCO. If Japan also withdraws, this will account for loss of another 10 per cent of its revenues. But one of the significant development that took place recently was the announcement by Mr. Amadou Mahtar M'bow not to try for a third term. Mr. Bow who enjoyed the backing of Afro-Asian countries, had been one of the main cause of irritation to countries such as U.S., U.K., and Japan. Federico Mayor was elected as the next Director-General and on 18 October, 1987, the Executive Board of the UNESCO approved his nomination.

For sometime the question of admission of Palestine as a full member of the UNESCO was under consideration of the Executive Board. On 27 May, 1991 this question was postponed with a view to await the result of middle east peace negotiations. Over a 3 years period ending in early 1991 UNESCO reduced its staff by 5.2 per cent. Regarding UNESCO's financial position Director-General Federico Mayor said, it was obliged to borrow funds during the past six months because the contributions from its member states were at a level entirely insufficient to cover its programme of work approved by the last general conference.

Mr. Mayor has reduced politicisation and poor management. Now even the former sceptics such as the U.S. recognized that the UNESCO was back on track. But because of financial constraints and amid a struggle in Washington over budget cuts, the U.S. could not afford to rejoin. The U. K. has however rejoined and had become 186th member of the UNESCO America, however, returned to UNESCO in 2003. As of October 2011, UNESCO had 195 Members.

The UNESCO has completed 70 years of successful working and during this period it has rendered signal service in the educational, scientific and cultural fields. On its 60th anniversary of UNESCO in 2005, a symposium on UNESCO's history was held. 33rd session of General Conference of UNESCO was held from 3rd to 21st October, 2005.

UNESCO has declared following important International Decades :

(i) International Decade for Action "water for life" (2005-2015)
(ii) U.N. Decade of Education for sustainable development (2005-2014)
(iii) International Decade for Physics (2005-2014)
(iv) U.N. Literacy Decade (2003-2012)
(v) International Decade for a Culture of Peace

(IV) Food and Agricultural Organization (F.A.O.)

It was established on 16th October, 1945 when its Constitution was adopted. Thereafter, it was brought into relationship with the United Nations and this agreement was approved by the General Assembly in December, 1946.

Objectives and Functions.—It aims to raise the living standards ; to increase the production of food-stuffs and to enhance the capacity of their distribution ; to improve the conditions of the rural population and thus to improve the economic systems of the world. In order to achieve these objectives the Organization performs various types of technical and non-technical functions. It collects informations related to food and agriculture and disseminates them. It also assists the member-States in their endeavours to increase the production of food-stuffs.

Membership :—

Article II of FAO Constitution provides that the original member nations of the Organization shall be such of the nations specified in Annex I as accept the Constitution. Further, the conference by 2/3rd majority of the votes cast, provided that a majority of the member nations of the Organization, is present, decide to admit as an additional member any nation which has submitted an application for membership and a declaration made in a formal instrument that it will accept the obligation of the Constitution in force at the time of admission.

According to Annexure I nations eligible for original membership is 45 including India. So far FAO has 197 members. India had become the member on 16th October, 1945.

Composition

FAO comprises of the following three main organs :

(A) The Conference
(B) The Council of the Organization
(C) The Director-General

(A) The Conference :—

The Conference comprises of each member nation and associate member.

(B) The Council of the Organization :—

The Council is elected by Conference. The Conference appoints an independent Chairman of the Council.

(C) The Director-General :—

The Director-General is appointed by the Conference for a term of six years. Dr. Jacques Diouf of Senegal was elected on 8 November, 1993 and began his six years term in January 1994. After completing his second term he was re-elected for a third term which began on January, 2006. The current head is Jose Gratiano de Silva. He took up his charge in January 2015 and remained as head till July 2015. The present Director-General is Qu Dongyu of China. He joined in August, 2019 and will remain in his office till 31 July, 2023.

60th anniversary of FAO was celebrated on 17th October, 2005. On this day a declaration of 60th anniversary entitled "Ensuring Humanity Freedom from Hunger" was adopted.

(V) International Civil Aviation Organization (I.C.A.O.)

From November 1 to December 7, 1944, an International Civil Aviation Conference was held in Chicago. In this Conference it was decided to establish an International Civil Aviation Organization. It was finally established on 14th April, 1947. The chief aim of this Organization is to encourage and develop international civil aviation. This Organization has the following main organs : (A) Assembly and (B) Council.

The Assembly is the representative-body and all the member-States are its members. The Council comprises of 27 members which are elected by the Assembly for a term of 3 years. The Council collects information for the development of international civil aviation ; conducts investigations and publishes information relating to civil aviation. It also makes recommendation in regard to the standards and practices of the international civil aviation. If on account of certain circumstances there are obstructions in International Civil Aviation, the Council conducts investigations and acts as an Arbitration Council to decide the disputes amongst the States. The Convention gives the I.C.A.O. Council the power to settle disputes between contracting parties. A leading case relating to International Civil Aviation Organization is, *I.C.A.O. Jurisdiction case (India* v. *Pakistan).*[15]

As of November, 2011, 191 ICAO Members of United Nations and Cook Island. The non-Members States are Dominica, Liechtenstein, Nine, Vatican city and the States with the limited recognition. The I.C.A.O. sets the basic international standards which apply world-wide to virtually all aspects of civil aviation. These are contained in the 18 Annexures to the Convention on International Civil Aviation signed at Chicago on 7 December, 1944, each one of these dealing with a particular aspect of aviation.[16] It may be noted that a specific ban on the use of weapons against civil aircraft was called for unanimously by the Assembly of the I.C.A.O. at its 25th extraordinary session which ended on 10 May, 1984, in Montreal. The weapons ban is the first significant amendment to the convention on International Civil Aviation signed in Chicago in 1944. It must be ratified by 102 or two thirds of I.C.A.O.'s contracting States before it comes into force. The text of weapons-ban amendment *inter alia*, provides that every state "must refrain from resorting to the use of weapons against civil aircraft in flight and in case of interception, the lives of persons on board and the safety of aircraft must not be endangered".[17]

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[15] I.C.J. Reports (1972), pp. 46ff. For Facts of the case see chapter on "Air-Law (Including Aircraft Hijacking)".

[16] U.N. Chronicle, Vol. XIX, No. 5 of 1982, p. 71.

On 7th December, 1994 the ICAO celebrated its golden jubilee. As a specialized agency of the U.N., ICAO is not only working to strengthen the international civil aviation scene through greater understanding among its member (*i.e.* 180 sovereign states) but has also been consistently working to take the world into an era where aviation technology is likely to be revolutionized with the turn of the century. As of April 2019, ICAO had 193 members.

The ICAO is setting up International Financial Facility for Aviation Safety (IFFAS). As pointed out by ICAO Secretary General, R.C. Costa Pereira in March 2001, "The Organization aims at generating $ 800 million towards IFFAS by levying an additional cess of one dollar on every airline ticket sold globally, out of this $ 50 million is required immediately to correct safety related deficiencies in developing countries who make minimum contribution to the ICAO."

ICAO has asked India to take up leadership role in establishment of IFFAS.

The necessity to promote IFFAS was felt for attainment of enhanced standards in global aviation safety which till date remains a low priority area for major international institutions. According to the Secretary General, it was also Imperative to improve safety related aviation infrastructure in all countries including those identified by the United Nations as least developed countries which may not have the requisite funds to invest in upgrading of civil aviation infrastructure for safety.

In March/April, 2006, civil aviation leaders from around the world adopted global strategy which would usher in a new era of openness and transparency concerning safety information.

ICAO also standardized certain functions for use in the airline industry such as Aeronautical Message Handling System (AMHS) making it a standards organisation.

*(VI) International Bank for Reconstruction and Development (World Bank or IBRD).**

Before discussing the World Bank it will be desirable to say a few words about the World Bank Group.

The World Bank Group.—The World Bank Group comprises of following four bodies :

(a) International Bank for Reconstruction (IBRD);
(b) International Development Corporation (IDA); and
(c) International Finance Association (IFA);
(d) Multiple Investment Guarantee Agency (MIGA).

While the first three are the specialized agencies of the U.N., the fourth one is MIGA. MIGA will be discussed briefly at the end of this chapter.

The World Bank or IBRD.—It was established on 27th December, 1946. Thereafter, it was brought into relationship with the United Nations through a special agreement which was approved by the General Assembly on 15th November, 1947. Its main objective is to assist the member-States in re-construction and development by investing capital. It also encourages investments of foreign capital by giving guarantee for the same. It also aims to encourage the balanced development of International trade. Its membership is open for all those States who were the members of International Monetary Fund before 31st December, 1945. Other States may be admitted as members through the majority decision of the Board of Governors.

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[17] U.N. Chronicle, Vol. XXI (1984) p. 54.

* *See* also for IAS (2008) Q. 6(b).

The Bank has the following main organs : (A) Board of Governors; (B) Executive Directors; and (C) President. The Board of Governors comprises of a Governor and an alternate member. It is constituted for a term of 5 years and holds its session once in a year. All the powers of the Bank are concentrated in the Board. The Board has delegated its owners to 18 Executive Directors who perform the general functions of the Bank. The Executive Directors elect a President who is responsible to the Organization and presides over the meetings of the Executive Directors.

The Bank lends funds for development of economic facilities. Thus it promotes the flow of capital internationally for productive purposes. The loans may be made to member countries, to their political sub-divisions or to private business enterprises in their territories. In case the borrower is not a Government, the guarantee of the member Government concerned is required. The Bank's aid is not limited to granting of loans. It also provides a wide range of technical assistance services to member countries. The Bank is one of the specialized agencies of the United Nations. The membership of the Bank is open to States who were the members of the International Monetary Fund before December 31, 1945. Others may be admitted by majority vote of the Board of Governors but the membership of the IMF is a pre-requisite for membership to the Bank. If a member of the Bank ceases to be a member of the IMF, it will lose its membership in the Bank unless the Board of Governors decides otherwise by a three-fourths vote. This provision has been made to ensure the observance of the Articles of Agreement of the IMF by the members of the Bank. The Bank has been instrumental in channelling of developmental assistance from individual developed countries to the developing countries. Several consortia, such as, aid consortium to India, have been formed to achieve this purpose.

On 28th April, 1992 Russia and 12 former Soviet republics won entry into the World Bank and IMF, thus gaining access to billions in western aid to help rescue their shattered economies. Though their admissions were approved, yet it was Russia who on 17th June, 1992 became the first of the republics of former Soviet Union to officially join the World Bank. Earlier, in June 1992, Russia had joined the IMF.

(VII) The International Development Association (IDA).—An affiliate of the World Bank, IDA was established in 1960. Articles of Agreement of IDA entered into force on 24th January, 1960. IDA was thus established on 24th September, 1960. IDA is a part of the World Bank that helps the world's poorest countries, reduce poverty by providing interest free loan and some grants for programmes and improving living conditions. IDA funds help these countries to deal with complex challenges they face in striving to meet future development goals. As of 28th January, 2011, International Development Association (IDA), had 172 (one hundred seventy-two) Members.

Purposes.—Article 1 of the Articles of Agreement says that this Association are to promote economic development and thus raise standards of living in the less developed areas included within the Association's membership, in particular by providing finance to meet the important development requirements on terms which are more flexible and bear less heavily on the balance of payments than those of the conventional loan, thereby furthering the developmental objectives of the World Bank (IBRD) and supplementing its activities. The Association shall be guided in all its decisions by the provisions of the Articles.

Membership and Initial Subscription.—According to Article II, the original members of the Association shall be those members of the Bank listed in Schedule A therein which on or before the date specified in Article XI, Section 2(c) accept membership in the Association. Membership shall be open to other Members of the Bank at such times and in accordance with such terms as the Association may determine.

Upon accepting membership each member shall subscribe funds in amount assigned to it such subscription are herein referred as initial subscription. The initial subscription assigned to each member shall be amount set forth opposite its name in Schedule A, expressed in terms of U.S. dollars of weight of fineness in effect on January 1, 1960.

Structure

The structure of IDA comprises of (A) Board of Governors; (B) Executive Directors; and (C) The President.

(A) Board of Governors.—All the powers of IDA shall be vested in the Board of Governors. Each Governor and Alternate Governor of the Bank which is also the member of the Association shall *ex-officio* be a Governor and alternate Governor, respectively, of the Association.

Voting.—Each original member shall in respect of its initial subscription, have 500 votes plus one additional vote of each $ 5000 of its initial subscription. Subscription other than initial subscription of original members shall carry voting rights as the Board of Governors shall determine, except as otherwise specifically provided, all matters before the Association shall be decided by a majority of votes cast.

(B) Executive Directors.—The Executive Directors shall be responsible for the conduct of the general operations of the IDA, and for this purpose shall exercise all the powers given to them by the Agreement or delegated to them by the Board of Governors.

The Executive Directors of the IDA shall be composed of *ex-officio* Executive Directors of the Bank which is also a member of the Association, or (ii) elected in an election to which the votes of at least one member of the Bank which is also a member of the Association and shall have counted toward the election. The alternate to each such Executive Director of the Bank shall be *ex-officio* be an Alternate Director of the Association. Any Director shall cease to hold office appointed, if all the members whose votes counted toward his election shall cease to be member of the Association.

(C) The President.—The President of the Bank shall be *ex-officio* President of Association. The President shall be the Chairman of the Executive Directors of the Association but shall have no vote except a deciding votes in case of an equal division. He may participate in meetings of the Board of Governors but shall not vote at such meetings.

Relationship to the Bank.—The IDA is an entity separate and distinct from the Bank and the Funds of the Association shall be kept separate apart from those of the Bank. The Association shall not borrow from or lend to the Bank except that this shall not preclude the Association from investing funds not needed at its financing operations in obligations of the Bank.

Replenishments.—The IDA has had several replenishments to augment its resources so as to help the poor countries of the world. Its last or latest replenishment was IDA 14. Replenishments which was approved by the Board of Governors on April 18, 2005. IDA 14 Replenishment is providing $ 33 billion to the world's 81 poorest countries during fiscal years 2006-2008. Of $ 33 billion, $ 18 billion will come from new contributions from 40 donor countries. This represents about 25% increase in overall resources over previous replenishments and the largest expansion of IDA resources in two decades.

Evaluation

The IDA is often and rightly too, called the soft-lending window of the World Bank Group. It furthers the developmental objectives of the World Bank and supplements its activities. It has become popular because it provides soft loans to developing and poor countries. It provides soft-loans which mature after a long period, sometimes as long as 50 years, and having a grace period of 10 years the loans provided by IDA are often interest free and carry only a nominal service charge (say 3 per cent). Moreover, they are not tied to specific projects.

(VIII) The International Finance Corporation (IFC).—The International Finance Corporation (IFC) is the private sector arm of the World Bank Group. It provides equity capital for the private sector without any government guarantee. The IFC provides loans, equity, structural finance and risk management products and advisory service to build the private sector in developed countries. The IFC was established in July, 1956. It became a

specialized agency of the U.N. on 20th February, 1957. As of 28th December, 2010, IFC had 184 (one hundred eighty-four) Members which collectively determine its policies and approve investments.

Purpose.—Article 1 of the Articles of Agreement of IFC provides that the IFC is to further economic development by encouraging enterprise in Member Countries, particularly in less developed countries thus supplementing the activities of the World Bank (IBRD).

Structure.—IFC comprises of—

(i) a Board of Governors;
(ii) a Board of Directors;
(iii) a President and staff.

(i) Board of Governors.—Each Governor and Alternate Governor of the World Bank shall be *ex-officio* a Governor or Alternate Governor of IFC.

Each member shall have 250 votes plus one additional vote for each share of stock held.

(ii) Board of Directors.—The Board of Directors shall be responsible for the conduct of general operations of the Corporation, and for this purpose shall exercise all the powers given to it by the agreement or delegated to by the Board of Governors.

The Board of Directors of the Corporation shall be composed of *ex-officio* of each Executive Director of the Bank who shall have been either (i) appointed by a member of the Bank which is also a member of the corporation, or (ii) elected in an election in which the votes of at least one member of the Bank which is also a member of the corporation shall have counted toward his election. The alternate to each such Executive Director of the Bank shall ex-officio be an Alternate Director of the Bank of the Corporation.

(iii) Chairman, President and Staff.—The President of the Bank (IBIR) shall be *ex-offico* Chairman of the Board of Directors of the IFC, but shall have no vote except a deciding vote in case of an equal division. He may participate in the meetings of the Board of Governors but shall not vote at such meetings.

The President of the Corporation shall be appointed by the Board of Directors on the recommendation of the Chairman. The President shall be the Chief operating staff of the Corporation.

Relationship to the Bank.—Section 6 of Article IV of the Articles of Agreement provides that the IFC shall be an entity separate and distinct from the Bank and the funds of the Corporation shall be kept separate and apart from those of the Bank.

Location of offices.—The principal office of the IFC shall be in the same locality as the principal office of the Bank. The corporation may establish other offices in the territories of any member.

Evaluation and Conclusion.—IFC represents the first step by the global community to foster private sector investment in developing countries. While closely associated with the World Bank (IBRD), the IFC is a separate legal entity and its funds are distinct from those of the Bank. The IFC was established to further economic development by encouraging the growth of productive private enterprise in its member countries, particularly the less developed areas. To achieve this purpose IFC invests its productive private enterprises in association with private investors and without government guarantee of repayment in cases where sufficient private capital is not available on reasonable terms. It also serves as a clearing house, to bring together investment, opportunities, private capital (both foreign and domestic) and experienced management. Thus it helps to stimulate the productive investment of private capital both domestic and foreign.

The World Bank, IDA, IFC and Multilateral Investment Guarantee Agency (MIGA) form the group known as the World Bank Group. This group has rendered signal service in the field of international monetary cooperation and has been greatly instrumental in channelizing flow of developmental assistance from the developed to the less developed countries.

As noted above IFC is separate and distinct from the World Bank, yet closely associated with it. The World Bank's President also serves as the President of the IFC. The Ex-Vice President's manages IFCs day to day operations. IFC coordinates with other institutions of the World Bank Group but is legally and financially independent. The World Bank President Paul Wolfowitz also serves as President of IFC.

IFC has over 2400 staff of whom 55% work at headquarter in Washington, D.C. and 45% in over 80 field offices.

IFC is the private sector arm of the World Bank Group. It helps the private sector of developing countries. An example of this is that on May 18, 2006, IFC has decided to provide $ 20 million finance package to LG Balakrishna and Bros. Limited of India comprising of equity investment of $ million equivalent and a loan of $ 15 million. The said decision is to support the improvement of the company's existing facilities as well as development of a greenfield hot forging facility near Coimbatore. It may be noted here that LGB Ltd. is one of India's leading manufacturing transmission chains for two wheelers and for other automation and industrial application. Besides this, the said company also offers fine balanced and forged parts of the automotive and other industries.

*(IX) International Monetary Fund (IMF)**

In the Bretton Woods Conference held in July 1944 at Bretton Woods (New Hampshire, USA), Statutes of two institutions—International Monetary Fund (IMF) or Fund and the International Bank for Reconstruction and Development (IBRD) or the World Bank—were adopted to promote international financial cooperation and economic development. The International Monetary Fund[18] aims 'to promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems', 'to facilitate the expansion and balanced growth of international trade......', 'to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation', and 'to assist in the establishment of multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade'.

The capacity of a member-State to cast votes is in accordance with the money deposited by it in the Fund. Besides 250 votes, each State may get one additional vote for $100,000,00 deposited by it in the Fund. International Monetary Fund has the following main organs : (A) Board of Governors ; (B) Executive Directors, and (C) Managing - Director. All the powers of the International Monetary Fund are concentrated in the Executive Directors who elect one Managing-Director from amongst themselves. There are 18 Executive Directors and the Executive Directors are responsible for the general functions of the Organization. The Managing-Director acts as the Chairman of the Executive Directors. The head-office of the International Monetary Funds is situated in Washington.

International Monetary Co-operation, as conceived by the IMF, has following three fundamental aspects : (i) harmonization of the national economic interests with those of other members of the international community; (ii) provision of financial assistance on a temporary basis, so that countries may restore balance of payments equilibrium without hurting the economies of other member-countries, and (iii) the promotion of economic growth and high employment.[19]

Each member of the Fund is assigned a quota provided in the original Articles of Agreement or subsequently established by a four-fifths vote and the consent of the members. Originally it was provided that twenty-five per cent would be paid in gold and the remainder would be paid in the currency of the member. Any change in the par value of a member's currency can be proposed only if it is necessary to correct a fundamental disequilibrium. It was also provided that the gold value of the assets of the Fund would be maintained irrespective of changes in the par or foreign exchange value of the currency of any member. In its annual meeting at Manila in October 1976, Surinam and Guinea-Bissau were admitted as members. This raised the members of the IMF to 131 nations. In June 1992 Russia formally became the member of IMF. Similarly 12 other republics of former Soviet Union have become of its members. Thus at present there are as many as 184 (one hundred eighty-four) members of the IMF. As per Articles of the Fund, each member has two hundred and fifty votes *plus* one additional vote for each part of its quota equivalent to 100,000,00. A total quota of 8,800 million was fixed in the beginning. Later on, quotas were increased three times, 50 per cent, 25 per cent and 25 per cent in 1959, 1966 and 1970, respectively. It has been decided to raise the quotas of 126, member-countries including substantial increases for the oil-exporting countries.

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* *See* also for IAS (2008) Q. 6(b).

[18] Hereinafter referred as "the Fund" or IMF.

[19] S.L.N. Sinha, "Three Decades of International Monetary Co-operation", India Quarterly, Vol. XXXII, No. 2 (April, June, 1976), p. 121 at p. 122.

Previously the member-countries had to pay 25 per cent of their quotas in gold and the remainder in their respective currencies. A significant change has taken place in this respect. Now the members have been given the option to pay 25 percent of the increase in quotas in SDRs (*i.e.* Special Drawing Rights), the currencies of other members or in the member's own currency. The obligation of the members to make up the deficiency in gold subscriptions for the original quota payments has also done away with.[20] The members of the IMF have decided to eliminate gold from the international monetary system. Although the love and lure of gold have not totally disappeared, the relative importance of gold has declined. One of the reasons for this is that while the official price of gold is 42.22 per ounce, the free market price is about three times this figure. Obviously, the central banks are reluctant to dump the gold any further. The IMF decided to sell a part of its own gold holding and distribute the profit on equitable basis.

Special Drawing Rights (S.D.Rs).—Gold, foreign exchange, reserves and credit as international reserves corresponding to the growth in the volume of international trade having been found inadequate, the IMF in 1967 issued international money called Special Drawing Rights. Hitherto the IMF was functioning like a co-operative society. By issuing international money in the form of Special Drawing Rights (SDRs), it assumed the role of a central bank. A unit of SDR has been defined to "equivalent to one-thirty-fifth of an ounce of fine gold, or the same gold equivalent as that of the pre. 1972 U.S. dollar and could be held only by official agencies. SDR allocations and transactions are only recorded in the books of the IMF. A proposal for issuing SDRs can be made only by the Managing Director of the IMF. It has to be approved by the Board of Executive Directors and the Board of Governors; in the latter case, a 85 per cent majority of votes is required to make the decision to issue international money near unanimous.[21] Further, "the issue of SDRs to the member-countries is strictly in proportion to quotas in the IMF. While SDRs are assets to the holders, they do not represent the liability of the IMF. There is no backing for the SDRs, but only the undertaking by member countries to abide by the regulations concerning SDRs. This constitutes international financial co-operation, *par excellence*. Holders of SDRs experiencing balance of payments difficulties can demand from other member-countries convertible currencies in exchange for SDRs. A member is obliged to accept, from other members, SDRs, up to a maximum of 200 per cent of the allocation made to it and in exchange give convertible currencies. Thus, the obligation is twice as large as the right". [22]

In order to prevent excessive use of SDRs by member-countries, it is provided that each member is required to maintain an average holding of 30 per cent of the initial allocation during a five years period. SDRs have been issued thrice, 3414 million units on

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[20] For further detailed study on this point see S.L.N. Sinha, "Gold subscription for IMF Quotas," The Banker (London), July, 1964.

[21] S.L.N. Sinha, "Three Decades of International Monetary Co-operation", India Quarterly. Vol. XXXII (1976), p. 121 at p. 126.

[22] Ibid.

1st January, 1971, 2949 million units on 1st January, 1971 and 2952 million units on 1st January, 1972. Thus so far 9315 million units of SDRs have been issued. Previously the rate of interest charged was only 1.5 per cent but with a view to cope up with the sharp increase in money market rates it has been increased to 5 per cent. The developing countries have demanded that there must be a link between the issue of SDRs and flow of development aid.

Oil Crisis.—In between October 1973 and January 1974, the world witnessed 300 per cent increase in oil prices which caused balance of payments difficulties to countries, particularly non-oil developing countries. In August 1974, the IMF set up the oil facility of SDR 3 billion with a view to help the member countries to tide over the balance of payment difficulties. Canada and some other European countries contributed to this fund. The IMF agreed to pay an interest of 7 per cent per annum to the lenders. Out of this Fund IMF provided loan to developing countries.

IMF loan of $ 5.68 billion for India.—On 9 September, 1981, the IMF gave its tentative approval to $ 5.68 billion loan to India which is its largest loan in history. This loan of five billion Special Drawing Rights—computed between $5.6 billion and $5.7 billion at current SDR value has been given to India to meet its balance of payments problems created by higher import costs of oil and other items.

Charge of surrender of India's Economic Sovereignty to IMF.—India has once again taken loans of large amount of money due to her balance of payment problem arising out of rise in price of petrol due to Gulf War. Opposition parties have charged the Indian Government of surrendering 'Economic Sovereignty' to IMF by accepting its conditionalities and adopting its budget accordingly. But as pointed out by the then Indian Finance Minister, Dr Manmohan Singh, any member of IMF taking loan has to accept certain conditions and that there was no question at all of surrendering economic sovereignty of the country. As a matter of fact, sovereignty is a problematic concept. In theory, each country jealously guards its sovereign and is not prepared to surrender even an iota of it. But in practice, each state to surrender its sovereignty in international transactions. As pointed out by Judge Lauterpach, International law, whether codified or not, implies restrictions upon sovereignty of nations. Indeed this is a truism because of inter-dependence of States.

Russia joins IMF.—On 2nd June, 1992, Russian Federation was formally accepted as a member of IMF, thus raising its membership to 165. As of 12 April, 2010, IMF had 186 members working foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth and reduce poverty. To date IMF had 189 members.

(X) Universal Postal Union (U.P.U.)

It was established on July 1, 1875. Its name was changed to Universal Postal Union (UPU) in 1878. In 1947, its Constitution was amended and it was brought into relationship with the United Nations through a special agreement which was approved by the General-Assembly in 1947. Thus the Universal Postal Union which was established in 1857 became a specialized agency of the United Nations in 1947. The main objective of the Universal Postal Union is to encourage international co-operation among the different Postal Services and to ensure regular postal services in the world. Any sovereign State may become a party to the Convention of the Universal Postal Union and thereby its member. For admission of a new State two third majority of the existing members is required. The Universal Postal Union has the following main organs :—(A) The Congress ; (B) Executive Committee; and (C) Bureau.

The Congress holds its session once in every five years. Each State-Member is represented in the Congress and is entitled to have one vote. During the term of five years, the responsibility to carry on the work of the Organization is that of the Executive Committee. Its office is situated in Berne. It comprises of 20 members who are elected by the Congress. The Bureau is the Secretariat of the Universal Postal Union and is also situated in Berne.

The postal services of the UPU's with 192 countries form the largest physical distribution network in the world. More than six million employees work in over 7,00,000 postal outlets to ensure that some 430 billion mail items are delivered each year to all the corners of the world.

(XI) International Tele-Communication Union (I.T.U.)

It was established through a Convention held in 1947 and started functioning since January 1, 1949. Following are the three main aims of this Union—(a) To achieve international co-operation for the development of and proper use of all types of international tele-communications ; (b) to ensure technical facilities in order to raise efficiency in tele-communication services and to increase their utility; and (c) to harmonize activities of the member-States to achieve the above mentioned objectives.

So far ITU has 193 (one hundred ninety-three) members (including 192 UN members and Vatican City). Besides this, it has over 590 sector members and there are 110 (one hundred ten) Associate members. It comprises four permanent organs : (A) General Secretariat; (B) the International Frequency Registration Board (I.F.R.B.), (C) the International Radio Consultative Committee ; and (D) the International Telegraph and Telephone Consultative Committee. In its plenipotentiary conference of the I.T.U. the 12th to be held since the I.T.U. was found in 1865, at Nairobi (Kenya) from 28 September to 6 November, 1982, International Tele-communication Convention was revised. In revising the convention (its Basic Provisions and General Regulations), the plenipotentiaries emphasized the principles of the universality of the Union, rotation and geographical distribution for high level posts, both at conferences and at Union headquarters, and the problems of technical co-operation and assistance.[23]

Plenipotentiary is the top policy making body of the ITU. The Plenipotentiary Conference is held every four years. The next ITU Plenipotentiary Conference will take place from Monday the 6th November, 2006 at the Sungate Royal Hotel in Antalya, Turkey.

(XII) World Meteorological Organization (W.M.O.)

The Convention of the World Meteorological Organization (WMO) was adopted at Washington on 11th October, 1947. It entered into force on 23 March, 1950. It is the U.N. system's authoritarian voice on the state and behaviour of the Earth's atmosphere, its interaction, oceans, the climate and its produce and the resulting of water reserves. At present WMO has 191 (one hundred ninety-one) Members.

According to Article 2 of the Convention, the purposes and functions of the World Meteorological Organization are the following :

(I) To facilitate world-wide co-operation in the establishment of net-works of Constitution for making of meteorological observations or other geo-physical observations related to meteorology and to promote the establishment and maintenance of meteorological centres charged with the provision of meteorological service ;

(II) To promote the establishment and maintenance of the systems for the rapid exchange of weather information ;

(III) To promote standardization of meteorological observations and to ensure the uniform publication of observations and statistics ;

(IV) To further the application of meteorology to aviation, shipping, agriculture and other human activities; and

(V) To encourage research and training in meteorology and to assist in co-ordinating the international aspects of such research and training.

Following are the main organs of the World Meteorological Organization :—(A) World Meteorological Congress ; (B) An Executive Committee ; (C) Regional and Technical Commissions created by the Congress ; and (D) A Secretariat headed by a Secretary-General located at Geneva.

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[23] U.N. Chronicle, Vol. XX, No. 1 of 1983, p. 119.

(XIII) International Maritime Organization (I.M.O.)

On the initiation of the Economic and Social Council of the United Nations the U.N. Maritime Conference which met in February-March, 1948, drafted the Conference of Inter-Governmental Maritime Consultative Organization. After having received the requisite number of signatories, the Convention of Inter-Governmental Maritime Consultative Organization came into effect on 17 March, 1958. Subsequently, its name was charged from IMCO to I.M.O. The function and purposes of Inter-Governmental Maritime Consultative Organization as mentioned in the Convention are as follows :

(a) To provide machinery for co-operation among governments in the field of governmental regulation and practice relating to technical matters, including those concerning safety at sea ;

(b) To encourage the removal of discriminatory action and all unnecessary restrictions by governments ;

(c) to provide for consideration by the organization of the matters concerning unfair restrictive practices by shipping concerns in accordance with part II.

(d) To consider matters concerning shipping that might be referred to it by any organ or specialized agency of the United Nations ;

(e) To provide for the exchange of information among governments on matters for consideration by the Organization.

It also drafts Conventions and Agreements in the field of shipping and maritime travel.

Following are the main organs of Inter-Governmental Maritime Consultative Organization : (A) Assembly ; (B) Council; and (c) a Maritime Safety-Committee and such other subsidiary organs as the Organization may at any time consider necessary and (d) the secretariat.

The Assembly comprises of all the member-States and lays down the general policy of the Organization. The Council consists of 16 members. It meets in between the sessions of Assembly and performs the functions of the Organization. The Secretariat of Inter-Governmental Maritime Consultative Organization is situated in London and is headed by a Secretary-General.[24]

Among other organs (IMO) comprises of an Assembly and a *Maritime Safety Committee*. Under the provisions of Article 28 (a) of the Convention for the establishment of the organization, this committee consist of 14 members elected by the Assembly from members of the organization having an important interest in maritime safety, "of which not less than eight shall be the largest ship-owning nations". When, on 15 January, 1959, the IMCO Assembly, for the first time proceeded to elect the members of the Committee, it elected neither Liberia nor Panama, although those two States were among the eight members of the organization which possessed the largest tonnage. The General Assembly, therefore, referred this matter for the advisory opinion of the Court and asked the Court whether the Maritime Safety Committee was constituted in accordance with the convention for the establishment of the Organization. In its Advisory opinion in the case of *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*[25] the Court replied to this question in the negative *i.e.* the Committee was not constituted in accordance with the convention.

Headquartered in London, IMO had 173 (172 U.N. Members and Cook Islands) Members and 3 Associate Members as of 2018.

(XIV) The International Fund for Agricultural Development (IFAD)

A United Nations Conference, meeting from 10 to 13 June, 1976 in Rome, adopted and initialled an agreement establishing an International Fund for Agricultural Development

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[24] For Comments on the Composition of the IMCO see : Robert 1 McLaren, "Equitable Geographical Distribution—IMCO; A Case-study", India quarterly Vol. XXIX, No. 2 (April-June, 1973), p. 151.

[25] Advisory opinion of 8 June, 1960.

(IFAD). Thus the Conference cleared the way for setting up of a new United Nations specialized agency (*i.e.* IFAD). The Fund will help to solve one of the worst problems in the world food situation, the slow growth rate of food production in many developing countries. The Fund's proposed initial target of 1,000 million is more than the total concessional assistance available every year for agricultural or food production. The Conference took the decision to establish an 18-nation preparatory commission to work out the machinery of the Fund and enable it to become a UN specialized agency.

Under the main concept of the Fund, it was concerned of a development Fund to disburse resources, partly through grants and mainly in the form of concessional loans to increase food production in developing countries. The organizational structure of the Fund is to be innovative, with the votes shared equally by three category of countries : developing donor (OPFC), developing recipient and developed. Thus, two-thirds of votes lie with developing countries, who will have a major influence on the investment decisions of the Fund at the same time two-thirds of the votes held by donor countries.[26]

The Agreement establishing the IFAD, a specialized agency in the U.N. system, was concluded on 13 June, 1976. It entered into force on 30 November, 1977.

As of February, 2014, it had 173 Members (171 U.N. Members plus Cook Islands and Nive). Its membership is open to any State member of the U.N. or specialized Agency or International Atomic Energy Agency (IAEA) structure.

IFAD comprises of the following :

(I) The Governing Council.—It is the IFAD's highest decision making authority with 164 member States. It meets annually.

(II) The Governing Council.—It comprises of 18 members who are responsible for overseeing the general operation of IFAD and approving loans and grants.

The President is IFAD's Chief Executive Officer and Chairperson of the Executive Board the current President is Lennart Bage who was re-elected for the second term in 2005. Current President is Mr. Kanyo Nivance from Nigeria.

(XV) The United Nations Industrial Development Organization (UNIDO)

The Constitution of the U.N. Industrial Development Organization was adopted by consensus on 8 April, 1979 by a Conference of Plenipotentiaries. The Constitution of UNIDO entered into force on 21 June, 1985. In 1985 it became the specialized agency of the U.N. UNIDO helps developing countries and countries with economic transition in their fight against marginalization in today and global world. In 2009, UNIDO had 172 members. It has the responsibility for promoting industrialization throughout the world, in cooperation with 172 member States. Its head-quarters are in Vienna and is represented in 35 developing countries. By October, 2014, it had 174 member Countries.

The structure of the UNIDO comprises of the three policy making organs :

(A) The General Conference.—It comprises of all the members.

(B) The Programme and Budget Committee.—It comprises of 27 members elected by the general conference for two years term.

(C) Industrial Development Board.—It comprises of 53 members.

(D) The Secretariat.—It comprises of a Director-General and staff. The current Director-General of UNIDO is Kandeh Yumkell of Sierra Leone elected in 2005.

(XVI) World Intellectual Property Organization (WIPO).—The Constitution of World Intellectual Property Organization (WIPO) was signed at Stockholm on 14 July, 1961. It is the successor of the United International Bureau for the protection of Intellectual Property which was founded in 1893. It became a specialized agency in 1974. The Constitution was amended on September 28, 1979.

Objectives of the Organization.—According to Article 3 the objectives of the organization are :

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[26] U.N. Monthly Chronicle, Vol. XII, No. 7 (July, 1976), p. 38.

(i) to promote the protection of the intellectual property throughout the world through cooperation among States and where appropriate, in collaboration with any other international Organization; and

(ii) to ensure administrative cooperation among the unions.

Membership.—According to Article 5, membership is open to any State which is a member of any union as defined in Article 2(vii). Membership is also open to any State not member of any of union provided that (i) it is a member of the U.N., any of the specialized agency or International Atomic Energy Agency (IAEA) or party to the statute of the International Court of Justice; or it is invited by the General Assembly to become a party to the convention. So far WIPO has 192 members including Holy See.

Structure.—The structure of the WIPO comprises of the following :

(A) The General Assembly.—The General Assembly comprises of all the State parties to the convention. Each State shall have one vote. It meets once in every second calendar year in ordinary session upon convocation by the Director-General. The General Assembly shall appoint the Director-General upon nomination by the coordination committee. Half of the State members of the General Assembly constitute the quorum.

(B) Conference.—The conference comprises of the States parties whether or not a member of any of the union.

(C) Coordination Committee.—The Coordination Committee consists of the State Parties to convention which are members of Paris Union, Burne Union or both. The coordination committee shall advise to the organs of the union, the General Assembly, the conference and the Director-General, in all administrative, financial and other matters of common interest either to two or more of the union, or one or more of the unions and the Organization and in particular on the budget of expenses common to the unions. It shall prepare draft agenda of General Assembly and draft programme and budget of the conference. It also plays an important role in the appointment of the Director-General and if the post of Director-General becomes vacant between two sessions of the General Assembly, may appoint an Acting Director-General for the term preceding the assuming of office of the new Director-General.

(D) International Bureau.—The International Bureau shall be the Secretariat of the Organization. It shall be directed by the Director-General and be assisted by two or more Deputy-Directors. The Director-General shall be the Chief Executive of the Organization and shall represent the organization.

Current Director-General of WIPO is Francis Gurry, who took office on December, 2008.

The WIPO has, at present, as many as 184 members. It administers 23 international treaties dealing with different aspects of intellectual property protection. India is also one of the members of the WIPO.

(XVII) World Tourism Organization (WTO).—It first met in 1975 in Madrid (Spain) and became the seventeenth and latest specialized agency of the United Nations in 2003. The World Tourism Organization (WTO) aims to promote the development of responsible, sustainable, and accessible tourism with a view to contribute to economic development, international understanding, peace, prosperity and universal respect for and observance of human rights and fundamental freedom.

U.N. WTO is the leading international organization in the field of tourism. It serves as a global forum for tourism policy issues and practical source of tourism know-how.

In the course of time U.N. WTO became popular among countries of the world. As of 28th January, 2011, World Tourism Organisation (WTO) had 154 Member States, 7 associate Members and two observers. Besides this, it had more than 300 affiliate members representing private sector, educational institutions, tourism association and local tourism authorities.

In the course of time WTO become popular among countries of the world. So far 186 countries (185 UN Members and Holy See) have become its members. Besides this, it has other affiliate members who represent private fields, educational institutions, tourism and local tourist authorities.

Structure.—The structure of the United Nations WTO comprises of the following main organs :

(A) General Assembly.—The General Assembly comprises of full members, Association members and representations of other international organizations who participate as observers.

The General Assembly meets every two years. Every four years it elects a Secretary General. The last session of the General Assembly was held at Dakar (Senegal) in November/December, 2005.

(B) The Executive Council.—It is composed of 29 members elected by the General Assembly in a ratio of one for every five full members. Spain as a host country has a permanent seat on Executive Council.

(C) Besides the above two main organs, there are regional commission, committees and a Secretarial.

The Secretary is headed by a Secretary-General who supervises over 90 full time staff of U.N. WTO and is assisted by a Deputy-Secretary General. The present Secretary-General is Francisco Frangialli (France). He was appointed as interim Secretary-General after the retirement of Antonio Enrique Z Savingnac in 1996. He was elected as full-fledged Secretary-General in 1997. He was re-elected in 2001. He was again re-elected in 2005. In 2008, Tabli Rifai of Jordan had become its Secretary-General.

Multilateral Investment Guarantee Agency (MIGA).—Multilateral Investment Guarantee Agency (MIGA) is not yet a specialized agency of the U.N. but it is the fourth and latest part of the World Bank Group. The Convention establishing the Multilateral Investment Guarantee Agency was concluded at Washington, D.C. on 11 October, 1985. It entered into force on 12th April, 1988. Its membership is open to all the members of the World Bank.

As regards objectives and purposes, Article 2 provides that the objective of the Agency shall be to encourage the flow of investments for productive purpose, among member countries, and in particular to developing member countries, thus supplementing the activities of the IBRD (Bank), the International Finance Corporation (IFC) and other international development finance institutions.

Article 2 further provides that to serve its objective, the Agency shall :

(a) issue guarantee including co-insurance and reinsurance against non-commercial risks' in respect of investments in a member country which flow from other countries;

(b) carryout appropriate complimentary activities to promote the flow of investments to and among developing countries; and

(c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objective.

The Agency shall be guided in all its decisions by the provisions of this Article.

The structure of the MIGA comprises of a Council, a Board of Directors, a President and staff to perform the duties as the Agency may determine. The location of principal office of the Agency is Washington, D C.

As of 27th October, 2005, the membership of MIGA comprised of 167 members including India out of which 23 were industrialized nations and 144 were developing countries. As a member of the World Group, the mission of MIGA is to promote foreign direct investment into developing countries to help support growth.

Conclusion.—The specialized agencies of the United Nations have done commendable work in various fields. They have proved to be greatly helpful in achieving the objectives mentioned in the Charter of the United Nations. Among the most important specialized agencies the International Labour Organization, Food and Agriculture

Organization, World Health Organization and the United Nations Educational, Scientific and Cultural Organization deserve a special mention. It may, however, be noted that there are certain limitations on these Organizations in respect of implementing their decision. In the words of Prof. Goodspeed, "All of the specialized agencies are restricted in the methods available for implementing the decisions. They cannot compel their members to do anything but must be content with making recommendations, offering assistance and stimulating interest and action. In this regard they are typical of all forms of international organization where the membership unit is the sovereign State. The employment of sanctions by International Labour Organization and the Fund have proved to be ineffective. One significant feature is the power of W.H.O. and I.C.A.O. to adopt technical regulations which are binding unless rejected within a given time limit".[27] To conclude in the words of Prof. Goodspeed, "The wide functions and objectives of the specialized agencies represent a broad attempt to cope with the basic social and economic problems facing the world. It is just a beginning, however, and the success achieved by the agencies will depend primarily upon the political climate in which they must work".[28]

As remarked by Mr. Bruno Kreisky, former Chancellor of Austria, while addressing the first consultation on the second replenishment of the IFAD held in Rome in July, 1983, "In the long run peace can be preserved if we are able to overcome hunger and poverty on the international level". The specialized agencies related to the U.N. deserve credit for not only making endeavours to overcome hunger and poverty but also trying to cope with other basic, social and economic problems confronting the world".

Development of International Law by Specialized Agencies.—For discussion of this please see "Introduction" (Chapter 1).

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[27] Goodspeed, note 1, p. 465.

[28] *Ibid.*

CHAPTER 40

WORLD TRADE ORGANIZATION*

Background.—Bretton Woods conference held in 1944 was the starting point for a new world order. It was envisaged that the new world economic order would be organised around three international institutions—(i) The International Bank for Reconstruction and Development (IBRD also called the World Bank); (ii) International Monetary Fund (IMF); and (iii) International Trade Organisation (ITO). While the first two institutions came into existence and exist even today, the third institution *i.e.* ITO never came into existence. After having been approved by the Governments of the U.S. and the U.K., proposals for the establishment of ITO were discussed at an International Conference on Trade and Employment first in London in 1946, then at Geneva and finally in Havana in 1947-1948. A Charter for an ITO was signed by 53 nations. To come into force it was required to be ratified by the member nations. The ITO never came into existence as the U.S. Senate did not ratify it so was the case of other countries who failed to ratify it. The main reason for the non-ratification by the U.S. Senate was that it was not prepared to accept a formal structure like the ITO.

However, despite the non-adoption of the Charter of ITO, U.S., U.K. and some other developed nations were keen to ensure reduction of trade barriers. Some of the participants in the London Conference on Trade and Employment requested that simultaneously with the continuing discussions of Trade Charter at Geneva, extensive trade tariff negotiations be started. 23 nations participated in these negotiations and as a result of this an extensive set of bilateral trade concessions were then extended to all participants and were incorporated in a General Agreement on Tariff and Trade, 1947. Since the ITO charter had not come into existence, the U.S. and other countries wanted to have the General Agreement on Tariff and Trade (GATT) implemented as early as possible. Since the implementation of some of the clauses of GATT required parliamentary approval in some of the countries the GATT itself could not be applied. To overcome this difficulty a "Protocol of Provisional Application" (PPA) was signed in late 1946 by 22 original members of GATT. This protocol came into effect on January 1, 1948 and GATT was applied through this Protocol.

As per preamble of the GATT the main objectives were to—(i) raise the standard of living; (ii) ensure the full employment, to increase the volume of real income and effective demand; (iii) ensure better utilization of resources of the world and (iv) ensure expansion of production and international trade. Since the establishment of the GATT, eight rounds of negotiations to reduce the tariffs and trade barriers in the trade in goods have been held. These rounds of negotiations are being summarised below :

1. The Geneva Round (1947).—Participated by 23 countries Geneva Round of negotiations were held between 10 April to 30 October, 1947. These negotiations resulted in exchange of tariff cuts for 45000 products worth $10 billion of trade on annual basis.

2. The Amnesty Round, 1949.—The second round was held at Amnesty (France) in 1949. In this round nine new countries joined bringing the membership of GATT to 32. In this round custom duties were reduced in respect of 5,000 items of goods.

3. The Torguay Round, 1950-1951.—The third round was held at Torguay (Britain) in 1950-51. 38 countries participated. The European countries with low tariff levels were not satisfied and felt that the negotiations were disadvantageous to them.

4. The Geneva Round 1955-56.—The Fourth Round was held at Geneva (Switzerland) in 1955-1956. European Countries were again disappointed and withdrew from negotiations and thus the number fell down to 22.

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* *See* also IAS (2006) Q. 8(a) ; IAS (2008) Q. 6(a).

5. The Dillon Round (Geneva) 1960-61.—The Fifth Round was held at Geneva (Switzerland) in 1960-61. In this Round EEC joined negotiations as a trade block. The U. S. Government obtained the authority under Trade Agreements Extension Act, 1958 to draw maximum advantage and participate in multilateral trade.

6. The Kennedy Round, 1964-67.—The Sixth Round, known as the Kennedy Round of negotiations was attended by 48 countries. About 35 developing countries also participated under special procedures. Fifty per cent reduction offer in industrial tariffs was announced by eleven industrialized countries.

7. The Tokyo Round, 1973-1979.—The Tokyo Round of negotiations were attended by as many as 99 countries coming from different levels of development and economic systems. During the Tokyo Round, a number of agreements in specific non-tariff measures and on agricultural products were reached.

8. The Uruguay Round, September 1986 to December, 1993.—The Uruguay Round of negotiations began in Uruguay in September, 1986 and culminated on December 15, 1993. Delegations from 117 countries accepted by consensus a GATT world trade treaty to open international markets and to ensure global economic growth into the twentieth century. The Dunkel Draft Text or Dunkel Package or the Dunkel Draft Act embodying the results of Uruguay Round of Multilateral Trade Negotiations was released on 20 December, 1991. The Uruguay Round of Multilateral Trade Negotiations were concluded on 15th December, 1993. As many as 125 countries including India signed the Final Act on April 15, 1994 at Marrakesh (Morocco). The General Agreement on Tariffs and Trade (GATT) 1994 more popularly known as the Dunkel Agreement, finally emerged as World Trade Organisation (WTO) in 1995.

Established and nurtured by the industrialized countries, the GATT continued to serve their interests though some special and preferential treatment to developing countries was provided in GATT rules, by and large they were discriminated under the garb of clauses such as "escape clauses" "safeguard" rules "voluntary export restraints", "orderly agreements". These clauses and safeguards allowed large scale version of GATT rules especially by the industrialised countries. Moreover, there were certain reasons which enabled countries to conduct most of trade outside the GATT rules.

In the first place, agriculture was treated as a special case from the beginning and thus escaping GATT rules. Secondly, though developed countries removed majority of tariff barriers yet some other still remained affecting developing countries. Thirdly, the U.S. and the EEC had concluded several bilateral, discriminatory and restrictive arrangements outside the GATT rules. Fourthly, GATT was also side-tracked due to the increasing use of subsides. Fifthly, "safeguards" rules under Article XIX of the GATT undermined the effective working of GATT. Sixthly, customs union and free-trade areas permitted under Article XIX of the GATT had been distorted and abused. Seventhly though GATT was a mandatory body, it lacked enforcing mechanism. Last but not the least with the emergence of more and more of new developing countries, it was felt by and large that the GATT rules devised half a century ago had outlined their utility.

Establishment of WTO.—As a result of the culmination of Uruguay Round of GATT negotiations for more than seven years at Marrakesh (Morocco) on April 15, 1994, as many as 125 countries including India agreed to the establishment of World Trade Organisation (WTO). The new World Trade Organisation (WTO) which came into effect on January 1, 1995 with the backing of 85 founding members including India replaced the General Agreement on Tariff and Trade (GATT).

The four-day ministerial meeting to usher in liberalised world trade started on 12th April, 1994 at Marrakesh. The Director-General of GATT, Mr. Peter Sutherland, stated that the WTO would play an active role, setting the trade policy agenda, working on consensus and basing itself on the fundamental principles of non-discrimination. The world treaty signed by 125 countries including India is estimated to add an annual $ 235 billion to the World Economic income within a decade. The treaty is expected to boost world trade by $ 755 billion each year by 2005 *i.e.* decade after it takes effect on 15th April, 1994, 125 countries signed the historic pact creating a new multilateral system slashing tariffs upto

40 per cent in the biggest package of market access concessions ever negotiated the developed and the developing countries participating in the historic trade conference at Marrakesh signed six major agreements running into 500 pages of final act and about 20,000 pages of individual national concessions on market access for goods and services culminating eight years of Uruguay Round of GATT talks. The four day Ministerial meeting at Marrakesh culminated in signing of six documents (as part of Marrakesh Declaration) including agreements in the establishment of the Preparatory Committee for the WTO, acceptance of the agreement establishing WTO as well as the pacts of trade and environment and organisational and financial consequences following from setting up of WTO. These agreements led to the replacement of the GATT by WTO. The WTO is thus the world body to oversee a comprehensive set of rules and disciplines covering every aspect of world commerce including trade in services and intellectual property protection. The Marrakesh Declaration calls for common action on the trade front with no retaliatory measures till the establishment of WTO in January, 1995.

The WTO is in fact the main organ for implementation of Multilateral Trade Agreements. It is the negotiating forum for the members. It can be regarded as the third economic pillar of world wide trade and commerce dimensions alongwith the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (World Bank).

Membership

There are two types of members—(i) original; and (ii) other members. The original members comprises of (a) the members to the GATT as on the date of entry into force of this agreement and (b) the European Communities which accept this Agreement and the Multilateral Trade Agreements and which schedules of concessions and commitments are annexed to the GATT 1994 and for which schedules of specific commitments are annexed to the General Agreement on Trade in services.

Besides the original members, other States may accede to this Agreement and the Multilateral Trade Agreements annexed thereto. The decision on accession is taken by the Ministerial conference by a two-thirds majority of the members. The WTO is tending to become Universal Organisation. China has already become its member. Russia may also follow the suit in near future. At the time of establishment WTO had 76 members. By 19th August, 2005, 72 more member joined and thus WTO comprised of 148 members. Since then two more members joined and by 18th December, 2005, WTO comprised of 150 members. At present it has 164 members.

Withdrawal from Membership

Any member may withdraw from this agreement by giving a written notice to the Director General of the WTO. The withdrawal takes effect upon the expiry of said six months.

Structure

The WTO consists of the following bodies :

(1) The Ministerial Conference.—The Ministerial Conference, which is the highest body, is composed of the representations of all the members. It is the executive of the WTO and carries out the functions of the WTO. It meets atleast once every two years. It has the authority to take decisions on all matters under any of Multilateral Trade Agreements on the request of the members.

(2) The General Council.—In between the meetings of the Ministerial Conference (MC) its functions are carried out by the General Council which is composed of representatives of all the members. It can meet as many times as is appropriate and necessary. It is thus an executive forum of the WTO. The General Council has three functional council working under its supervision and guidance. These functional commissions are following :

(i) Council for Trade in Goods;
(ii) Council for Trade in Services; and
(iii) Council for Trade Related Aspects of Intellectual Property Rights (TRIPS).

Subsidiary bodies.—The above three council may establish subsidiary bodies. Subject to the approval of their respective councils, these subsidiary bodies shall make their respective rules of procedure.

(3) The Dispute Settlement Body.—The disputes settlement understanding envisaged a Disputes Settlement Body. The Disputes Settlement Body is empowered to have its own chairman and to frame rules of procedure as it deems necessary for the discharge of its responsibilities.

(4) Trade Policy Review Body.—As envisaged in Trade Policy Review Body shall be convened by the General Council. The Trade Policy Review Body may have its own chairman and may frame such rules of procedure as are necessary for the discharge of its responsibilities.

(5) The Committee on Trade and Development the Committee on Balance of Payment Restrictions and Committee on Budget Finance and Administration.—These committees were to be established by the General Council to carry out the functions assigned to them by the Agreement and by the Multilateral Trade Arguments and additional functions assigned to them by the General Council. The General Council may also establish such additional committees with such functions as it may deem appropriate. The representatives of all members shall be the members of these committees.

(6) Bodies provided under the Plurilateral Trade Agreements.—These bodies shall carry out the functions provided to them under those agreements and shall operate within the institutional framework of the WTO. The General Council shall be kept informed of the activities of these bodies on a regular basis.

(7) The Secretariat.—The WTO provides for a Secretariat headed by a Director General. The Director General shall be appointed by the Ministerial Conference. The Ministerial Conference shall also adopt regulations setting the powers, functions, conditions of services and terms of office of the Director General. The members of the staff of the Secretariat shall be appointed by the Director General who shall also lay down their duties and conditions of service in accordance with the regulations adopted by the Ministerial Conference.

The current Director-General is Robert Azevedo.

Functions of WTO.—As per Article III of the Agreement establishing WTO, the main functions of the WTO are :

(i) to facilitate the implementation operation, administration and the promotion of the agreement (i.e. of 1994) and the Multilateral Trade Agreements and also of the Plurilateral Trade Agreements;

(ii) to provide the forum for negotiations among its member in respect of multilateral trade relations regarding their matters under the agreements of GATT and also to provide a forum for further negotiations among its members regarding their multilateral trade relations and a framework for implementation of the result of such negotiations;

(iii) to administer the rules and procedures governing the settlement of disputes;

(iv) to administer the Trade Policy Review Mechanism (TPRM);

(v) to co-operate with the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD) or World Bank and its affiliated agencies to bring about greater coherence in global economic policy making.

Decision-Making.—As in the GATT, the decision-making shall be by consensus. But where the consensus cannot be arrived at or is not possible the decision shall be arrived at by voting. Decisions in Ministerial Conference and the General Council shall be taken by a majority of the votes cast, each member of the WTO having one vote. This is however, subject to any other provision in the agreement or in the relevant Multilateral Trade Agreement.

The Ministerial Conference and the General Council possess the exclusive authority to adopt interpretations of this agreements as well as the Multilateral Trade Agreements. The decisions regarding the said interpretations shall be made by a three-fourths majority of the members. In exceptional circumstances an obligation of a member may be waived by the Ministerial conference provided that such a decision is taken by a majority of three-fourths of the members. Decisions under Plurilateral Trade Agreements shall be governed by the provisions of the such agreements.

Dispute Settlement Mechanism.—The WTO provides for a Disputes Settlement Body (DSB) which is responsible for settlement of disputes. The Disputes Settlement Body (DSB) may establish panels for specific investigations, may constitute appellate body, may adopt reports of panels and Appellate Body and may exercise surveillance to ensure compliance with rules and recommendations and if necessary may also authorize retaliatory measures in cases of non-implementation of recommendations. For the purpose of investigation, the (DSB) has four subsidiary bodies —(i) Working groups; (ii) Panels; (iii) Permanent Expert Group; and (iv) Arbitration.

There are following main stages in settling disputes under the WTO :

(a) Consultation.—The first stage in the settling of disputes is consultation among the members concerned. The purpose of holding consultation is to arrive at mutually agreed and satisfactory solution. The holding of consultation does not prejudice the rights of the members. Any request for consultation ought to be notified to the DSB in writing specifying the reason for the request. When a member makes a request for consultations, it has to be replied promptly within ten days and to hold consultation within 30 days from the date of the request by the other member. Many a disputes are thus settled at this initial stage.

However, if a dispute is not solved through consultation within sixty days from the date of request the party may request the DSB for the establishment of a panel.

(b) Establishment of a Panel.—If the dispute is not settled through consultations, the member who sought the consultations may request the DSB to establish a panel. Such a request ought to be accompanied with full particulars of the dispute, details of consultations and the reasons for their failure. After considering the request, the DSB decides the establishment of a panel. The panel is composed of three or five panelists. The panel is established in consultation with the parties to the dispute. The panel functions as an expert team to help the DSB to arrive at a finding. If the dispute is between a developing and developed country and if the country so desires, one panelist ought to be from a developing country. The panelists are selected by the Secretariat. The panelists serve in their individual position and not in their official position.

(c) Report of the Panel.—After examining the complaint, the Panel prepares its report containing the findings and recommendations. The Panel has to submit its report within six months and in case of urgency within three months. In any case the maximum time which the panel can take to circulate the report to the members is nine months.

(d) Adoption of Panel Report.—The DSB then adopts the report within 60 days but not earlier than 20 days. The members having objections may state their reasons in writing for circulation before DSB meeting at which report will be considered.

(e) Appellate Review before Standing Appellate Body (SAB).—The WTO provides for a Standing Appellate Body (SAB) to hear appeals. The panel's decision can be challenged in the SAB by either party to the dispute. It is provided that the Appeal proceedings must not generally exceed 60 days and in no case 90 days. The Standing Appellate Body (SAB) comprises of seven persons who have distinguised themselves in the field of law and international trade.

(f) Implementation.—There is provision for prompt compliance of the rulings or recommendations of the Standing Appellate Body (SAB). Thirty days after the adoption of the report by the panel or the decision of the Appellate Body, it is the obligation of the party concerned to inform DSB its willingness or otherwise to implement the rulings or recommendations. If the member concerned fails to implement within the reasonable time it is obliged to start the negotiations with the complainant. If the negotiations fail or satisfactory compensation is not agreed, the complainant may approach the DSB to suspend concessions or obligations against the other party. This is the last remedy available to an aggrieved member.

Acceptance, Entry into force etc.—The acceptance of the agreement could be made by signature or otherwise by members of GATT, 1947 and the European communities, which were eligible to become members of WTO as per Article XI of the agreement. A member accepting this agreement after its entry into force would be required to implement those concessions and obligations in the Multilateral Trade Agreement which would be required to be implemented over a period of time beginning with the entry into force of this agreement as if it accepted this agreement on the date of entry into force. In case of Plurilateral Trade Agreement shall be governed by the provisions of that agreement.

WTO in Action.—Since Ministerial Conference is the highest body of WTO, it will be worthwhile to discuss first the Ministerial Conferences held so far.

The First Ministerial Conference, 1996 (Singapore).—As noted above the Ministerial Conference, the highest body of the WTO meets atleast once in every two years. After the WTO came into existence on January 1, 1995, the First Ministerial Conference was held at Sunetec city of Singapore from December 9th, to December, 13th, 1996. Trade Ministers of 128 Member countries and observer representatives from 28 countries who were seeking to become members participated the conference. At the end of the conference declaration of 23 paragraph was made. This declaration was not a new treaty, it was simply a political statement negotiated by Trade Ministers. The statement dealt with six problem areas—(i) labour standards; (ii) Investment; (iii) Competition policies; (iv) Government procurement; (v) textiles; (vi) agriculture, while the first four were new issues, the last two were old issues. Yet another issue mentioned in the declaration was relating to Information Technology in which the U.S. was very much interested. But a trade agreement on information technology could not be materialised.

The Second Ministerial Conference, 1998 (Geneva).—The Second Ministerial Conference was held at the headquarters of the United Nations from May 18, to May 20, 1998. This conference was attended by 132 member nations. There were three main features of this Ministerial Conference—(i) celebrations on 50th anniversary of Multilateral Trading Year; (ii) a ministerial declaration; and (iii) a new agreement on some commercial transactions on the internet.

1998 being the 50th anniversary of the GATT which came into existence in January 1948 after a signing of an interim agreement by 23 countries including India, a day long commemoration of the event was made on May 19, 1998. The second feature was the adoption of a declaration laying the foundation for next year for a new set of global talks in certain areas such as TRIPs, TRIMs, the dispute settlement process, Technical Barriers to Trade (TBT), the improvement of the trading powers of the least developed countries including the poorest nations of the world located mainly in Africa and trade issues.

The third main feature of the second ministerial conference was the conclusion of an agreement on duty free trade in electronic commerce. Though e-commerce being very much in infancy, it was likely to rapidly develop and the US having the largest number of internet users was to gain most from keeping this trade duty free.

The Third Ministerial Conference, 1999 [Seattle (US)] and November, 2001.—The Third Ministerial Conference of the WTO was held at SEATTLE in the State of Washington from November 30th, 1999 to December 3rd, 1999. This conference was attended by 135 Member nations and observers from about 30 nations. Prior to the conference consultations of Ministers were held at LAUSANNE on October 25 and 26, 1999 for evolving a consensus among the major participating members but no consensus could be arrived at. The ministers were not expected to take any decision on a further opening of national markets of trade, their task was limited to evolve a consensus on an agenda for negotiations to start in the year 2000.

The Seattle Conference had to decide which of the following main issues ought to be taken from January 2000 and also what broad scope of negotiations ought to be :

(i) Agricultural products;

(ii) Services;

(iii) Tariffs on industrial products;

(iv) Implementation of TRIPs, textiles and anti-dumping duties and subsidies;

(v) New issues such as foreign investment, competition policies, transparency in government and e-commerce;

(vi) Non-trade issues such as linkage between trade and labour and linkage between trade and development.

Different stands were taken. While the US preferred on the agenda of WTO core labour standards, environment protection, industrial tariffs, e-commerce, transparency in government procurement practices the European Union, Japan and few other industrialized countries wanted comprehensive discussions on all new issues such as investment rules, competition policy, government procurement, labour and environmental standards, industrial tariffs. On the other hand, developing countries including India wanted the future work programme of the WTO confined to the 'built in' agenda of the existing agreements. They wanted negotiation for the liberalisation in the agricultural and service sectors as well as the reviews of the existing agreements.

The Seattle Ministerial Conference was marred by protests and demonstrations by NGOs and organised labour under the American Federation of Labour and congress of Industrial Organisations. About 50,000 people from different parts of the world staged demonstration against anti-people policies of the WTO and against its secretive, unaccountable supra-national nature and interference in national regulations. The conference collapsed on December 3rd, 1999 following the united protests of the members of the developing nations against lack of transparency and imposition of the view of the rich and the developed countries on the poor countries in the negotiation process. The four-days talks of the 135 members of the WTO was finally suspended by the chairperson stating that 135 nation members were raising too many complex issues in too short a time. He added that talks would resume as soon as the conditions became ripe. As a matter of fact, the four-day conference in Seattle had begun with a complex ominous note as 50,000 trade unionists, environmentalists, feminists and students staged protests and demonstrations which disrupted the conference, It was the imposition of curfew which helped the session get off the ground. However, ultimately the session had to be suspended because of the reasons mentioned above.

Doha (Qatar) Ministerial Conference (November, 2001).—During the Doha Ministerial Conference, rich and poor nations were locked in a bitter battle on 11/11/2001 over World Trade Organisation to launch new global trade expanding talks. Earlier while criticizing the draft for not reflecting the concerns and objections of large number of 142 member countries, India demanded a covering letter to the draft listing differences and options on such critical issues if revision of the text was not possible at that stage. According to India, "the language suggested for 'trade and investment' and 'trade and competition' in the draft was extremely disturbing. "These two issues had been included despite the fact that there was no consensus on starting 'negotiations on them. India also shared the view or well known position that the WTO rules are sufficient to address all legitimate concerns relating to environment its inclusion in the latest draft was unsatisfactory. India was also disappointed with the draft declaration relating to outstanding implementation.

A major breakthrough, however, was reached by 142 WTO members when they reached a compromise deal at the Ministerial Conference on 12/11/2001 on Intellectual Property Rights (IPR) which was regarded as one of the contention and difficult implementation issues pertaining to access to medicine and public health concerns in poor and developing countries. The accord, known as TRIPs, however, made it clear that it "shall not prevent members from taking measures to protect public health."

Cancun (Mexico) Ministerial Conference (September, 2003).—Cancun (Mexico) Ministerial Conference started in the city of Cancun on 10th September, 2003 amidst protests and rallies. It may be noted here that before the start of the Cancun Summit, on 4th September, 2003, Indian Prime Minister, Sri Atal Bihari Bajpai had suggested that developing States should form a front.

The Cancun Summit was attended by 146 member Countries. Indian delegation of 60 members was led by Commerce Minister, Sri Arun Jaitley. India, Brazil, China and 18 other developing countries issued a joint statement alleging that that the prices of agricultural products of America and European countries were adversely affecting them. In fact, the Ministerial Conference started with disagreement on almost all issues. The leader of Indian Delegation, Mr. Arun Jaitley led the group of developing countries in expressing the concerns of developing countries. By then it had become clear that the Cancun Conference would also meet the same fate as the Doha Summit had done earlier. The main reason for this was that America and European countries were disregarding the interests and concerns of the developing countries. After talks of four days, Fifteen pages WTO draft that was presented was clearly in favour of America and European countries and further served their interests. Under the leadership of India, Brazil and China, the Group of G-20 countries insisted on the abolition of subsidies and concessions of farm products of developed countries. This was not acceptable to the developed countries. In view of the opposition of India and other developing countries no draft could be accepted and passed. However, the most remarkable achievement of the Cancun Conference was the unity and forming of a joint front by the developing countries.

WTO Director-General Supachai Panitchpakdi was, however, optimistic of putting global talks back on track after the setback at the Cancun Ministerial meet in September, 2003. He remarked, "Cancun was disappointing but we need to move forward with the co-operation of all the member countries to salvage WTO.............We may not get everything but we shall have to make the best of the situation.

Six months after Cancun Ministerial Conference of WTO broke up in disarray in March 2004, the member States were making efforts to resume global trade liberalisation talks by solving one of the toughest issues: agriculture.

It may be noted here, as remarked by Celine Charveriat of Oxfan International, "The failure (of Cancun Ministerial Conference) was probably a necessary evil, which held rich countries understand that the era when they could make developing countries swallow anything is over." Further, in her view, the "G-20" is resolute and united. Developing countries have now a louder voice in the "G-20" group they formed last year around India and Brazil, which opposed farm subsidies.

Soon after the failure of negotiations at Cancun, senior U.S. trade representative, Robert Zoellick, announced that U.S. would favour bilateral and regional trade deals with individual block or countries instead of the multilateral accords bartered with all the WTO's members. But in the course of time, U.S. attitude was mellowed and the U.S. turned back on that attitude. This is evident from the fact that despite the fear that U.S. Presidential elections would undermine efforts to bridge the divide this year it was reported by the negotiators that the climate was improving. Giving a strong boost to the revival effort at the beginning of the year Zoellick sent a letter to 145 counterparts assuring them that the U.S. did not want to make 2004 a "lost year" for world trade. Further, the U.S. distanced itself from a joint position concluded with the European Union last summer, in saying now that it now backed attempts to fix a deadline for elimination of subsidies for agricultural exports, a key demand of the developing countries which had been turned down in Cancun.

The Hong Kong (Sixth) Ministerial Conference (2005) :

The Sixth (Hong Kong) Ministerial Conference was held in Hong Kong, China) from 13th to 18th December, 2005. WTO's 149 member governments and after six days of intensive negotiations approved a declaration which has been described as significant progress since the July, 2004 package

In this conference the main disputed subject was agricultural subsidy. As compared to developing States, the developed and industrialized countries give more agricultural subsidies to their farmers. This agricultural subsidity is of two types—(i) subsidies to the farmers so that compared to world prices, domestic prices may be less; and (ii) export subsidies so that exports of agricultural products may be encouraged.

The developed countries are demanding the reduction of import duties whereas they are not willing to reduce export subsidies. The developing countries are, therefore, demanding the developed countries to reduce subsidies on agricultural products.

During Cancun (2003) Ministerial Conference, India had been successful in forming and leading a group of developing countries. The Commerce Minister, Mr. Kamal Nath gave further impetus to this development and now the membership of this group swelled to 110 and is known as G-110. The main objective of forming this group is to protect the interests of developing countries.

The final draft adopted in the conference reflected the heavy bargaining on the main issues. The draft is ambiguous and gives hope to all the groups but no group could find victory in the draft. The draft has asked the developed countries to reduce subsidies on domestic agricultural product. In this connection, such countries have been divided into three parts. The first part constitutes the European Union. The second part comprises of America and Japan which have to reduce subsidies to a great extent. The third part constitutes the remaining countries. The draft provides that the developed countries have to reduce agricultural subsidies by 2013.

The rich nations are taking only short or baby steps towards fair trade, therefore free trade does not seem possible in a near future on the other hand the grand alliance of developing countries looks forward to a new World Trade Order.

The Doha round of talks under the WTO which was already two years behind schedule continued at Geneva in July, 2006. But the talks again reached deadlock with the U.S. and European Union facing a united block of developing countries on the issue of agricultural subsidies. Mr. Kamal Nath, Indian Commerce Minister, also agreed that talks were a failure. By a last minute tactical intervention, India somehow managed to keep alive its proposal on a method for cutting import duties in ongoing round WTO negotiations India, however, sharply criticized the U.S. decision to provide 80 billion dollars worth of subsidies to its farmers alleging that the action would distort trade and is against the spirit of WTO.

After the collapse of mini-ministerial conference WTO Director-General, Pascal Lamy was given two weeks to persuade the key players countries to make concessions to bring about convergence on the two contentious issues of agriculture and industrial tariff. Earlier India hinted at pullout from talks in view of the rigid attitude of the U.S. and E.U. on farm subsidies yet after persuasion, India agreed to rejoin the talks.

Efforts to end the Deadlock of Doha Conference.—Efforts are being made for several years to end the deadlock of Doha Conference. The main cause of deadlock was America's rigidness to not to reduce the Agricultural financial subsidy. Efforts were given impetus in May 2007 when prominent members of WTO assembled in Paris and Brussels. Thirty prominent Industrial Countries assembled for talks on 10 May, 2007. During these talks Commissioner Peter Madelson of European Union, American Commercial Representative Susan Schwala and Indian Commerce Minister, Kamal Nath and Brazilian Commerce Minister Celso Amorin got the opportunity to discuss the issue.

Doha talks remained suspended since July 2006. Therefore, in April, 2007, Chief Agricultural Negotiator of WTO, Crawford Falconer submitted some new ideas before the members to take forward the talks. He proposed that America ought to reduce agriculture subsidy by 19 billion dollars every year. WTO Director General Pascal Lamy expressed the view that commercial talks were rapidly progressing towards consensus. But unfortunately after sometime, there was a setback to this thinking. First, G-4 talks among America, European Union, Brazil and India failed. Secondly, there was a greater setback when American Congress refused to increase the term of TPA. Therefore, it would not be wrong to conclude that talks would remain suspended until American elections are completed.

7th Ministerial Conference of WTO (Geneva).—The 7th Ministerial Conference of WTO was held in Geneva (Switzerland) from 30 November to December 2, 2009. The general theme for discussion was "The WTO, the Multilateral Trading System and the Current Global Economic Environment".

On 30 November, 2009, Pascal Laung urged unity in efforts to conclude Doha Round next year. On December, 2009, Ministers called for speedy Doha Round Deal. On the next day *i.e.*, December 2, 2009, Ministers showed political energy for ending Doha Round.

As regards the scope of the conference , it will be desirable to refer to the report of Lamy Pascal. In his report to the General Council on 17 November, 2009 Pascal Lamy said that while the upcoming WTO Ministerial Conference would not be a negotiating session, it would be a platform for Ministers to review the functioning of the house "including Doha Round" to send a number of strong signal to the world with respect to the entire WTO waterfront of issues—from monetary and severally to disputes, accession, aid for trade, technical assistance and international governance.

An impasse remains as of June 2012, agreement has not been reached despite intense negotiations.

8th Ministerial Conference.—8th Ministerial Conference of the WTO was held at Geneva (Switzerland) from 15 to 17 December, 2011. In this conference, membership agreements were made for Russia, Sarroa and Montenegro.

9th Ministerial Conference.—Ninth Ministerial Conference was held from 3-6 December, 2013 in Bali (Indonesia). In this Conference 159 members of WTO agreed to the Bali Package which eases barriers to international trade.

10th Ministerial Conference.—Tenth Ministerial Conference was held in Nairobi (Kenya) from 15 to 19 December, 2015. The completion of Afganistan and Liberia's accession to the WTO was on the agenda. It culminated in the adoption of the "Nairobi Package", a series of six Ministerial Decisions on agriculture, cotton and illness related to least developed countries (LDCs). The Conference was Chaired by Kenya's Cabinet Secretary for Foreign Affairs and International Trade, Amina Mohammed.

11th Ministerial Conference.—The WTO's 11th Ministerial Conference was held in Buenos Aires (Argentina) from 11 to 13 December, 2017. It was chaired by Minister Susana Malcorra of Argentina. The conference concluded with a number of decisions including on fisheries, subsidies and e-commerce duties, and a commitment to continue negotiations in all areas.

12th Ministerial Conference.—The agreement to host the WTO Ministerial Conference in Nur-Sultan, Kazakhistan was signed on October 30, 2019. The Ministerial Conference was held from June 8-11, 2020.

The WTO and India*

Though the Government of India all along maintained that India would definitely benefit by joining the WTO, critics have severely opposed this view. The assertion of the government that the new GATT agreement *i.e.* GATT 1994 Agreement is "the only hope for an equitable and just international order on trade" does not seem to be correct. As pointed out by former Commerce Secretary Mr. S.P. Shukla, "Even a cursory acquaintance with the origin and operation of GATT the history of pressure and arm twisting that surrounded the beginning, the middle and the end of the Uruguay Round and the unashamed pursuit of more extraneous issues such as environment, labour standards and human rights by the United States and the European Union even before the new regime was adopted—should be adequate for any being of ordinary intelligence to perceive the inequitous unjust, intermidatory and G-7 biased character of new regime and its instruments. "Further to pretend that the new regime is something benign and just is to live in a fool's paradise."

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* IAS (2002) Q. 6(b) ; IAS (2008) Q. 8(b).

Some of the aspects of the new agreement, for example, TRIPs agreement have gone to such extent that they read more like a municipal law and not international law, which it was supposed to be or ought to have been. A pertinent question, therefore, arises as to what is the legal position of the Final Act *vis-a-vis* the Constitution of India with a view to ascertain this, an independent judicial commission consisting of three retired Judges of the Supreme Court—Justice D.A. Desai, Justice O. Chinappa Reddy and Justice V. R. Krishna Iyer examined the question whether the GATT, 1994 Final Act has breached the basic structure of the Constitution of India in any way and whether it is violative of Fundamental rights in any manner. Set up at the initiative of the National Working Group of Patent Laws and the independent initiative, the Commission is known as the "People's Commission on Dunkel Text". However, as made clear by Justice Iyer in a Press statement, "we agree that we have no authority in any sense to make the pronouncement. Indeed, we do not want to claim the capacity and wish to emphasise that we propose to do so in the way of a report should be meant for people's better understanding of the legal facets of the Final Act *vis-a-vis* India the Constitution and its people. Among those who deposed to before the Commission were Mr. George Fernandes of the Janata Dal, Mr. T. N. Chaturvedi of the Bhartiya Janata Party and Mr. S. P. Shukla, the former Commerce Secretary and Finance Secretary to the Government of India. The Commission gave its decision (rather opinion) in the last week of March, 1996. According to the Commission the new International Trade Treaty (*i.e.* GATT, 1994) would be violative of the basic structure of the Constitution because this would violate the rights of people to medicine, food articles and living standards. The Commission also pointed that before signing the treaty States and the Parliament were not consulted. This would also lead to unprecedented increase in the prices of medicines. Thus Dunkel Proposal and ultimately GATT, 1994 were against the interests of India. It is also significant to remember that in September, 1991 as many as 250 Members of Parliament of prominent political parties of the country had requested the government to refuse to accept proposals relating to patents and not to be pressurised by the western countries in this respect.

On 13th December, 1997, the developed and the developing countries entered into a 'historic' accord to remove international barriers to the expansion of banking, insurance and securities. Though termed 'historic', there was in fact no cause for jubilation. It was clearly an accord for the rich. So far as India was concerned it might be bonanza for some of the U.S. companies who were keen to enter Indian markets in those fields. The accord was negotiated and concluded at Geneva by 132 countries. Following the accord, India was required to allow opening of 12 branches of foreign banks in a year as against 8 at present in a "rationale and non-discriminatory" basis *i.e.* on most favoured nation basis. Though India did not make any commitment to open the insurance sector, according to experts, it seemed certain that as in the case of banks, India would not be able to withstand U.S. pressure for a long time in this sector also.

As regards intellectual property rights and patents also India's stands are crumbling under the U.S. pressure and India finds herself in an unenviable position. The U.S. stand was confirmed by the WTO which asked India to make the desired changes in her law in respect of intellectual property rights and patents. India could have benefited by joining the WTO if she was successful in increasing her share in world trade. But unfortunately that has not taken place due to *inter alia*, political instability and rampant corruption, especially at high levels. Since it is now too late to retract her steps, the only option left is to mend her domestic fences with all vigour and strength at her command and compete with other countries to increase her share in the world trade.

On 18th May, 1998, India's Commerce Minister, Ram Krishna Hegde told the opening session of WTO's Second Ministerial Conference at Geneva that India remained deeply committed to the success of the multilateral trading system but the imbalances in the existing system must be corrected keeping in perspective the interests of the "most under privileged amongst us." India took at a proactive stand at the WTO meeting demanding amendments to the trade related intellectual properties agreement (TRIPs), improved market access in services and better deal in agriculture. As regards the TRIPs agreement, the Indian Commerce Minister pointed out that the transition period of ten years allowed to the developing countries to introduce product patent had been effectively neutralized by another clause in the agreement that requires these countries to grant exclusive marketing rights much before the deadline. He also underlined the need for reviewing TRIPs for providing improved protection to indigenous know-how of which there is abundance in India.

Further, the Indian Commerce Minister also pointed out the double standards followed in the WTO agreement on trades in agriculture and said that while the majority of the developing countries were prohibited from using export subsidies, the same was permitted to the developed countries provided their budgetary outlays on these subsidies were within their reduction commitment. This, he pointed out, was obviously unfair because the countries which have been distorting the market in the past continued to maintain the subsidy regime while others have been prohibited from using such measures. He also expressed concern on the general agreement on trade in services (GATS) because while India's comparative advantage in providing services by professionals was not being allowed to be exploited, there was unabating pressure on India to open up markets to services where the developed world has an advantage.

Since the joining of the WTO, India's experiences have been far from satisfactory, rather they have been bitter. For example, in the first week of November, 2001 at Doha meeting of the Ministerial Conference India strongly opposed the second draft of the Ministerial meeting and termed as "extremely disturbing" attempts to bring in new issues like investment and competition into the work programme of the WTO. India criticised the draft for not reflecting concerns and objections of large number of 142 member countries and demanded a covering letter to the draft listing differences and options on such critical issues of revision of the text was not possible at that stage. Indian delegation led by Commerce Secretary, Mr. Prabir Sen Gupta said that the language suggested for 'trade and investment' and trade and competition in the draft was extremely disturbing. Indian delegation was surprised and upset to find that the earlier paras giving options on investment and competition had been dropped and the draft contained only the option of negotiations. What upset India most was that these two issues had been included despite the fact that there was no consensus on starting negotiations on them.

India and several other developing countries voiced strong opposition to the negotiating option as well as the so-called "option/options" approach on investment and competition. According to Indian delegation the latest draft with regard to environment was also unsatisfactory as it expressed desirability on negotiations after the fifth ministerial Conference. India's position with regard to this was that WTO rules were sufficient to address all legitimate concerns relating to environment. As regards transparency in government procurement and trade facilitation Indian delegation said "the draft clearly proposes negotiations while, we have all along been urging for continuation of the study process, inasmuch as there is no consensus as yet even on elements like scope and definition". The four issues—(i) competition; (ii) investment; (iii) trade facilitation and transparency; and (iv) government procurement; have come to be known as the, Singapore issues. India was also disappointed with the draft declaration relating to outstanding implementing issues.

Doha meeting of Ministerial Conference, which was attended by 2600 delegates from 142 WTO members achieved a major breakthrough with regard to Intellectual Property Rights (IPR) which was hitherto a contentious and implementation issue pertaining to access pertaining to medicine and public health concerns in poor and developing countries. It was provided in the accord that known as TRIPs that it "shall not prevent members from taking measures to protect public health" The developing countries including India had opposed the U.S. and Switzerland over the right to override patents and have open access to cheaper generic drug in times of epidemics. India, Brazil and other developing countries wanted the right to produce or import cheaper generic version of which even though may be violative of international trade rules.

The Cancun Ministerial Conference in September, 2003 for the first time demonstrated that with the emerging unity among the developing countries the rich countries must realize that the era when they could make developing countries swallow anything is over. The greatest achievement of Cancun Conference for the developing countries has been the unity and joint front of G-20 countries around India, Brazil and China. It is imperative now in their own interests to remain united.

Thus, India's experience so far after joining the WTO has been far from satisfactory. Since it is now too late to retract her steps, the only remedy left to her is increase its exports and share in world trade. But alas! that goal seems to be too far and elusive.

As noted above, India has been able to forge unity among the developing countries. As many as 110 developing countries have formed a group, known as G-110, to present a united block against the rich nations.

CHAPTER 41

COLLECTIVE SECURITY*

The Concept of Collective Security.—"The United Nations provides three pillars for the maintenance of peace : peaceful change, the pacific settlement of disputes, and *Collective Security*".[1] Further, "the idea of Collective Security is that by pooling their strength and collectively organizing international force and security all nations will be relieved of their anxiety over national security. All will co-operate in controlling a disturber of the peace. They will act as one for all and all for one. Their combined power will serve as guarantee of the security of each. In the face of such overwhelming strength, the theory goes, every nation will fulfil its international obligations as it could not resist collective enforcement any way. The use of peaceful methods will be stimulated, greater trust among nations will be created, and aggression will cease as an obviously enterprise." [2] The term, "collective security" has not been used either in the Covenant of the League of Nations or in the Charter of the U.N. It means "general co-operative action for the maintenance and enforcement of international peace.[3] Collective Security is based on the principle that conflict among the members of the community affects the whole community and unilateral violence against a member is crime against all the members. Thus under it, the idea is to maintain peace which is inherent on the basis of every political community.[4]

The League of Nations deserves credit for starting the concept of Collective Security. The Covenant of the League of Nations provided that if any member-State resorted to war in violation of the provisions of the Covenant it would be deemed to be the enemy of the whole League of Nations. This was for the first time that an International Organization introduced such important provisions in regard to collective security. A brief discussion, therefore, of the provisions of the Covenant of the League of Nations will be desirable here.

Covenant of the League of Nations and Collective Security.—The Covenant of the League of Nations under Articles 10 to 17 introduced the concept of Collective Security. Following are the main provisions in this connection :

(i) *Guarantee against aggression.*—The Covenant of the League of Nations provided that the members of the League undertake to respect and preserve as against external aggression, the territorial integrity and existing political independence of all members of League. In case of any such aggression and in any case of threat and danger of such aggression, Council shall advise upon the means by which this obligation shall be fulfilled.[5]

(ii) *Action in case of threat of war or war.*—The Covenant of League of Nations provided that any war or threat of war, whether immediately affecting any member of the League or not, is hereby declared a matter of concern to the whole League and the League shall take action that may be deemed wise and effectual to safeguard the peace of nations.[6]

(iii) *Disputes to be submitted for settlement.*—The members of the League agreed that, if there should arise any dispute between them likely to lead to a rupture, they will submit the matter either to arbitration of judicial settlement or to enquiry by the Council and they agreed in no case to resort to war until 3 months after the award by the arbitrators or judicial decision or the report by the Council.[7] This provision is very important because it for the first time imposed restrictions upon the freedom of the States to resort to war at their will.

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* See also for P.C.S. (1985), Q. 5—For answer see also Chapter on "War, Its Legal Character and Effects" ; *see* also for UPPCS (2001) Q. 8(b).

[1] Werner Levi, Fundamentals of World Organization (1950), p. 86.

[2] Ibid, at p. 72.

[3] Millard N. Hogan, International Conflict and Collective Security (University of Kentuchy Press, 1955), p. 179.

[4] Ibid., at p. 1.

[5] Article 10, Covenant of the League of Nations.

[6] Article 11, Ibid.

(iv) *Implementation of the award or the judicial decision.*—The members of the League also agreed that they would carry out in full any award or decision that might be rendered and they would not resort to war against a member of the League which complied therewith. In the event of any failure to carry out such an award or decision, the Council could propose what steps should be taken to effect thereto.[8]

(v) *Sanctions.*—The Covenant of the League of Nations contained important sanctions under Article 16, which provided that "should any member of the League resort to war in disregard of its Covenant under Articles 12, 13 and 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject to the severance of all trade, financial relations, the prohibition of all intercourse between their nations and the nations of Covenant-breaking State, and prevention of all financial, commercial or personal intercourse between the nationals of covenant-breaking State and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State whether a member of the League or not". Article 16 further provided: "Any member of the League which has violated any provision of the Covenant of the League, may be declared to be no longer a member of the League by a vote of the Council concurred in by the representatives of all other members of the League represented thereon".

It is clear from the above provisions that League of Nations made first important endeavour to introduce the system of collective security. It is entirely a different matter that the Collective Security system of the League could not succeed. The proof of its greatest failure was the Second World War, Failure of the Collective Security system was mainly due to the fact that the members failed to abide by their solemn obligations which they undertook under the League of Nations. However, it cannot be denied that there were certain defects and *lacunas* in the Collective Security provided under the League. To mention only one constitutional defect of the Covenant, although it imposed certain restrictions upon the right of the nation to resort to war, it did not completely prohibit the war. That is to say, after exhausting the provisions of Articles 12, 13 and 15, the members could resort to war, after a lapse of 3 months, after the award by the arbitrators or the judicial decisions report by the Council. The United Nations gained immensely from the experience of the League of Nations and that is why the system of Collective Security provided under the United Nations is much more effective than that of its predecessor, the League of Nations.

United Nations Charter and collective security*

Following are the main provisions which have built a system of a Collective Security under the Charter :

(1) In the Preamble of the Charter, it has been resolved "to save succeeding generations from the scourge of war, which in our life time has brought untold sorrow to mankind" and for this end, "to unite our strength to maintain international peace and security".

(2) It is one of the purposes of the United Nations (under Article 1), to maintain international peace and security, and to that end to take *"effective collective measures* for the prevention and removal of threats and the suppression of acts of aggression or other breach of peace and to bring out by peaceful means, and in conformity with the principles of Justice in International law,

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7. Article 12, Covenant of the League of Nations.
8. Article 13 (4), Ibid.
* See also for I.A.S. (1970), No. 8; P.C.S. (1976), Q. No. 1; C.S.E. (1982), Q. 8 (b) ; UPPCS (2001) Q. 8(b).

adjustment or settlement of international disputes or situation which might lead to a breach of peace." [9]

(3) It is one of the principles of the United Nations that, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.[10] As rightly remarked by Louis Henkin, in accordance with this principle the Charter ended the freedom of the States to resort to war at their will.

(4) Yet another principle of the United Nations is that all members shall give United Nations every assistance in any action it takes in accordance with the Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.[11]

(5) *Pacific Settlement of Disputes.*—The Charter provides that parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial-settlement, resort to regional agencies or arrangements or other peaceful means of their own choice. It is further provided that the Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means.[12] It is further provided that if the Security Council deems that the continuance of any dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate (Article 37).

(6) *Binding effect of Security Council decisions.*— Members of the United Nations have agreed to accept and carry out the decisions of the Security Council in accordance with the present Charter.[13]

(7) *Enforcement or Preventive Action.*—Chapter 7 of the Charter deals with the enforcement or preventive action and is most important Chapter which builds a system of Collective Security. Following are some of the important provisions under this Chapter :

  (i) For any action to be taken under Chapter 7, it is necessary that the Security Council should first determine the existence of any threat of peace, breach of peace or act of aggression. It is only after the Security Council has determined that a breach of peace or an act of aggression has taken place, then it may make recommendations or decide what measures shall be taken to maintain or to restore International Peace and Security.[14]

  (ii) The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decision and it may call upon the members of the United Nations to apply such measures which may include complete or partial interruption of economic relations and rail, sea, air, postal, telegraphic, radio and other means of communication and severance of diplomatic relations.[15]

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[9] As remarked by Werner Levi, "Since the end of the First World War, however, international organisation has retained the idea of using the combined forces of nations for the dual purpose of discouraging the wrongful application of force by any one nation and of controlling any threat or breach of the peace. This system so-called collective security was impliedly embodied in the Covenant, where it was accepted as a reaction against the discredited pre-war balance-of-power system and a return to the idea of Universalism and the concept of powers. The Charter again and more fully incorporated the principle, specifying in Article 1 that for the purpose of maintaining Peace and Security the members should take effective collective measures," Note 1, at p. 71.

[10] Article 2 (4) U.N. Charter.

[11] Article 2 (5), Ibid.

[12] Article 33, Ibid.

[13] Article 25, Ibid.

[14] Article 39, Ibid.

(iii) In case, the measures taken by the Security Council under Article 41 mentioned above, proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or to restore International Peace and Security. Such actions may include demonstration, blockade and other operations by air, sea or land forces of the members of the United Nations.[16] This is the most important provision so far as the Collective Security is concerned, because it empowers the Security Council to use even armed forces for the maintenance of peace and security. As noted earlier, the members have agreed to accept and carry out the decision of the Security Council. Thus it is through the collective measures under this provision, the system of Collective Security has been made very effective. It is further provided in the Charter that the members are under obligation to make available to the Security Council on its call and in accordance with the special agreements armed forces, assistance and facilities for the performance of maintaining International Peace and Security.[17] It is unfortunate that the provisions under this Article have not been implemented.

(iv) It is further provided that there shall be a Military Staff Committee to advise and assist the Security Council's military requirements for the maintenance of International Peace and Security, the employment and command of forces placed at its disposal, the regulation of armaments and possible disarmaments.[18] It may be noted here that since special agreements envisaged under Article 43 for the availability of armed forces could not be made this provision has also not been implemented and has become more or less a defunct provision.

(v) It is further provided that the members of the Untied Nations shall join in affording mutual assistance in carrying out the measure decided upon by the Security Council.[19]

(8) *Individual and Collective Self-defence.*—Besides the above-mentioned provisions, the Charter of the United Nations under Article 51 confers inherent right of individual or collective self-defence upon the members of the United Nations.[20] As pointed out by Prof. Julius Stone, the right of individual and collective self-defence is, however, subject to the certain conditions—(i) if an armed attack takes place ; (ii) the right exists until Security Council takes any action ; (iii) it shall be reported to the Security Council ; (iv) it is subject to the review by the Security Council; (v) this right cannot affect the authority and responsibility of the Security Council, for the maintenance or restoration of international peace and security; (vi) this right is limited to the members of the United Nations and is not available to the non-members.[21]

It is clear from the above provisions that the framers of the Charter tried their best to equip the United Nations with a formidable system of Collective Security. So far as constitutional provisions of the United Nations are concerned, it need not be over-emphasised that if they were properly implemented, the United Nations might have a formidable system of Collective Security. But because of conflict and non-cooperation among the major powers many important provisions have become more or less defunct. Therefore, the United Nations has not been able to equip itself with armed forces and other necessary powers to ensure the maintenance or restoration of international peace and security. When the framers of the Charter conferred upon the members the right of individual or collective self-defence, they never thought that it might jeopardise, to some extent the system of Collective Security. In pursuance of Article 51, and other articles under the Chapter of 'Regional Arrangements' many regional agreements have been entered into by the States, which instead of assisting the Security Council for its functions of Collective Security, have escaped its control and supervision and to some extent even undermine the functions of the Security Council. Regional Arrangements which were intended to be complementary to the functions of the Security Council have, to some extent, proved detrimental for the maintenance of peace and security.

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[15] Article 41, U.N. Charter.

[16] Article 42, Ibid.

[17] Article 43, Ibid.

[18] Article 47, Ibid.

[19] Article 49, Ibid.

[20] For a critical discussion of the right of 'Individual and Collective Self-defence' See Chapter on 'Intervention.'

[21] Julius Stone, Legal Control of International Conflicts, p. 243.

First Ever Summit of the Security Council.[22]—A brief reference may be made here to the First Ever Summit meeting of the Security Council held on 31st January, 1992. Attended by 13 Heads of States or Government and two Foreign Ministers of the Council's 15 members, the Council reaffirmed its commitment to the Charter's Collective Security system to deal with threats to peace and reverse acts of aggression.

Distinction between Collective Security and Collective Self-Defence.—It may be noted here that there is difference between Collective Security and Collective Self-defence. As pointed out by Hans Kelsen,[23] "Collective Security differs from Collective Self-defence in so far as enforcement action taken by Security Council under Chapter VII is the intended reaction against the breach of peace committed through an act of aggression, whereas the use of force in self-defence is intended by Charter as provisional and temporary until Security Council takes necessary measures and until Collective Security comes into action and not a substitute for it." It has been pointed out earlier that under Article 51 the right of Collective Self-defence exists until Security Council takes any action. Thus it is provisional and temporary. It comes to an end as soon as the Security Council takes any action. Moreover it should not affect the authority and responsibility of the Security Council for the maintenance or restoration of international peace and security. In view of the provisions of the Charter discussed above, it is clear that the sanctions behind the Collective Security are much stronger than that of Collective Self-defence. Collective Self-defence is, in fact, an exception to the principle of non-intervention incorporated in Article 2(4) of the U.N. Charter so far as Collective Security is concerned, Article 2(7) specifically provides that this principle (*i.e.*, the principle of non-intervention in the domestic affairs of a State by the U.N.) shall not prejudice the application of enforcement measures under Chapter VII.

Conclusion.—Due to the conflict among the permanent members, the system of Collective Security has failed to achieve the desired objectives. Because of the exercise of veto, Security Council failed to fulfil the 'primary responsibility' of maintaining international peace and security. Due to the failure of the Security Council to fulfil the responsibility entrusted to it under the Charter the General Assembly assumed certain powers in the field of International Peace and Security.[24] But Congo experience has shown that even for the successful functioning of the General Assembly in this field, unanimity among major powers is essential. It has been pointed out, and rightly too, that the arguments in favour of the system are based on faulty or incomplete assumptions.[25] First, an essential assumption is the absolute irresistibility of the accumulated force.[26] A second assumption of the Collective Security system is doubtful, namely, that all nations want International Peace and Security. What they really, want is peace and security for themselves.[27] A third difficulty that has been overlooked is that the construction of a

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[22] For a little more detailed discussion see Appendix II.

[23] Hans Kelsen, "Collective Security and Collective Self-Defence under the Charter," A.J.I.L., Vol. 42 (1948) p. 783 at p. 795.

[24] For criticial discussion of the Expanding Role of the General Assembly see Chapter on "The General Assembly."

[25] Werner Levi, Note 1, at p. 73.

[26] Ibid.

[27] Ibid, at p. 74.

Collective Security system is the one of reaching agreement when action is to be taken.[28] Finally, the greatest difficulties can be experienced in determining collectively what form the force is to be given.[29] To conclude in the words of Francis O. Wilcox, "The high expectations of 1945 have collided head on with the hard realities of 1950's and 1960. The concept of Collective Security as it was envisaged in the United Nations Charter may not be entirely dead but its blood pressure is very low and its heart beat is hardly discernible." [30]

Gulf War (1991) and Collective Security.—Whenever there is unanimity among the five permanent members the system of Collective Security not only proves to be effective but is able to achieve the desired objectives. The glaring example of this is Gulf War (1991).[31] However, it may be noted that one of the main reasons for the successful working of the system of Collective Security in Gulf War was the decline in the power and capacity of the Soviet Union and the emergence of the U.S. as the sole super power. Indeed throughout the Gulf War (1991), the U.S. dictated the Security Council so much so that it did not allow the Council to meet and deliberate even once until its objectives were achieved. In view of the breaking up of the Soviet and growing demand for enlargement of the Council, only time will tell how such manipulated unanimity will work in future.

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[28] Werner Levi, Note 1, at p. 78.

[29] Ibid, at p. 79.

[30] Francis O. Wilcox, "The Collective Security and Insecurity, Global and Regional," Proc. ASIL. (April 24-26, 1969), p. 54.

[31] For a detailed discussion of Gulf War (1991) *see* Appendix II.

CHAPTER 42

REGIONALISM AND REGIONAL ARRANGEMENTS

As pointed out by Francis O. Wilcox, "The question of relative merits of regionalism and globalism in International Organisation generated as much heat as any other issue at San Francisco in 1945 with the exception of the veto. In more recent years the inadequacies of the U.N., the changing nature of the Cold War, the growth and expansion of Regional Organisations, the proliferation of nuclear weapons, and the continued shrinking of the universe have kept the heat of this controversy at a relatively high level." [1] At one extreme are those staunch supporters of regionalism who are of the view that regional arrangements are a natural out-growth of international co-operation. They contend that a Universal Organisation is too ambitious and cannot command the allegiance necessary to fulfil its objectives in a world still divided by National Sovereignty. At the other end of the spectrum are those who are of the view that regional agencies foment great military power rivalries, weaken the effectiveness of the U.N. and undermine the principle of Collective Security.[2] As stated by Prof. Inis L. Claude, Jr., "Regional Organisations, which have escaped the direction and control of the United Nations that was stipulated in the Charter, have been used to some degree not only as alternative agencies for promoting the solution of disputes but also as jurisdictional refuges, providing pretexts for keeping disputes out of the United Nations hands. These political factors are likely to continue to inhibit the full development of the United Nations potentiality for assisting in the settlement of disputes." [3]

Regionalism under the League of Nations.—Even prior to the League of Nations, 'regionalism' in the sense of a grouping of States by a common bond of policy existed. Monroe Doctrine of the British Empire are obvious examples.[4] The Covenant of the League of Nations under Article 21 had made a provision for regionalism by stating that "Nothing in the Covenant shall be deemed to affect the validity of international engagements such as the treaties of arbitration or regional understandings like the Monroe doctrine for securing the maintenance of peace." Thus, "the sum total of such rebirth of regionalist thinly disguised disappointment with the world wide Collective Security of the League of Nations and a determination to provide some protection against the possibility of a similar breakdown of a future global system." [5]

Regionalism under the U.N. Charter.*—At the San Francisco Conference, some formula had to be devised to bring about compatibility between regional and global organisations. A compromise formula was evolved and embodied in Articles 52 to 54 of the Charter. The Charter does not define the term regionalism but provides certain guidelines and safeguards.

Article 52 provides that nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of peace and security as are appropriate for regional action, provided that arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations. Article 53 provides that the Security Council shall, when appropriate, utilise such regional arrangements or agencies for enforcement action under its authority. Article 54 provides that the Security Council shall at all times be kept fully

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1. Francis O. Wilcox, "Regionalism and the United Nations", Int. Orgn., (Summer 1965), p. 789.
2. Ibid.
3. Inis L. Claude, Jr., "Implications and Questions for the Future," Int. Orgn., Vol. XIX, No. 3 (Summer 1965), p. 835 at p. 843.
4. D.W. Bowett, the Law of International Institutions (1970), p. 143.
5. Stephen S. Goodspeed, the Nature and Function of International Organisation, Second Edition, p. 571.

* C.S.E. (1980), Q. 11 (b).

informed of the activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

A further enforcement to local or regional action is found in Article 51 which affirms that nothing in the present Charter shall impair the inherent right of individual or Collective Self-defence if an armed attack occurs against a member of the U.N. until the Security Council has taken measures necessary to maintain international peace and Security. It however, provides that the right of self-defence shall be immediately reported to the Security Council and shall not in any way effect the responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Thus the Charter has embodied the above and other safeguards to prevent regional arrangements from challenging the basic Charter principle of Universal Collective Security. The said other safeguards provided under the Charter are the following :

(1) Under Article 102, all regional arrangements must be registered with the Secretariat and published by it.

(2) Under Article 52, it is necessary "that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations."

(3) Article 103 provides that in the event of a conflict between the obligations of the Members of the U.N. under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

(4) Article 53 clearly prohibits the regional agencies from taking any enforcement action "without the authorization of the Security Council".

(5) As provided under Article 52 "the regional arrangement or agency must be appropriate for regional action".

(6) Finally, Article 54 requires, "the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional agencies for the maintenance of international peace and security".

As remarked by Goodspeed, "the framers of the Charter realistically faced the problem and made universalism and regionalism as compatible as possible in these provisions." [6] It is evident from the above provisions that the framers of the Charter reserved the basic right of the Security Council to deal with any dispute whether regional, inter-regional or global in character. "The framers of the Charter intended to establish a flexible framework within which existing and future regional agencies and the United Nations might function together harmoniously, the one lending support and encouragement to the other in their mutually complementary task. They intended to underline the primary role of the regional agencies in the settlement of local disputes and they obviously wished to recognise the inherent right of States to defend themselves against armed attack, veto or no veto. They did not intend, however, to kick the day lights out of the world 'Organization' or to detract from its primary responsibility for the maintenance of peace and security.'[7] But after the establishment of the U.N. the balance achieved in the provisions of the Charter began to shift. This is evident from the treaties that have been negotiated setting up the various regional arrangements. Both the NATO and SEATO have neglected to establish any regional relationship or commitments.[8] The NATO refers only Article 51 and no mention is made of Articles 52-54. The SEATO did not refer to any particular article of the Charter. "The significance of these changes is obvious. As the Cold War intensified, the parties to the newer arrangements considered it desirable to avoid the burdensome limitations restrictions found in the regional articles of the Charter." [9] Further, "A second shift in the balance between the regional organisations and the United Nations stems from the fact that the regional agencies have been the less active in the peaceful settlement of disputes than the framers of the Charter anticipated.......... Moreover, the regional agencies have not eased the burden of the United Nations very much by serving either as a shock absorber or as a court of last resort for the settlement of local disputes." [10]

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[6] Stephen S. Goodspeed, the Nature and Function of International Organisation, Second Edition, p. 572.

[7] Francis O. Wilcox, Note 1, at p. 792.

[8] Ibid.

[9] Ibid., at p. 794.

As pointed out by Francis O. Wilcox, this shift has taken place because of the following three reasons : (a) inability of the U.N. to create a kind of enforcement machinery contemplated in the Charter; (b) regional defence organisations have not been created for the purpose of resolving differences between their own members; (c) the third and perhaps the most important reason stems from the serious limitation on their membership.[11] Further, "As far as enforcement action is concerned, the relationship between the United Nations and the regional organisations have undergone for reaching and, in the eyes of some people, highly disturbing changes. By their words and their deeds the O.A.S. the O.A.U., the Arab League, and to lesser extent, collective defensive Organizations like N.A.T.O., C.E.N.T.O. and S.E.A.T.O. have either disregarded the authority of the U.N. or have taken positive steps to avoid the controls over regional action contemplated by the Charter." [12]

Regional and Global Security.—Regionalism has some obvious advantages. A smaller organisation which is restricted geographically, can easily cope with the common problems more effectively than a world organisation ; on the other hand, a global organisation has its own advantages. For a reasonable balance between the regional and the Universal, the United Nations must be reshaped to meet the realities of a new era. As suggested by Wilcox, "what we should do now is to strengthen the Organisations, first by building a greater sense of responsibility and second, by developing a more Universal basis of support for U.N. peace keeping operations".[13] As aptly remarked by Corbett, "there is ample reason to believe that the Nations will go on strengthening their existing regional associations and devising new ones for political as well for economic and social purposes. The problem of relationship between regional and universal will remain. If the regional associations are not to become simply larger and stronger centres of arbitrary power, their activity must be subjected to some measure of collective control. In planning such control, one lesson from the experience of last twenty years might be that preliminary authorization of enforcement action is unworkable and that we must be satisfied with an *ex post facto* scrutiny of complaints of excess of regional authority and a system that would provide due compensation. If so here as in many other contexts, an ultimate appeal to judicial decision leading, where necessary, to collective sanction, would be highly desirable." [14]

Important Regional Agreements

The length of the book does not permit discussion in detail of all the Regional Agreements. It is, therefore, proposed to discuss briefly below some of the important Regional Agreements of the World.

Following are some of the important Regional Agreements of the world :

(1) *Organisation of American States (O.A.S.).*—The Organisation of American States is a Regional Agreement which was established in 1948. In accordance with Article 1 of the Charter of the said Organization, it is a Regional Agency in accordance with the provisions of the United Nations Charter. So far as the question of collective security is concerned, Article 24 of the Charter of the said Organisation lays down the following: "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States". In 1965 a Conference of American States was held at Riole Janeiro wherein it was declared that it

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[10] Francis O. Wilcox, Note 1, at p. 795.

[11] Ibid.

[12] Ibid., at p. 799.

[13] Ibid., at p. 811.

[14] P.E. Corbett, "Regional, Functional and Universal Organisation," in Asian States and the Development of Universal International Law (1972), p. 123 at pp. 128-129.

[illegible] to build a new approach by the inter-American system [illegible] working structure of the Organization of American States [illegible] democracy and developing the [illegible] development of the peoples of the hemisphere [illegible] economic integration. A Protocol of amendment [illegible] of American States was signed on 27 February, [illegible]

[illegible] membership has been suspended.

[illegible] offices are in San Jose, Costa Rica and in Washington D.C.

[illegible] Governing Bodies of the O.A.S. are following:

(a) General Assembly

(b) Meeting of the Consultation of Members of Foreign Affairs

(c) Permanent Council and

(d) Inter-American Council for Integral Development.

[illegible] 21 nations of the hemisphere signed the OAS charter [illegible] goals and their respect for each nation's sovereignty. [illegible] Declaration of Rights and Duties of Man [illegible]

Arab League – The Arab League was [illegible] of the Arab League is to [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

not likely to be smooth sailing. NATO Leaders, especially, Mr Bill Clinton of the U.S., will have to convince Russia that NATO's absorption of Warsaw is not aimed at containing Russia. Russia's apprehensions about NATO offensive against Serbs may also come in the way. Last but not the least, Russian nationalist leader Vladimir Zhirinovsky has warned that the move of extending NATO membership could lead to World War III.

As noted above plan "partnership for peace" does not spell any precise time table for admission of former Soviet block States including Russia. The admission of these States into NATO may be in phases stretching from three to five years depending upon the developments in Russia, Ukraine and other former Soviet Republics.

(6) *Warsaw Treaty or Pact.*—Warsaw Treaty or Pact was established in 1955 by Bulgaria, East Germany, Hungary, Poland, Rumania and Russia for a period of 30 years. The headquarters of this Organization is in Moscow. It is clear from its preamble that this organization has been established to set-up a system of collective security for East European States. A meeting of the Political Consultative Committee of the Warsaw Treaty was held in Bucharest on November 25-26, 1976. By general agreement of the member States of the Warsaw Treaty, a treaty (comprising of 6 Articles) was adopted.[19] Article I of the Treaty provides that Members of the Treaty shall "not be" the first to use nuclear weapons, one against the other, on the land, at sea, in the air and in outer space. Article IV provides that the treaty shall be open for signature by any State which signed in the city of Helsinki the Final Act of the Conference on Security and co-operation in Europe on August 1, 1975.

Dissolution of Warsaw Pact.—Following the political upheavals in Eastern Europe, Czechoslovakia and Hungary led the way in pressing for an end to Warsaw Pact. At the insistence of Czechoslovakia, Hungary and Poland, the military structures of the Pact were dissolved last April 11 in Moscow. The seventh member East Germany ceased to exist with German Unification last October 3. Finally at the stroke of 12 midday of July 1, 1991, the leaders of the Warsaw Pact signed the Protocol dissolving the Warsaw Pact, thus ending a 36 year era of East-West confrontation.

(7) *Organisation for Security and Cooperation in Europe (OSCE).*—Leaders of 54 countries including the United States and Russia, on 19th November, 1999 adopted a Charter for European Security the accord establishes the principle that conflicts in one state are the legitimate concern of all. A two day summit of the organisation for Security and Cooperation in Europe (OSCE) was held at Istanbul where the said accord was adopted. The member States reaffirmed their commitment to peace, human rights, democracy and the prevention of conflict. According to a key passage in the Charter, "participating States are accountable to their citizens and responsible to each other for the implementation of their OSCE commitments. We regard these commitments as our common achievements and therefore consider them to be matters of immediate and legitimate concern to all participating States".

The accord, which was signed by President Bill Clinton on behalf of the United States and Igor Ivanov on behalf of Russia, has been described by U.S. official as the equivalent in security terms of what the 1975 Helsinki final act did for the human rights, which at the height of the cold war, were declared to be a matter of legitimate international interest.

Russia's acceptance of the text of the Charter seems to represent a concession to western pressures following Moscow's previous rejection of what it saw as international interference in its internal affair (such as Russia's war in Chechnya). However, President Boris Yeltsin of Russia had angrily told the western leaders on 18th November, 1999 that they had no right to criticise Russia's war against "bandit and killers" in the rebel Caucasian republic. Probably due to this that the declaration strongly reaffirmed that "we fully acknowledge the territorial integrity of the Russian Federation and condemn terrorism in all its forms. The declaration added that "in the light of the humanitarian situation in the region it is important to alleviate the hardships of the civilian population, including by creating appropriate conditions for international organisations to provide humanitarian aid."

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[19] For text of the Treaty : See New Times, No. 49 (December, 1976), p. 32; For Communique issued after the Meeting and Declaration of Warsaw Treaty Member States, See Ibid pp. 25-31.

As pointed out earlier, the above list is simply illustrative and by no means exhaustive. In view of the paucity of space, only a few regional arrangements have been discussed above briefly.

Conclusion.—Immediately after the establishment of the United Nations it became obvious that the system of collective security established under it was unrealistic and defective. It was based on the assumption that the Great Powers would perform their responsibilities sincerely and would co-operate among themselves. The assumption proved to be unreal. The Great Powers on account of their non-co-operation and the repeated exercise of Veto, completely undermined the system of collective security. The failure of the system of collective security established under the Charter, compelled the nations of the world to enter into regional agreement for their security.[20]

Article 52 of the United Nations Charter provides that the members of the United Nations entering into regional arrangements shall make every effort to achieve pacific settlement of local disputes through such regional arrangement or by such regional agencies before referring them to the Security Council. It was, therefore, intended that local and regional matters will thus be resolved and the system of regional arrangements will assist the Security Council in the performance of its functions of the maintenance of international peace and security. The regional arrangements were, therefore, intended to be complimentary to the system of collective security established under Charter. But they have not only escaped the control and supervision of the Security Council, but have, in many respects, undermined the system of collective security introduced under the Charter. But it would be wrong to say that they made no contribution at all. As remarked by Francis O. Wilcox, "yet despite the plethora of unresolved disputes that plague international community, we have managed to middle through 20 years (now about 47 years) of U.N. history without pluging the world into nuclear war. To that extent the determining power to some of our regional agencies coupled with the moral force and the peace-keeping activities of the United Nations have been successful".[21]

In the first-ever summit of the U.N. Security Council held on 31 January, 1992, Secretary-General of the U.N. was asked to give his recommendations on improving preventive diplomacy, peace-making and peace-keeping. In his response, the Secretary-General submitted a special report entitled. "An Agenda for Peace" which was released on 23rd June, 1992.[22] In his report "Agenda for Peace", Secretary-General Boutros Boutros Ghali recommended that regional arrangements and agencies should also be utilized for prevention, peace-making, peace-keeping and peace building. As a matter of decentralization, delegation and cooperation with U.N. efforts, regional action would not only lighten the Council's burden but also "contribute to a deeper sense of participation, consensus and democratization in international affairs. Similarly, U.N. peace operations require the cooperation of international organizations and specialized agencies. The Secretary-General has rightly said that the most difficult problem facing peace-keeping and peace-making operations is building greater coordination and synchronization within the U.N. system".[23]

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[20] See Lawrence S. Finkelstein, "The United Nations; Then and Now", Int. Orgn., Vol. No. XIX, No. 3 (Summer, 1965), p. 367 at p. 382.

[21] Francis O. Wilcox, "Regionalism and the United Nations," Int. Orgn. (Summer 1965), p. 789 at p. 808.

[22] See Also U.N. Document (A/47/277-S/24111).

[23] U.N. Chronicle, Vol. XXIX, No. 3 (September, 1992) p. 4.

The Security Council concluded a nine-month review of "Agenda for Peace" on 28th May, 1993. The Security Council said that regional organizations and arrangements were asked to consider ways of enhancing their contributions to the maintenance of peace and security. The Council expressed its readiness to support and facilitate peace-keeping efforts undertaken in the framework of regional organizations and arrangements in accordance with Chapter VIII of the Charter.[24] It need not be overemphasized that all these developments have taken place in the context of the activist role of the Security Council which commenced during the Gulf War. It is in the context of these developments that NATO's involvement, especially the threat of air strike, in former Yugoslavia must be seen.

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[24] U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 3.

CHAPTER 43

MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY : APPRAISAL AND NEW TRENDS*

Introduction.—The memories of Nazi atrocities, flagrant violation of human rights, loss of lives of millions of innocent people and unprecedented devastation caused during the Second World War were fresh in the minds of the framers of the Charter of United Nations. Though the League of Nations as an institution failed to "preserve as against external aggression, the territorial integrity and existing political independence of all members of the League"[1] and consequently failed to prevent the breaking of the Second World War, yet the statesmen of the world still had faith in International organisation (in its wider sense of process of organising International relations). Even during the Second World War, they had started endeavours to establish another International organisation. Indeed they ultimately succeeded in establishing the United Nations on the basis of the United Nations Charter which was adopted and signed at Sanfrancisco on 25th June, 1945. After having been ratified by five permanent members and majority of other States, the U.N. Charter came into force on 24th October, 1945.

Born as a result of the experiences of a devastating 'war that witnessed Nazi atrocities, flagrant violation of human rights and death of millions of innocent people, it was quite natural for the framers of the Charter to have determined *"to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and* to re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and for these ends *"to unite our strength to maintain international peace and security"* and "to ensure, by the acceptance of principles and the institution of methods, *that armed force shall not be used save in the common interest"* and to "have resolved to combine our efforts to accomplish these aims." [2] It is with this chief objective that the United Nations was established.

Having expounded the above reasons for the establishment of the United Nations, the very first purpose of the United Nations could not but be *"to maintain international peace and security,* and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." Thus, "The purpose of the United Nations Organisation is to maintain world peace."

The flagrant violation of human rights, dropping of atom bomb at Hiroshima and Nagasaki and the unprecedented death and destruction caused during the Second World War created such a scare in the minds of peoples that they shuddered even at the idea of war. The framers of the U.N. Charter were also so much scared of war that they have not used the word "war" in any concrete provision of the Charter.[3] They have replaced it with the term "use force". The framers of the Charter wanted not only to prohibit war but also to ensure that not even 'force' or 'threat' thereof shall be used by member States in their international relations. That is why, in Article 2 (4) of the Charter they provided :

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* See also for P.C.S. (1991) Q. 10.

[1] Article 10 of the Covenant of the League of Nations.

[2] Preamble of the U.N. Charter.

[3] The term "war" occurs only thrice in Charter—first in the preamble to stress that it is a scourge 'which twice in our lifetime has brought untold sorrow to mankind and secondly twice in Article 107 which says "Nothing in the present Charter shall invalidate or preclude actions, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action". Since all the States to which Art. 107 refer have already become members of the U.N., this provision has become redundant.

> "All Members shall refrain in their international relations from *the threat or use of force* against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations."

The provisions relating to international peace and security are studded throughout the Charter. They find mention in preamble, purposes, principles and many other concrete provisions of the Charter. In order to ensure prompt and effective action by the United Nations, its members have conferred on the Security Council *the primary responsibility for the maintenance of international peace and security* and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[4] Further, the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present charter.[5] Moreover, the five permanent members of the Security Council namely United States of America, U.K., France, China and Soviet Union were conferred on Veto power[6] under the assumption that they shall continue to cooperate in the same way as they did during the second world war. But this assumption proved to be wrong and unrealistic for the cooperation among the Great Powers, which was the prerequisite for making peace settlements failed to materialise. The high expectations of 1945 collided head on with the hard realities of 1950's and 1960's.[7]

Immediately after coming into force of the U.N. Charter, there developed confrontation between the East and West—mainly between the Soviet Union on the one hand and the United States of America and United Kingdom on the other hand. This confrontation proved to be detrimental for the achievement of chief objective of the U.N. *i.e.* maintenance of peace and security. "It did not take long for Sanfrancisco hopes of great power unity to fade. Bitter disillusionment rapidly replaced cautious optimism of the spring of 1945. Irreconciliable conflict over German settlement, harsh agreement over other peace treaties; the clash over Trieste; guerilla war in Greece; and the continuance of Soviet forces in Iran beyond the agreed deadline rapidly produced an atmosphere of distrust and hostility. In U.N. itself, the Security Council was the scene of bitter clashes and within a year the Soviet Union had cast several vetoes and staged famous walkout over Iranian affair." [8] It obviously resulted in the failure of the Security Council from equipping itself to exercise the full powers conferred on it by the Charter. The frequent use of vetoes crippled the Security Council and it failed to perform the role which was envisaged for it under the Charter. Though the Security Council failed to fulfil the 'primary responsibility' for the maintenance of international peace and security, the responsibility of the organisation as a whole *i.e.* the U.N. did not end. Therefore, with the initiative of the U.S., Uniting for Peace Resolution was passed by the General Assembly on 3rd November, 1950. It equipped the General Assembly with important powers for the maintenance of international peace and security. "It was an attempt to transfer the sanctioning competence from the Security Council to General Assembly in order to evade veto and to revise the task of the United Nations to maintain and restore international peace and security." [9] Thus in fact, "The objective of the Resolution was to improve the machinery of the U.N. for preserving peace." [10]

The transfer of sanctioning competence from the Security Council to the General Assembly naturally devolved a lot of powers on the Secretary-General because being "the chief administrative officer of the organisation"[11] he acts in that capacity in all meetings of the General Assembly and Security Council and has to "perform such other functions as are entrusted to him by these organs." [12] Thus the centre of gravity in respect of international peace and security which was originally in the Security Council shifted to the General Assembly and from there it shifted to the Secretary-General. As regards maintenance of international peace and security, the decade of 1950's witnessed a new trend in thought and practice. The main factors responsible for the new trend were the unprecedented increase in membership of the U.N., non-alignment of the new members of Asian and African countries in the cold war and the appointment of Dag Hammarskjold as the Secretary-General in 1953. One of the important features of the new trend was 'preventive action' or 'preventive diplomacy' which increased the role of the Secretary-General. Preventive action involved mainly two lines of action—(1) to stabilise the situation in the field on a day-to-day basis and to prevent the incidents endangering international peace and security; and (2) to be quietly helpful by being a third party which may bridge the gulf between two conflicting parties.

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[4] Article 24

[5] Article 25

[6] See Article 27.

[7] See Francis O. Wilcox, "Collective Security and Insecurity, Global and Regional", Proc. ASIL, April 24-26, 1969, p. 54.

[8] Lawrence S. Finkelstein, "The United Nations : Then and Now", Int. Orgn., Vol. XIX No. 3 (1965) p. 367 at p. 382.

[9] Josef L. Kunz, "Sanctions in International Law", AJIL, Vol. 54 (1960) p. 324 at . 336.

[10] Juraj Andrassy, "Uniting for Peace", AJIL, Vol. 50 (1956) p. 563.

[11] See Article 97.

The establishment of the United Emergency Force (UNEF) in Suez Canal Crisis brought about a revolutionary change in the role of the U.N. in keeping the peace. The objective of the establishment of UNEF was to secure and supervise the cessation of hostilities. Later in the Congo Crisis (1960-61), the General Assembly broadened the scope of the U.N. operation in Congo (ONUC), created earlier by the Security Council. The involvement of the U.N. in Congo, however, proved to be very costly and virtually plunged the U.N. in a financial crisis because France and Soviet Union refused to pay their part of expenses of the UNEF and ONUC on the ground that the General Assembly was not competent to undertake such operations and that Uniting for Peace Resolution, 1950 was *ultra vires* of the U.N. Charter. It became evident from the Congo experience that Secretary-General was not an adequate substitute for cooperation and Unity of Five Permanent Members or the assumptions of the Great Powers Unity upon which the whole fabric of international peace and security was envisaged and built under the Charter.

A brief reference may also be made here to the Regional Arrangements or organisation completed under Article 52 of the Charter. Article 53 clearly provides that the Security Council, where appropriate, may utilize such regional arrangements or agencies for enforcement action under its authority. Further, no enforcement actions can be taken under regional arrangements without the authorization of the Security Council. Moreover, as provided by Article 54, the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security. Thus the regional arrangements were to remain under supervision and control of the Security Council. But due to lack of trust and non-cooperation among the great powers, regional arrangements or agencies escaped the supervision and control of the Security Council. They were rather used to some degree not only as alternative agencies for promoting the solution of disputes but also as jurisdictional refuge providing pretexts for keeping the disputes out of U.N. hands. These political developments thus inhibited the full development of the U.N. "potentiality for assisting in the settlement of disputes." [13]

Due to the limitations of the General Assembly and Secretary-General as referred above and the near paralysis of the Security Council due to frequent use of veto, the system of maintenance of international peace and security stipulated under the U.N. Charter remained fragile for a long time. The present decade of the 1990's has brought about new hopes. The factors responsible for the optimism and new hopes are the breaking up of the Soviet Union, end of cold war and the emergence of the U.S. as the sole super power. It was on account of these factors that U.N. Security Council's role in the Gulf War (1991) was a complete success. Being emboldened by this and the factors mentioned above, the Security Council has started playing a more active, rather an activist role, in the maintenance of peace and security. This is evident from its role in former Yugoslavia, Somalia, Lockerbie case etc. This new role undoubtedly requires the development of new techniques, mechanism and capacities. In the first ever summit of the Security Council held on 31st January, 1992, the members of the Council "affirmed their determination to build on the initiative of their meeting in order to secure positive advances in promoting international peace and security......... The members of the Council agree that the world now has the best chance of achieving international peace and security since the foundation of the United Nations......". As regards peace-making and peace-keeping the Secretary-General was asked "to prepare, for circulation of the members of the United Nations by July 1992, his analysis and recommendation on ways of strengthening and making more efficient within the framework and provision of the Charter the capacity of the United Nations for preventive diplomacy, for peace-making and peace-keeping. In response, Secretary-General Boutros Boutros Ghali, submitted a special report entitled "*An Agenda for Peace*". This report was released on 23rd June, 1992 as a 53-page booklet and also as a U.N. document.[14]

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[12] See Article 98.

[13] See Iris L. Claude, Jr., "Implications and Questions for the Future", Int. Orgn., Vol. XIX (Summer 1965) p. 835 at p. 843.

Before we discuss "An Agenda for Peace" it will be desirable to discuss the role of different principal organs of the U.N. and other agencies for the maintenance of International Peace and Security. In this connection the roles of Security Council, General Assembly, Secretary-General and Regional Arrangements or Agencies deserves a special mention here :—

(I) Role of Security Council.—The provisions of the U.N. Charter relating to maintenance of international peace and security are contained in Articles 24 to 32 of Chapter V. Articles 33 to 38 of Chapter VI entitled "Pacific Settlement of Disputes" and Articles 39 to 51 of Chapter VII entitled "Action with Respect to Threats of the Peace, Breaches of the Peace, and acts of Aggression". These have already been discussed in Chapter on "The Security Council" under the heading "Maintenance of International Peace and Security" including the discussion of 'Pacific Settlement of disputes', 'Sanctions against aggressor or action with respect to threats to peace, breach of peace and acts of aggression, 'Definition of Aggression', 'Consequences of failure of the Security Council', 'Veto and its effect on the Efficiency of the Security Council'. 'Contribution of the Security Council for the maintenance of Peace and Security' and 'Evaluation'. Besides this, the concept of Collective Security has been discussed in Chapter on "Collective Security". The readers are, therefore, requested to read Chapters on "The Security Council" and "Collective Security" for the discussion of the Role of the Security Council.

(II) Role of General Assembly* —Next only to the Security Council, General Assembly is the important principal organ of the U.N. concerning the maintenance of international peace and security. This is because of the obvious reason that the General Assembly is the most democratic and representative principal organ of the United Nations. Every member State of the U.N. is represented in this august body[15] and each member State has one vote.[16] At present, there are as many as 185 members of the U.N. When so many States pass a resolution unanimously or with overwhelming majority, it cannot but have an important impact. It represents international standard and may be a link for the development of customary rules of international law. Though the framers of the Charter envisaged General Assembly to be only a deliberative body with no power to pass binding resolutions. But because of being the most representative organ, the powers of the General Assembly constantly increased and will continue to increase. This development also found support from some provisions of the Charter, the most important of which is Article 10. Article 10 provides that the General Assembly may discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the U.N. Charter. The only limitation to such wide powers of the General Assembly is, as provided by Article 12, that while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests. Besides, the wide powers conferred on General Assembly by Article 10, Article 11 specifically provides that General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or both. Further, the General Assembly may discuss any question relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a member of the U.N. in accordance with Article 35, paragraph 2. Besides this, the General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. Finally the powers of the General Assembly set forth in Article 11 shall not limit the general scope of Article 10.

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[14] See U.N. document (A/47/277-S/24111).

* See also for C.S.E. (1995) Q. 6(b).

[15] See Article 9.

[16] See Article 18.

It need not be overemphasized here that Article 10 confers very wide powers on General Assembly. There is no other provision in the whole of the Charter which confers such wide powers on any other organ of the United Nations. Having such wide powers under the Charter, the General Assembly became the most potent principal organ of the U.N. in the course of time due to distrust among the Great powers, cold war and frequent use of vetoes in the Security Council. The powers of the General Assembly reached their zenith with the passing of Uniting for Peace Resolution, 1950.

Uniting for Peace Resolution

N.B.—For the Expanding Role of the General Assembly, Uniting for Peace Resolution, 1950 and validity of Uniting for Peace Resolution, 1950, please see Chapter on "The General Assembly of the United Nations."

Despite the phenomenon increase in the role of the General Assembly Congo experience made it clear that even for the successful functioning of the General Assembly, especially in the field of international peace and security, unanimity and cooperation of five permanent members of the Security Council is essential. In fact, there is no substitute to unanimity and cooperation of great powers. In the 1990's, especially after the breaking up of the Soviet Union and Gulf War (1991), the Security Council reasserted itself and started fulfilling effectively its 'primary responsibility' of maintaining international peace and security. Taking advantage of the situation the United States of America assumed the leadership of the Security Council as the sole super power and the Council started taking even an activist role in the field of international peace and security.

(III) Role of the Secretary-General.—Article 99 of the U.N. Charter provides that the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. Since it involved expression of his opinion, in past Secretary-General hardly ever used this provision. They feared that they might not become centre, of conflict between great powers. In 1990's however, the situation has changed and new role envisaged and outlined after the First-ever summit of the Council on 31st January, 1992, will require the Secretary-General to take initiatives and to perform a very active role. The provisions of Article 99 will therefore assume significance and may be implemented properly.

N.B.—For a more detailed discussion of the role of the Secretary-General please see 'Functions of the Secretary-General' discussed under the Chapter on "The Secretariat".

(IV) Role of Regional Arrangement.—Articles 52 to 54 of the U.N. Charter deal with Regional Arrangements. These Articles envisage a definite role for the maintenance of international peace and security. For example, Article 53 provides that the Security Council shall, where appropriate, utilize regional arrangements or agencies for enforcement action under its authority. The Charter envisaged that regional arrangements would remain under the control, authority and supervision. But because of distrust and conflict among great powers, they escaped from the control and authority of the Security Council. Due to end of cold war and the emergence of U.S. as the sole super power, the situation has changed in the 1990's. Now the provisions of Article 53 may be enforced in their letter and spirit. The recent involvement of NATO in Bosnia is a glaring example of this.

N.B.—For a more detailed discussion see also Chapter on "Regionalism".

First-ever Summit Level—Meeting of the Security Council: New Challenges and New Trends.—The whole perspectives of the concept of Collective Security in particular and international peace and security in general changed in the 1990's especially after the breaking up of Soviet Union, end of cold war, Gulf War (1991), disillusionment with communism in socialist countries, turmoil in Yogoslavia, Czechoslavakia etc. New challenges and new trends required new initiatives, new techniques and new strategies. Taking advantage of the situation, first-ever summit of the Security Council was held on 31st January, 1992. It was attended by 13 Heads of State or Government and two Foreign Ministers of the Council's 15 members. This summit was described as "historic", "timely", "extraordinary", "unique" and "unprecedented". The Security Council in its joint statement said these were "new favourable circumstances, under which it had begun to fulfil more effectively its primary responsibility for the maintenance of international peace and security." Taking place at "a time of momentous change", the Council members said that the end of cold war had raised hopes for "a safer, more equitable and more humane world." The Security Council asked the U.N. Secretary-General Boutros Boutros Ghali to make recommendations on ways to strengthen and make more efficient the U.N. capacity for preventive diplomacy, peace-making and peace-keeping within the U.N. Charter's framework and provisions.[17] The joint statement added that the Secretary-General's recommendations could cover the U.N. role in identifying "potential crisis and areas of instability" as well as the contribution to be made by regional organizations, in accordance with Chapter VIII of the Chapter, in helping the Council's work. They could also cover the need for adequate resources, both material and financial.[18]

Addressing the Summit meeting of the Council, Secretary-General Boutros Boutros Ghali said, "Now that cold war had come to an end, we must work to avoid the outbreak or resurgence of new conflicts. The explosion of nationalities, which is pushing countries with many ethnic groups towards division, is a new challenge to peace and security." He added, "the U.N. would have to respond to the irredentist claims of ethnic and cultural communities or their call for autonomy." Further, account must be taken of "the abundant supply of arms, the aggravation of economic inequalities between various communities and the flow of refugees." Secretary-General favoured periodic summit-level meetings of the Council to take stock of the state of the world.[19]

Secretary-General's Response—"An Agenda for Peace".—In response to the request of the Security Council, Secretary-General submitted a special report entitled, "An Agenda for Peace"[20] which was released on 23rd June, 1992. In the beginning of the report Secretary-General Boutros Boutros Ghali stated : "The adversarial decades of the cold war made the original promise of the organisation impossible to fulfil. The January 1992 Summit therefore represented an unprecedented recommitment, at the highest political level, to the purposes and principles of the Charter."

Further, "In these past months, a conviction has grown, among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter—a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, 'social progress and better standards of life in larger freedom'. This opportunity must not be squandered. The organization must never again be crippled as it was in the era that has now passed." [21]

In his special report entitled, "An Agenda for Peace", the Secretary-General submitted his recommendations on improving preventive diplomacy, peace-making, peace-keeping and Post-conflict peace-building.

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[17] See U.N. Chronicle, Vol. XXIX, No. 2, (June, 1992), p. 4.

[18] Ibid, at pp. 4-5.

[19] Ibid, at p. 6.

[20] See U.N. document (A/47/277-S/24111).

[21] See U.N. Chronicle, Vol. XXIX, No. 3, (September, 1992), p. 2.

Preventive Diplomacy.—A brief reference of 'Preventive Diplomacy' has already been made above under the heading 'Introduction'. Besides this, readers are requested to see Chapter on "The Secretariat" wherein Secretary-General's recommendations on 'Preventive Diplomacy' have been mentioned.

In addition to this, it may be noted that Security Council met on 29th October, 1992 and 30th November, 1992 to consider proposals put forward in Secretary-General's "An Agenda for Peace". In 30 November, 1992 statement[22], the Security Council supported the wider use of fact-finding as tool of preventive diplomacy. The Council also endorsed the Secretary-General's view that in some cases, a fact-finding mission could help defuse dispute or situation, indicating to those concerned that the U.N. and in particular the Council was "actively seized the matter as a present or potential threat to international peace and security." The Council asserted that such an action in the early stages of a potential dispute could be particular effective. The Council welcomed the Secretary-General's readiness to make use of full of his powers under Article 99 of the U.N. Charter to draw the Council's attention to any matter which in his opinion might threaten international peace and security.[23]

The General Assembly also considered "An Agenda for Peace" and adopted without a vote a resolution[24] containing specific recommendations. The General Assembly supported the continued use of experts in fact-finding missions and urged that Member States requests for such missions be considered expeditiously. In the area of resources and logistical aspects of preventive diplomacy, member States were asked to provide political and practical support to the Secretary-General in his efforts in that area as well as any necessary expertise and logistical resources.[25]

Peace-Making.—In his report, "An Agenda for Peace", Secretary-General Boutros Boutros Ghali pointed out, "Between the tasks of seeking to prevent conflict and keeping the peace lies the responsibility to try to bring hostile parties to agreement by peaceful means". To further the pursuit of peace-making he recommended the following :

(i) Creation of new category of U.N. forces—"Peace enforcement units"—to be deployed in cases where the task of maintaining a cease-fire might exceed the mission of peace-keeping. Such units would consist of trained volunteer troops more heavily armed than peace-keeping forces;

(ii) Full participation of the General Assembly in supporting efforts at mediation, negotiation or arbitration of a dispute;

(iii) Greater reliance on the International Court of Justice for the peaceful adjudication of differences; and

(iv) Armed forces should be made available by Member States to Security Council on a permanent basis to provide the U.N. with credibility as a "guarantor of international security." [26]

Peace-Keeping.—According to Secretary-General Boutros Boutros Ghali, the nature of peace-keeping which has evolved in recent years is "the invention of United Nations." In his report the stated, "As the international climate has changed and peace-keeping operations are increasingly fielded to help implement settlements that have been negotiated by peace-makers, a new era of demands and problems has emerged regarding logistics, equipment, personnel and finance." To meet increasingly demands, he recommended the following :

(i) The immediate establishment of a $50 million revolving peace-keeping reserve fund;

(ii) Improved training of peace-keeping personnel especially language training for national police contingents who may serve with the organization; and

(iii) Establishment of a pre-positioned stock of basic peace-keeping equipments

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[22] See S/24872.

[23] See U.N. Chronicle, Vol. XXX, No. 1, (March, 1993) p. 2.

[24] See Resolution 47/120.

[25] See note 23, p. 3.

[26] See note 21, at p. 3.

> to fill gaps in under-equipped troops provided by Governments. Alternatively, Governments should commit to keeping certain equipments on stand-by for immediate use by the U.N. when required.[27]

The Security Council concluded on 28 May, 1993 a nine-month review of Secretary-General Boutros Boutros Ghali's wide-ranging strategy "An Agenda for Peace" urging all States to make participation in and support for international peace-keeping a part of their foreign and national security policy. In its review[28], the Council said U.N. peace-keeping operations should be conducted in accordance with operational principles consistent with U.N. Charter provisions, including a clear political goal with a precise mandate, subject to periodic review and change in its character or duration only by the Council itself; consent of the Government and, where appropriate, the parties concerned, save in exceptional case, support for a political process or the peaceful settlement of disputes; impartiality in implementing Council decisions; the Council's readiness to take measures against parties which do not observe its decisions; and the Council's right to authorize "all means necessary" for U.N. forces to carry out their mandate and the inherent right of U.N. forces to take measures for self-defence.

In that context, the Council emphasized the need for the full cooperation of the parties concerned in implementing mandates of peace-keeping operations, and stressed that such operations should neither be a substitute for a political settlement nor should they be expected to "continue in perpetuity."

In the context of the rapid growth in and new approaches to peace-keeping operations, the Council commended the initial measures taken by the Secretary-General to improve U.N. capacity in that field. Bold new steps were required. The Secretary-General was asked to report by September 1993 on specific new proposals to further enhance those capabilities.

In view of the mounting cost and complexity of the operations, the Council also asked the Secretary-General to address measures designed to place them on a more solid and durable financial basis, taking into account the Ford Foundation Report[29] and addressing the necessary financial and managerial reforms, diversification of funding and the need to ensure adequate resources for peace-keeping operations and maximum transparency and accountability in use of resources.

Member States were called upon to pay their assessed contributions for peace-keeping operations in full and on time. The Council also encouraged those States which could do so to make voluntary contributions.

The Council also strongly condemned attacks on U.N. Peace-keeping, U.N. Peace-keepers and declared its determination to undertake more decisive efforts to ensure the security of U.N. personnel in the course of fulfilling their duties.

The Council asked the Member States to provide detailed information on situations of tension and potential crisis so that the Secretary-General could consider measures to strengthen the Secretariat's capacity to collect and analyse information. The Council supported preventive deployment, on a case-by-case basis, in zones of instability and potential crisis. The close link which might exist, in many cases, between humanitarian assistance and peace-keeping operations was underlined.

Existing U.N. Peace-keeping Operations Around the World.—At present, there are following 16 (sixteen) U.N. Peace-keeping operations :[30]

(1) U.N. Truce Supervision Organisation (UNTSO).—UNTSO was established in June 1948 to assist the Mediator and the Truce Commission in supervising the observance of the truce in Palestine. UNTSO supervises the General Armistice Agreement of 1949 and the Observation of the cease-fire in the Suez Canal area and the

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[27] See note 21, at p 3.

[28] See U.N. Chronicle, Vol. XXX, No. 3, (September, 1993) pp. 2-3.

[29] This has been referred under the heading "Financial Crisis Faced by the U.N." in Chapter on "The General Assembly of the United Nations".

[30] See U.N. Chronicle, Volume XXX, No. 3 (September, 1993), pp. 40-41.

Golan Heights which followed the Arab-Israeli war of June 1967. It also cooperates with the United Nations Disengagement Observer Force and the United Nations Interim Force in Lebanon. UNTSO has the strength of 224 military observers who are stationed in Beirut and in the Sinai.

(2) U.N. Military Observer Group in India and Pakistan (UNMOGIP).—UNMOGIP was established in January 1949 to supervise the cease-fire between India and Pakistan in the State of Jammu and Kashmir. It has the strength of 38 military observers.

(3) U.N. Peace-keeping Force in Cyprus (UNFICYP).—Established in March 1964, UNFICYP has a strength of 1,480 military personnel and 38 civilian police. It was established to use its best efforts to prevent the recurrence of fighting and to contribute to the maintenance and restoration of law and order and a return to normal conditions. Since the hostilities in 1974, this has included supervising the cease-fire and maintaining a buffer zone between the lines of the Cyprus National Guard and of the Turkish and Turkish Cypriot forces.

(4) U.N. Disengagement Observer Force (UNDOF).—UNDOF was established in June 1974 to supervise the cease-fire between Israel and Syria, disengagement of Israeli and Syrian forces and the areas of separation and limitation as provided in the Agreement in Disengagement between Israel and Syrian forces on 31st May, 1974. It has strength of 1,120 troops assisted by military observers of UNTSO observer Group Golan.

(5) U.N. Interim Force in Lebanon (UNIFIL).—Established in March, 1978 UNIFIL has a strength of 5,280 troops, assisted by 57 military observers of UNTSO observer group in Lebanon and 520 civilian staff, it was established to confirm with the withdrawal of Israeli forces from Southern Lebanon, restore international peace and security and assist Government of Lebanon in ensuring the return of the effective authority of the area.

(6) U.N. Mission for the Referendum in Western Sahara (MINURSO).—It was established in September 1991 originally to monitor a cease-fire, verify reduction of Moroccan troops in the territory, monitor confinement of troops to designated locations, ensure the release of Western Sahara political prisoners or detainees, oversee the exchange of prisoners of war, implement the repatriation programme, identify and register qualified voters, organize and ensure a free referendum and proclaim the results. Due to divergent views, the plan has not been fully implemented. MINURSO has a strength of 225 military observers, 100 military support personnel and 103 civilian staff.

(7) U. N. Observer Mission in Liberia (UNOMIL).—This observer mission was established on 22 September, 1993 to supervise the cease-fire of July 1993, and elections of February-March, 1994 and to coordinate humanitarian help. About 300 military, humanitarian and election observers were deployed in this mission.

(8) U. N. Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) (April 2013 to present).—MINUSMA was established by Security Resolution 2100 of 25th April, 2013 to support political processes in that country and carryout a number of security related tasks.

The Mission has been asked to support the transitional authorities of Mali in the stabilization of the country and implementation of the transitional road map focusing on major population centres and those lines of communication protecting civilians human rights monitoring the creation of conditions for the provision of humanitarian assistance and the return of displaced persons, the extension of State authority and the preparation of the inclusive and peaceful elections.

(9) U.N. Stabilization Mission in Haiti (MINUSTAH).—The U.N. stabilization mission (MINUSTAH) in Haiti succeeded a Multi-national Interim Force (MIF) authorized by the Security Council in February 2004 after President Bert and Aristide departed from Haiti for excile in the aftermath of an armed conflict which spread to several cities across the country.

The devastating earthquake of 12 January, 2010 which resulted in more than 2,20,000 deaths (according to Haitian government figures) including 96 U.N. Peace keepers delivered, a severe blow to country's already shaking economy, and infrastructure. The Security Council by resolution 1908 of 19 January, 2010 endorsed the Secretary General recommendation to increase the overall force levels of MINUSTAH to support the immediate recovery and reconstruction in stability efforts to the country.

Following the completion of Presidential election in 2011 MINUSTAH has been working to fulfil its original mandate to restore to secure and stable environment to promote the potential process to strengthen Haiti's Government institutions and rule of law structure, as well as to promote and to protect human rights.

The Mission has continued to mobilize its logistical resources to assist in the effort to contain and treat cholera outbreak in October, 2010.

(10) United Nations organisation stabilization Mission in the Democratic Republic of Congo (MONUSCO)—(Duration—July 2010 to Present).—MONUSCO took over the earlier U.N. Peace-keeping operation *i.e.,* (U.N. Organisation Mission in Democratic Republic of the Congo (MONUSCO)—On 1 July 2011. It was in accordance with the Security Council Resolution 1925 of 28 May to reflect the new phase reached in the country.

The new Mission has been authorised to use all necessary means to carry out the mandate relating among other things to the protection of the civilian humanitarian personnel and human rights defendars undergoing imminent threat of physical violence and to support the Government of the Democratic Republic of Congo (DRC) in its stabilization and peace consolidation efforts.

(11) United Nations Assistance Mission in Afghanistan (UNAMA).—UNAMA is a political mission established by Security Council on 2002 at the request of the Government to assist it and the people of Afghanistan in laying the foundations for sustainable peace and development in the country, on 19 March, 2013. The 15 Members of Security Council unanimously adopted resolution 2096 (2013).

The resolution renewed the mandate of UNAMA and set out the scope and range of activities. It must undertake over coming 12 months as Afghanistan continues its political and security transaction.

(12) African Union/U.N. Hybrid operation in Darfur—(Duration 31 July 2007 to present).—UNAMID was established on 31 July, 2007 with the adoption of security resolution 1769. The protection of civilians in its core mandate but it is also tasked with contributing to security for humanitarian assistance monitoring and verifying the implementation of agreements assisting an inclusive political process contributing to the promotion of human rights the rule of law and monitoring and reporting on the situation along with borders with Chad and the Central African Republic (CAR).

(13) United Nations Interim Security Force for Abyei (UNISFA).—UNISFA was established by Security Council by resolution 199 of June 2011. The Security Council responded to the urgent situation in Sudan's Abyei region by establishing the U.N. Interim Security Force for Abyei (UNISFA). The Security Council was deeply concerned by the violence escalating tension and population displacement. The operation will monitor the flash point border between north and south and it is authorized to use force in protecting civilian and humanitarian worker in Abyei.

UNISFA establishment came after the Government of Sudan and the Sudan People's Liberation Movement (SPLM) reached an agreement in Addis Ababa, Ethiopia to demobilize Abyei and let Ethiopian troops to monitor the area.

(14) United Nations Interim Administration Mission in Kosovo (UNMIK).—In order to provide an interim administration for Kosovo under which people of Kosovo could enjoy substantial autonomy. Its task was unprecedented in complicity and scope, the vested in UNOMIK with authority over the territory and people of Kosovo including the legislation and executive powers and administration of judiciary.

Subsequently following the declaration of independence by the Kosovo authorities and the entry into force of a new constitution. On 16 June, 2008, the task of the Mission have significantly been modified to focus primarily on the promotion of security, stability and human rights in Kosovo since June 1999. This Mission is continuing.

(15) United Nations Operation in Cote divoire (UNOCI)—Duration April 2004 to present).—Acting under the Charter of the United Nations, the Security Council by its resolution 1528 (2004) of 27 February 2004 established UNOCI, as from 4 April, 2004 with a mandate to facilitate the implementation by the Ivorian parties of the peace agreement signed by them in January 2003. Following the 2010 Presidential election and the ensuing political crisis in Cote divoire UNOCI has remained on the ground to protect civilian and support the Ivorian Government in disarmament, demobilization and reintegration (DDR) of former combatants as well as the security system reform.

(16) UN Mission in South Sudan (UNMISS).—Sudan emerged an independent sovereign nation on 9th July, 2011. Its process started in 2005 as a result of six years comprehensive Peace Agreement (CPA). By Security Council Res. 1996 (2011) decided that there is danger to International peace and security in Sudan. This Mission was started to ensure maintenance of peace and security.

In its meeting on 28 May, 1993 the Security Council said that in the context of rapid growth in and new approaches to peace-keeping operations, initial measures taken by the Secretary-General to improve U.N. capacity in that field were commendable. The Council said that bold new steps were required. It asked the Secretary-General to report by September, 1993 on specific new proposals to further enhance these capabilities.[31] It may be noted that in a study made by Worldwatch "a think Tank of Washington, in collaboration with Ford Foundation has suggested to revolving peace-keeping reserve fund of $ 400 million and charging of interest on late payments made by States. It has also suggested that instead of single annual contribution, payments may be taken in four annual instalments. These suggestions merit serious consideration. As regards for $ 400 million revolving fund for peace-keeping, it should be financed by three annual assessments on Member States.

Past U.N. Peace Keeping operation.—The above U.N. Peace Keeping operation are continuing in present. In Past also many Peace Keeping operations were established in Africa (22), America (8), Asia and the Pacific (9), Europe (8) and Middle East (7). Thus a total 54 U. N. Peace Keeping operations were made in past.

Post-conflict Peace-building.—According to Secretary-General, Boutros Boutros Ghali, whereas preventive diplomacy is to avoid a crisis, "Post-conflict peace-building is to prevent a recurrence." He, therefore, recommended[32] various post-conflict measure designed to foster confidence between parties to an armed dispute, including—

(i) Disarming them, repatriating refugees, monitoring elections, advancing efforts to protect human rights and reforming or strengthening governmental institutions;

(ii) Undertaking projects that bring States together, including agricultural development, improvement of transportation, sharing of resources and educational exchanges;

(iii) Demining combat zones to enable restoration of agriculture, road building and other peace-building activities; and

(iv) Development of U.N. technical assistance to help transform deficient national structures and strengthen democratic institutions.

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[31] See U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) pp. 2-3.

[32] See U.N. Chronicle, Vol. XXIX, No. 3 (September, 1992) pp. 3-4.

On 30th April, 1993, the Security Council issued a statement[33] on post-conflict peace-building emphasizing importance of building strong foundations for peace in all countries and regions of the world. The Council generally agreed with the recommendations of the Secretary-General and said that in the aftermath of an international conflict, peace-building might, among other things, include measures and cooperative projects linking two or more countries in mutually beneficial undertakings, "which constitute not only to economic, social and cultural development, but also enhance mutual understanding and confidence that are so fundamental to peace". The Council added that U.N. organisations and agencies in developing and implementing their programmes "need to be constantly sensitive to the goal of strengthening international peace and security as envisaged in Article 1 of the Charter". Recognizing that post-conflict peace-building, in the context of overall efforts to build the foundations of peace, also needed adequate financial resources in order to be effective, the Council stressed that Member States, U.N. bodies and other international organizations should make all efforts to have adequate funding available for specific projects—such as the earliest possible return of refugees and displaced persons to their homes of origin—in post-conflict situations. The Council fully recognized that social peace was as important as strategic or political peace.[34]

U.N. Rapid Force Proposal Rejected

In January 1994, U.N. Secretary-General Boutros Boutros Ghali proposed the setting up of a United Nations Rapid Reaction Force to act quickly in case of need and a Unified Command for the U.N. Peace Keeping Forces. Both these suggestions were promptly rejected by the United States of America because this was seen an attempt by the U.N. Secretary-General to abrogate to himself more powers. India has also rejected Secretary-General's concept of an independent U.N. Peace Enforcement Capacity. This was made clearly by Ambassador T.P. Srinivasan while speaking at the 50th anniversary of the U.N. However, Indian delegate fully endorsed the Secretary-General's suggestions for the establishment of a mechanism to implement Article 50 especially regarding compensation to countries whcse trade is adversely affected by the imposition of sanctions.

Conclusion.—For more than four decades, the Security Council remained almost paralysed due to conflict among great powers and frequent use of vetoes. The whole fabric of international peace and security under the U.N. Charter is based on the assumption of cooperation and unity among the five permanent members. Since this assumption failed to materialise and proved to be unrealistic, the Council failed to perform its primary responsibility for the maintenance of international peace and security. The end of cold war in the 1990's and the successful action against Iraq in the Gulf War (1991) have created new opportunity and rekindled hopes for a proper and effective functioning of the Security Council. Due to the emergence of the U.S. as the sole super power the Council has even embarked on an activist role. But there are dangers and risks on the pursuance of such a role. On the one hand, countries like Russia might feel that the specific action in question (such as in Bosnia) has been launched to contain Russia, on the other hand, developing countries may apprehend that the western countries led by the United States of America might not monopolise the U.N. and establish their hagemony over the world as they did in past. For ensuring success of the new initiatives and strategies, it is necessary that the Security Council should be enlarged and made more representative. The majority of member States will have faith and confidence in the Council only after it is democratised and made more representative. The membership of the Security Council should be increased to 25. The number of permanent members should be increased from 5 to 10. Suggestions have been made for inclusion of Germany, Japan, India, Brazil and Egypt as permanent members. These suggestions merit serious consideration. Moreover, the number of non-permanent members should be increased from 10 to 15. Secretary-General Boutros Boutros Ghali's recommendations regarding preventive diplomacy, peace-making, peace-keeping and post-conflict peace building can be successfully implemented only in an atmosphere of trust, cooperation and unity. A democratic and representative Security Council will definitely prove to be a better guarantor of international peace and Security. In the words of Secretary-General Boutros Boutros Ghali, "The United Nations was created with great and courageous vision. Now is the time, for its nations and peoples, and the men and women who serve it to seize the moment for the sake of the future." We can seize the opportunity only when we are able to create trust in nations and peoples, in men and women, *i.e.*, in the "people of the United Nations." Last but not the least, trust required a sense of confidence that the organization would react "swiftly, surely and impartially" and that it would not be debilitated by political opportunism or by administrative or financial inadequacy. According to Secretary-General Boutros Boutros Ghali, there is a near unanimous view among member-States of the U.N. that the Security Council has to be expanded. But according to his personal view "this will not be possible by 1995 as desired by some member-States. He expressed this view at Moscow on 5th April, 1994 while addressing a Press Conference. He added that questionnaires had been sent to the then all 184[35] member-States to ascertain their views on the subject. So far about 80 to 90 countries had sent in their replies. Since then the Membership of the U.N. has swelled to 193. Judging from these replies, there seems to be agreement to overhaul the Security Council. There is, however, no unanimity on who should become new permanent members or how the new non-permanent members should be chosen.

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[33] See S/25696.

[34] U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 3.

Reference may also be made to the role played by U.N. Peace-keeping forces which have rendered signal service to the establishing of peace especially in border disputes and civil strife in the member States of the U.N.

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[35] At present there are 189 members of the U.N.

CHAPTER 44

DISARMAMENT[1]

Introduction.—Disarmament is a very complicated and gigantic problem in the modern period. The devastating effects of nuclear weapons have further added to the urgency of the problem. Numerous efforts have so far been made to achieve disarmament but unfortunately a very little, rather negligible, success has been achieved. As aptly remarked by Prof. Lincoln P. Bloomfield, "A visitor from another, more advanced, planet would find many paradoxes on earth, but surely the most extraordinary would be the fantastic destructive potential of nuclear weapons which contrasts starkly with the primitive and near impotent institutions of global peacekeeping. He might marvel that a breed capable of producing the wealth for a 185 billion armoury of lethal devices, let alone the technology for killing several hundred in a single exchange of weapons had not produced a workable international order capable of regulating such apocalyptic man-made power...... Also no such International Order exists today and the prospects are not encouraging that it will exist within the foreseeable future." [2] Dr. Hambro has also rightly remarked : "The armament race comes as close to collective insanity as anything in the history of mankind and it is, to my mind, surprising that public opinion is willing to take it." [3]

Disarmament efforts before the League of Nations.—"Disarmament has been discussed for several centuries but plans for its implementation have failed because no State whose participation was essential was willing to pay the price that is required.[4] The idea of disarmament is not new and may be traced through the writings of Sully, William Penn, Rousseau and Kant. The proposal of Russian Isar to Lord Castlereagh of Great Britain in 1816 was, however, the first practical attempt to achieve quantitative disarmament. Similar proposals were made by the French monarch in 1831 and on several occasions but with no success. Abortive attempts were made by Great Britain and France also before 1890. The International Peace Conference at Hague in 1899 is the first great landmark in the field of disarmament because it was invoked for the specific purpose of limiting armaments by national agreement. Thus, during the nineteenth century and down to the time of the First World War numerous efforts were made to achieve the limitation and reduction of national armaments by international agreement. Yet another landmark was the Treaty of Versailles which drastically limited the German armaments. As regards the period after 1918, although there was a great deal of discussion on disarmament at many disarmament Conferences, the only respect in which disarmament was effective was in respect of the navies, that too in a limited scale. It has been rightly observed, by an eminent author :

> "Disarmament efforts have been many, the successes few and limited. There has never been an approach to what Cohen calls 'effective disarmament' ".[5]

League of Nations and disarmament.—The Covenant of the League of Nations dealt at length with the reduction of armaments. "The League of Nations" writes Philip Noel Baker,[6] "is the first attempt in history to furnish the international society of nations with the permanent and organic system of international political institutions. This attempt was an outcome of the world war." The horrors of the war shocked the minds of men, so that they looked forward to the creation of an international order based on respect for law. Since the League of Nations was the child of the First World War, it was quite natural for its framers to secure the reduction of armaments. The Covenant, therefore, provided that League Council, with the assistance of a Permanent Advisory Commission, would formulate plans for reducing arms. The Covenant, recognised that the maintenance of peace required the reduction of "national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligation".[7]

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[1] See for detailed study; S.K. Kapoor, "Disarmament, Restrospect and Prospect," Lawyer, Vol. 5, No. 4 (April, 1973), p. 65.

[2] Lincoln P. Bloomfield, "Arms Control and International Order," Int. Orgn., Vol. XIII, (1969), p. 637.

[3] Edward Hambro, "Problems Facing the United Nations," A.J.I.L., Vol. 65, No. 4 (September, 1971), p. 384 at p. 385.

[4] Stephen S. Goodspeed, the Nature and Function of International Organisation Second Edition (1967), p. 285.

[5] C.P. Schliecher, Introduction to, International Relations (1954), p. 744.

[6] Encylopaedia of Social Sciences, Vol. 9, p. 287.

The long awaited Disarmament Conference met on February 2 1932, in Geneva. The representatives of sixtyone States who participated, agreed on necessity of arms limitation of international supervision of the arms business and of publicity of arms budget. But the Conference "could never reconcile the French demand for security with the equally insistent German determinations to regain a status of equality with the other European powers. General disarmament was impossible unless these positions could be reconciled. Any hope for compromise was destroyed by the rise of Hitler and the mounting suspicion of France". [8] However, it must be noted that the Conference proved to be useful for some of the technical problems of the disarmament became clear through study and debate. It also "became evident that security was the important requisite to guarantee any system of limiting armaments. The lesson was learnt that disarmament must follow rather than precede security". [9]

The efforts of the League to promote disarmament failed because of the frantic efforts of re-armaments by Germany. As a matter of fact, the League of Nations was abandoned by those who failed to abide by their solemn obligations. "Certainly a fundamental question concerning the failure of the League" writes Prof. Goodspeed, "then centres around the betrayal of the Covenant by its members. It may be granted that the Covenant had weaknesses, faulty drafting, even structural defects which inhibited its smooth functioning. But its goals were unobtainable primarily because the will to achieve them was absent". [10]

1925 Geneva Protocol or Protocol for the Prohibition of the use of Asphyxialy Poisonous or other Gaseous and of Bacteriological Methods of War (1925) :

The above-mentioned Protocol was signed on 17 June, 1925. It entered into force for each signatory as from date of deposit of its ratification accession took effect.

The conference of State Parties to the 1925 Geneva Protocol and other Interested States on the Prohibition of chemical weapons was held from 7 to 11 January, 1989. 149 countries including India participated in the Conference and supported the humanitarian assistance to the people affected by chemical weapons. They also expressed the concern over the danger to international peace and security by the use of chemical weapons.

United Nations and Disarmament.—The Charter of the U.N. does not speak of reduction but of "regulation" of armaments. The provisions relating to disarmament in the U.N. Charter are as follows :

(1) After having determined "to save the succeeding generations from the scourge of war" and for that end "to ensure......... that armed force shall not be used, save in common interest". [11] The Charter goes on to empower the General Assembly to consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments and to make recommendation with regard to such principles to the Members of the Security Council or to both.[12]

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[7] Article 8 of the Covenant of the League of Nations.

[8] Stephen S. Goodspeed, the Nature and Function of International Organisation, p. 293.

[9] Ibid.

[10] Ibid.

[11] Preamble of the Charter.

[12] Article 11, Paragraph 1, of the U.N. Charter.

(2) Secondly, but more importantly, it is further provided that in order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Art. 47 plans to be submitted to the members of the U.N. for the establishment of a system for the regulation of armaments.[13] Thus the Charter aims to provide security along with the regulations of armaments by granting military powers to the U.N. under Art. 43.

(3) Thirdly, the Charter makes the provision for a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments and possible disarmament.[14]

(4) Fourthly, in order to enable the U.N. to take urgent military measures, the Charter enjoins the Members to held immediately available national air force contingents, for combined international enforcement action.[15]

It may be noted that special agreements contemplated under Art. 43 have not materialised. The Military Staff Committee has ceased to function. As a matter of fact, it was never actively concerned with the regulation of armaments.

Establishment of the U.N. Atomic Energy Commission.—"From the outset the role of the U.N. as a control Organisation has been at issue in disarmament negotiations."[16] The first important endeavour of the General Assembly in the field of disarmament was to adopt on January 24, 1946 a resolution which established the U.N. Atomic Energy Commission.

The U.N. General Assembly also adopted its first resolution, calling for the peaceful uses of atomic energy and elimination of weapons of mass destruction. Bernand Baruch was the first U.S. representative to the Commission and he presented a proposal that the U.S. would destroy its atomic arsenal on condition that the U.N. imposed control on atomic development that would not be subject to U.N. Security Council veto. These controls would allow only the peaceful uses of atomic energy. The plan was passed by the Commission but not agreed to by the Soviet Union who abstained during the proposal in the Security Council. Debates on the plan continued into 1948, but agreement could not be arrived at. In 1948 Commission decided to adjourn indefinitely.

Baruch Plan.—On June 24, 1946, the United States presented a plan known as the Baruch Plan, to the U.N. Atomic Energy Commission. The said plan envisaged the establishment by treaty and International Atomic Development Authority to own, operate, manage and licence all facilities for the production of atomic energy. In short the United States, "sought to retain the U.N. Charter while at the same time urging the establishment of what in effect was limited world government to enforce atomic disarmament. While the Charter's enforcement provisions were to stand as they were, a new treaty would have effectively altered Article 27 in atomic energy matters".[17] The Soviet Union, on the other hand, stuck firmly by the original Charter and his unanimity principle and wanted a general reduction of all armaments and the prohibition of the manufacture and use of atomic weapons. Consequently, a compromise was effected in the form of "Principles governing the General Regulation and Reduction of Armaments" which was passed unanimously by the General Assembly in 1946. Through this resolution the Security Council was directed to take practical measures to reduce and regulate armaments and to expedite the work of the U.N. Atomic Energy Commission. "Thus while the former continued to insist on a control system including inspection and verification before they were ready to countenance major steps towards disarmament while the latter pressed for prior outlawing of atomic weapons and reduction of all weapons without effective international control by means of inspection".[18]

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[13] Article 26.

[14] Article 47, Paragraph 1.

[15] Article 45.

[16] Daniel S. Cheeves. "The U.N. and Disarmament," Int. Organ. Vol. XIX, No. 3 (Summer 1965), p. 463 at p. 468.

[17] Ibid., at pp. 468-469.

Establishment of Disarmament Commission.—The United States monopoly of atomic weapons ended in 1949. This naturally made the Baruch Plan irrelevant. The next important step was the establishment of Disarmament Commission by the VI General Assembly in 1952. This, in fact, consolidated the U.N. Atomic Energy Commission and the U.N. Commission for Conventional Armaments. Moreover, the following year Soviet Union and Western allies agreed to negotiate as members of five power sub-Committee of Disarmament Commission. Although the Soviet Union receded from its earlier stand that atomic weapons should be banned first and control established second, it remained firm on the stand that the International Control Organisation must not interfere in the domestic affairs of States.

Establishment of the International Atomic Energy Agency (IAEA)

Under the aegis of the U.N., an international conference for the peaceful uses of atomic energy was held in August 1955 at Geneva. Thereafter, the representatives of 81 States assembled at the U.N. headquarters in September 1956 to consider a draft for the statute of the IAEA. It was adopted unanimously on 23 October, 1956 and came into force from 29th July, 1957. India became a member of IAEA in 1957. As of November, 2005, IAEA had 139 members. According to the statute, the Agency aims to "seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world". Its aim is to ensure "as far as it is possible that assistance provided by it or its request or under its supervision is not such a way as to further any military purpose". The IAEA comprises of three main organs—(A) General Conference; (B) A Board of Governors; and (C) Staff headed by a Director-General. The most difficult problems that confronts the activity of the Agency throughout the world are those of inspection and safeguarding of fissionable materials. The IAEA is neither a specialized agency related to the U.N. nor an independent inter-governmental organisation. It has a special status and is an Agency "under the aegis of United Nations".

Antarctica Treaty.—The Antarctica Treaty was signed at Washington on December, 1959 and entered into force on 23rd June, 1961 Article 1 of the Antarctica Treaty provides that Antarctica shall be used for peaceful purposes only. There shall be prohibited *inter alia* any measures of a military nature, such as the establishment of military base and fortification, the carrying out of military manoeuvres, as well as the testing of any types of weapon. However, this treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purposes.

Disarmament Efforts from 1960 to 1970.—After fifteen years of seemingly futile discussions, disarmament debates reached a turning point in 1960 which witnessed a thaw in the relation between the two super powers. Consequently, the following four important treaties were agreed upon :

(1) **Partial Test Ban Treaty (1963).**—The Partial Test Ban Treaty of 5th August, 1963 which prohibited nuclear tests in the atmosphere, in outer space and under water. It may be noted here that France and China have refused to sign this treaty which has been signed by many countries including India. It was opened for signature on 8th August, 1963 and entered into force on 10th October, 1963. Article 1 of the Treaty provides that each of the parties to this treaty undertakes to prohibit, to prevent and not to carryout any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control, in the atmosphere beyond its limits, including outer space or under water, including territorial waters or high seas.

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[18] Daniel S. Cheeves. "The U.N. and Disarmament," Int. Organ. Vol. XIX, No. 3 (Summer 1965), p. 463 at p. 463.

(2) **Outer Space Treaty (1967).**—The Treaty on Principles governing the activities of States in the Exploration and use of outer space including the Moon and of other Celestial Bodies of 1967 (or popularly known as Outer Space Treaty) which banned nuclear and other weapons of mass destruction from outer space and provided for the demilitarization of celestial bodies. As of May 2013, 103 countries have become parties to this Treaty.

(3) **The Treaty for the Prohibition of Nuclear Weapons in Latin America.**

(4) **Non-Proliferation Treaty (1968)***.—The Treaty for the Non-Proliferation of Nuclear Weapons of 1968 which under Art. 1 prohibited further spread of nuclear weapons. It was opened for signature on July 1st, 1968.

The Treaty for Non-Proliferation of Nuclear Weapons, 1968 come into force on 5 March 1970. So far 190 countries have become parties to the Treaty. India has refused to sign this treaty on the ground that it is discriminatory and unequal. A lot of pressure has been put on India by the western countries especially the U.S., to sign Non-Proliferation Treaty (NPT).

On 3rd November, 1993, India's delegate to the U.N. General Assembly, Mr K.P. Unnikrishnan, said in his speech on International Atomic Energy Commission (IAEA) report that India hoped that the NPT review and extension conference in 1995 would offer an opportunity to evolve a universal and non-discriminatory regime. He added, India would not subscribe to "a treaty of an attitude that divides the world into nuclear haves and have-nots..." Pakistan and Israel have also not signed the treaty.

In May 1995, in the Review Conference of Treaty for the Non-Proliferation of Nuclear Weapons held in New York, the Treaty has been extended unconditionally for an indefinite period. Now there are only 12 nations who have not signed the Treaty, of these three possess nuclear capability (Israel, Pakistan and India) and the rest to have this capability. Since India is committed to peaceful use of nuclear energy, its position is different from Israel and Pakistan. But in view of the new scenario due to indefinite NPT extension, India will have to formulate adequate response to withstand U.S. pressures.

Yet another review conference of the NPT was held in May 2000. Under the treaty only five countries—the U.S., Russia, Britain, France and Cuba are permitted to have nuclear arms. The other parties to the Treaty have to renounce nuclear weapons. That is why India calls it a discriminatory treaty and has refused to join it. India, Pakistan, Israel and Cuba have not joined the treaty.

But what caused upset to the review conference was Moscow's decision to store rather destroy 20,000 non-strategic or tactical nuclear weapons and the U.S. plan to refurbish its reserve of 2500-3000 warheads after START II limit of 3,500 deployed warheads for each side is activated. However, the five nuclear powers promised to get rid of estimated 20,000 strategic and tactical nuclear arms they have mostly in U.S. and Russia. Many non-nuclear nations have criticised the big atomic powers for not having a true strategy for disarmament for they have found ways around reduction agreements to maintain their arsenals.

An important development, however, took place on 19th May, 2000 when during the review conference the five nuclear powers agreed to an unequivocal undertaking to totally eliminate their nuclear arsenals. The agreement specified no time table and it was pointed out that it would take many years to achieve a nuclear free world. The agreement was included in a document outlining practical steps to implement Art-IV which was considered by 188 signatories to the NPT. But during war against Taliban Government of Afghanistan, America once again revised its priorities.

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* See also for C.S.E. (1995) Q. 8(b).

North Korea was a party to the Treaty from December 12, 1985 to April 10, 2003. North Korea said that it had nuclear weapons and withdrew from the NPT.

Though India has not joined NPT, it honours its obligations in the field of non-proliferation of nuclear weapons. The nuclear deal being entered into between America and India envisages cooperation of U.S. and other countries with India. But the critics of the nuclear deal between India and the U.S. criticize the deal on the ground that India is not a party to NPT. But not only India denies it but other important nuclear nations also acknowledge it and praise India for honouring its obligations. During American-Russian Summit on 15th July, 2006 both countries issued a joint statement which runs as follows :

"We welcome the important non-proliferation obligation which India has taken on her, as well as India's closer involvement in the basic efforts in the field of proliferation."

Non-Proliferation Treaty (NPT) Review Conference was held in 1995. The conference enhanced the term of the Treaty for indefinite period. Subsequently, next Review Conference was held. So far 190 sovereign nations have become parties to the NPT. But there has been no change in the attitude of India. India has not yet become party to this Treaty. Pakistan and Israel also have not become parties to this treaty. Besides this, North Korea has withdrawn its membership from this Treaty. North Korea remained party to this Treaty from 12 December, 1985 to 10 April, 2003.

On 24 September, 2009, President Obama of the U.S. led U.N. push to make India sign NPT. The Obama authored U.N. Security Resolution No. 1887 was passed unanimously. It called all states to sign off NPT. The resolution seemed especially against holdout such as India and Pakistan as well as the signatories planning to withdraw from the treaty. However, India stuck to its standpoint and called the Treaty discriminatory. There are four Sovereign Countries, namely, India, Israel, Pakistan and North Korea who are not parties to this Treaty.

Disarmament Decade (1970-1980).—The decade of 1970 was declared by the United Nations as the Disarmament Decade. The U.N. Agency that has been mostly involved with the goal of disarmament is the 26 Nations U.N. Conference on the Committee on Disarmament. It celebrated its 10th anniversary in March, 1970.[19] It was very heartening to note that the U.N's Disarmament Decade began auspiciously with the coming into force on 5th March, 1970 of the Treaty on the Non-Proliferation of Nuclear weapons. The deposition of the instruments of ratification by 43 countries in Washinghton, London and Moscow was really an event of historic importance. In the 1984 session, the name of the Committee was changed to Conference on Disarmament. In the regular session the Conference on Disarmament recommended the declaration of the Decade of 1991 to 2000 as the Third Disarmament Decade. A world-wide ban on chemical weapons—the goal of U.N. for many years—was the centre-piece of deliberations during the first part of 1992 session of the Conference on Disarmament held from 21st January to 26th March, 1992. The Conference on Disarmament comprises of 61 nations.

The treaty on the Prohibition of the Emplacement of Nuclear weapons and other weapons of Mass Destruction on the sea bed and Ocean floor and in the sub-soil thereof or Sea-bed Treaty, 1972.—Yet another significant achievement in the field of disarmament is the Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Sea-bed and Ocean Floor and in the sub-soil thereof signed by U.K., U.S.S.R. and U.S. on February 11, 1971. The importance of the treaty as a disarmament measure lies in the fact that it has been predicted that : "The total potential for war in the future will be largely determined by its under sea component".[20] The Sea-bed Treaty came into force on May 18, 1972 as 30 nations ratified it by that time. In the words of the then Prime Minister Kosygin of Russia, this treaty is "an important act in international affairs...... a first step towards complete demilitarisation of the sea". This treaty has been hailed as "a significant effort to prevent the spread of weapons of mass destruction to

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19. "World Disarmament—A Decade of Progress", The American Reporter, (March 22, 1972), p. 5.

20. William A. Nirenberg, "Militarised Oceans" in Nigel Calder, Unless Peace Comes, at p. 11.

areas which man is just beginning to explore".[21] It may, however, be noted that the treaty is directed solely against the placement, that is, fixation of weapons on the sea-bed and is silent about mobile launchers as well as submarines which remain and are likely to remain a principal means of nuclear warfare. "The practical value of this treaty is still uncertain chiefly for the reasons that the military use of the sea on its surface and in water column is not forbidden. The military use of the sea necessarily affects the sea-bed too".[22] In fact, every one of the nuclear limitation treaties which the U.S. and Russia have put through so far has only been a non-permanent move aimed at preventing the non-nuclear countries from acquiring atomic weapons rather than a step towards limiting their own armaments. In view of these reasons, India has refused to subscribe to the one-sided pact. Nevertheless, the treaty has barred nuclear weapons from 70% of earth's surface and is thus a significant addition to the structure of multilateral arms control agreements.[23]

Convention on the Development Production, Stockpiling of Bacteriological and Toxin weapons and on their Destruction, 1971.—This Convention was entered into to supplement 1925 Geneva Protocol. It was opened for signature on April 10, 1972. It entered into force on 26 March, 1975. As of October 2011, 185 parties had become parties to this Convention.

Disarmament and outer space.—Outer space is another important area where some modest beginnings have been made. As remarked by Prof. Lincoln P. Bloomfield "... ...in the realm of arms control, which could ultimately prove to be the most important aspect of international co-operation in space, some modest steps have been taken through the ban on nuclear weapon tests in outer space and the agreement not to orbit nuclear weapons...... It may, however, offer some special prospects growing out of the relative newness of outer space and the consequent common interests in demilitarising it, as much as Antartica was demilitarised and internationalised by 1959 Antartica Treaty.[24]

Reference may be made here to Outer Space Treaty *i.e.,* Treaty on principles governing activities of States in the exploration and use of outer space including the moon and other celestial bodies. This treaty was opened for signature in January, 1967 and entered in-to force on 10 October, 1967. As of 2015, 190 countries have become parties to the Convention.

Strategic Arms Limitation Talks (SALT).—A brief reference of the Strategic Arms Limitation Talks, popularly known as SALT between U.S. and U.S.S.R. will not be out of place here. The object of these talks was to find a way for both sides to agree on plan that would limit and perhaps some day reduce their vast nuclear arsenals. An agreement limiting the strategic offensive and defensive system of the U.S. and U.S.S.R. would go to the heart of the security concerning the two countries. The United States' President, Richard Nixon's visit to Soviet Union in May, 1972 helped to bring about a thaw in the relations of the two countries. Probably, the most important outcome of the visit was the SALT agreement concluded in May 26, 1972 lifting defensive Anti-Balastic Missiles (ABM) sites in each country. It took the form of a treaty subject to ratification by the United States Senate.[25]

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[21] The American Reporter, May 31, 1972, p. 8.

[22] Vladimir Ibler, "The Interests of Self-locked States and the Prospects and Development of the Law of the Sea," I.J.I.L., Vol. 11 (July, 1971), p. 389 at p. 409.

[23] The first Review Conference of the Parties to the 1972 Treaty Prohibiting the emplacement of nuclear and other weapons of mass destruction on the sea-bed opened on 20th June and ended on 1st July, 1977 in Geneva. It adopted a Final Declaration requesting the conference of the committee on disarmament (CCD) to consider promptly further measures for the prevention of an arms race on the sea-bed. The next Review Conference will be held in Geneva in 1982 or not later than 1984, U.N. Monthly Chronicle, Vol. XIV, No. 7 (July, 1973), p. 18.

[24] Lincoln P. Bloomfield, "Outer Space and International Co-operation", Int. Organ., Vol., XIX (1965), p. 603 at p. 620.

[25] The said SALT Agreement was to expire on October 1 this year. In March 1977, the U.S. and U.S.S.R. failed to search an accord at SALT. On 23rd September, 1977, however, the U.S. and the U.S.S.R. agreed to extend the SALT. [The Statesman dated 25 September, 1977]: For detailed study see also J.P. Jain, "The SALT Agreements, India Quarterly" (1976), p. 6.

The said agreement, however, permitted both countries to replace existing offensive nuclear missiles, whether placed on land or a board at sea, with more sophisticated weapons as technological advance permits. As stated by Mr Chiao Kua Hua, Chinese Chief delegate to U.N., the Soviet-American Agreement to limit Strategic arms "by no means be regarded as a step towards nuclear disarmament". He added, "on the contrary this marks the beginning of a new State in the Soviet-American arms-race". He further added, "Before the ink on the agreement had dried the one hastened to test new types of nuclear weapons and the other expressed its intention to make a big increase immediately in its military expenditure".

Convention on the Development, Production and Stockpiling of Bacterio-logical and Toxin Weapon and on their Destruction.—This convention was drafted by the conference of the committee on Disarmament and was commenced by the General Assembly on December 16, 1971.[26] On April 10, 1972, the Secretary-General, Kurt Waldheim opened the Convention for signature and made an appeal to the Governments of all States to sign and ratify it at an early date thus contribute to its early entry into force as an important and effective international instrument.[27]

The convention entered into force on 26th March, 1975. Article 1 of the convention provides that each State Party to the convention never in any circumstance shall develop, provide, stockpile or otherwise acquire or retain—

(1) Microbial or other biological agent or toxins whatever their origin or method of production or types and the quantities that have no justification for prophylactic, protective or other peaceful purposes.

(2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Article II of the convention provides that each State Party to this convention undertake or to divert to peaceful purpose as soon as possible but not later than nine months after the entry into force of this convention, all agents, to toxins, weapons equipment and means of delivery specified in Article I of this convention, which are in its possession under its jurisdiction or control in implementing the provisions of this article all necessary safety precautions shall be observed to protect populations and the environment.

The convention has been signed by 170 nations. India signed the convention on 15th January, 1973 and ratified it on 15th July, 1974. So far 162 countries have become parties to this convention.

Geneva Disarmament Conference.—25-nations Geneva Disarmament Conference began on 17 April, 1974. In a message to the Conference the Secretary-General of the U.N. appealed to the nations attending the Conference to enter into an agreement on Chemical Weapons and Prohibition of the Use of Nuclear Weapons under the Ground. Talks were going on for years in connection with the prohibition of the use of nuclear weapons under the ground but no progress could be achieved.

Special Session of General Assembly on Disarmament in 1978.—On 21st December, 1976, the General Assembly decided to hold a special session on disarmament in May and June, 1978. A preparatory Commission was also established.[28] The General Assembly held its tenth special session devoted to disarmament from 23rd May to 1st July, 1978 at United Nations Headquarters. Before the session ended, the Assembly adopted by consensus on 30th June, 1978 a Final Document consisting of an *Introduction, a Declaration, a Programme of Action,* and recommendations *concerning the international machinery for disarmament negotiations.* Under the programme of action the

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[26] Resolution 2826 (XXVI).

[27] U.N. Monthly Chronicle, Vol. IX, No. 5 (May, 1972), p. 21.

[28] On September, 1977, the Preparatory Commission recommended that the Special Session should be held between 23rd May and 28th June, 1978 [U.N. Monthly Chronicle, Vol. XIV, No. 9 (October, 1977), p. 28].

Assembly set out a series of suggestions for negotiation and other action in specific areas, and in the Declaration, which forms another part of the Final Document, it urged that the resources released through disarmament be used to promote the well-being of all peoples and to improve the economic conditions of developing countries. In a statement at the end of session the Assembly President said the strengthening of international disarmament negotiating machinery was the central focus of the session and the decisions in the Final Document related to that matter represented important and historic achievements.[29] As regards the international machinery for disarmament negotiations, the Final Document contains, *inter alia* the following important points :—

(i) The First committee of the General Assembly should deal in the future only with questions of disarmament and related international security questions.

(ii) The General Assembly established, as successor to the commission originally established by resolution 502 (VI) a *Disarmament Commission composed of all Members of the U.N.*

The General Assembly decided that :—

(a) the Disarmament Commission shall be a deliberative body, a subsidiary organ of the General Assembly, the function of which shall be to consider and make recommendations on various problems in the field of disarmament and to follow up the relevant decisions and recommendations of the special session devoted to disarmament. The Disarmament Commission should *inter alia,* consider the elements of comprehensive programme for disarmament to be submitted as recommendations to the General Assembly and, through it, to the negotiating body, the committee on Disarmament;

(b) the Disarmament Commission shall function under the rules of procedure relating to the committees of the General Assembly with such modifications as the Commission may deem necessary and shall make every effort to ensure that, in so far as possible decisions on substantive issues be adopted by consensus;

(c) the Disarmament Commission shall report annually to the General Assembly. It will submit for the consideration by the thirty-third session of the General Assembly a report on organizational matters. In 1979, the Disarmament Commission would meet for a period not exceeding four weeks, the dates, to be decided at the thirty-third session of the General Assembly;

(d) the Secretary-General shall furnish such experts, staff and services as are necessary for the effective accomplishment of the commission's functions.

(iii) A second special session of the General Assembly devoted to disarmament should be held on a date to be decided by the General Assembly as its thirty-third session.

(iv) At its earliest appropriate time a world disarmament conference should be convened with universal participation and with adequate preparation.

(v) In order to enable the U.N. to continue to fulfil its role in the field of disarmament and to carry out the additional talks assigned to it by this special session, the United Nations centre for Disarmament should be adequately strengthened and its research and information functions accordingly extended.

Evaluation of Disarmament efforts by the U.N.—As regards the U.N. as the Disarmament forum we may quickly dispose of the Security Council because it has played scarcely any role in disarmament discussions although the Charter of the U.N. has fixed the responsibility on it to formulate plans for the establishment of a system for the regulation of armament. The General Assembly became an important forum for disarmament discussions mainly because the major protagonists failed to compromise their differences. Yet another reason for the greater involvement of the General Assembly was that non-nuclear States, especially the non-aligned, sought to bring pressure on both East and West to curb the arms race. The Secretariat must also be given credit for playing a useful conspicuous role by providing services, which have been utilized even by non-U.N. bodies such as the Eighteen Nations Disarmament Committee (ENDC). The Assembly has gained importance as disarmament forum because both major and minor powers utilize it as a forum to mobilize support for their points of view. It may be noted that since 1957 negotiations relating to disarmament have been carried on principally in non-U.N. bodies. It is ironical to note that this shift in the negotiating forum correspond with the almost doubling of U.N. membership that began in 1955. Nevertheless, the General Assembly has always had an active concern with disarmament negotiations. From time to time, it has passed resolutions on various aspects of arms control. The inescapable importance of the General Assembly as a disarmament forum lies in the fact that even when disarmament negotiations take place in the non-U.N. bodies such as ENDC, the reports of success or failure are demanded in the General Assembly.

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[29] U.N. Monthly Chronicle, Vol. XV, No. 7 (July, 1978), p. 3.

Thus, one could not discount the role of the U.N. in its influence on the negotiations and this was even true of the U.S.-U.S.S.R. negotiations on SALT. As regards the Non-Proliferation Treaty it may be noted that it was the U.N. contribution which helped materially to bring the treaty into force. However, it cannot but be conceded that the concentrations in the years 1963—69 on such formal arms control progress as there had been since the nuclear age began, all the achievements inside the U.N. were preceded by bilateral negotiations outside the U.N. Despite this, the U.N. particularly the General Assembly, has been very much concerned with disarmament. In every session it devotes considerable time on this topic and passes a number of resolutions on varied aspects of disarmament. "International relations cannot be stable so long as the arms race continues".[30] Hence, "In the present conditions, no other way of strengthening international security and ensuring peace is more reliable than disarmament. It is a problem that bears on the interests of all States, big and small. In view of this, it is the U.N., where the overwhelming majority of the world are represented, that must give a fresh impetus in accelearating the solution of the whole complex of problem connected with disarmament.[31] It may, however, be noted, "That five powers have a special responsibility for maintaining world security and success of nuclear disarmament depends, above all, on them".[32] As aptly remarked by Prof. Lincoln P. Bloomfield, "The United Nations cannot disarm the nuclear weapon nations. It has neither carrots nor sticks with which to bend them to the will of even an overwhelming majority of nations".[33]

Star War

The formal name of 'Star War' is *Strategic Defence Initiative.* This plan is based on the strategy that if America was ever attacked by nuclear weapons, it would destroy the said weapons in the outer space or space and would not allow them to come down on earth. It also takes into account the possibility of a limited nuclear war.

The idea that a limited nuclear war can be fought is most dangerous. As regards the legal position of 'star war' under international law, it deserves consideration under two heads—(i) Laws of outer space, and (ii) Laws of war. To take up the first, Article IV of the Outer Space Treaty, 1967 provides that State Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons on celestial bodies, or station such weapons in outer space in any other manner. So far as laws of war are concerned, the use of nuclear weapons or threat thereof is clearly violative of international law. But the test and manufacture of nuclear weapons by a State so long as it does not affect other sovereign States or is not inconsistent with the provisions of a treaty. 'Star war' is also violative of 1972-Anti-Ballistic Missile Treaty (ABM). It is also violative of Articles 1 (1) and 2 (4) of Charter.

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[30] N. Kapchenko, "U.N.'s Main Task. To keep and Strengthen Peace," Int. Affairs No. 12 (December, 1971), p. 10 at p. 15.

[31] Ibid.

[32] A. Stoleshuikov, "Disarmament The possibilities of a World Forum," Int. Affairs (December 1971), p. 18 at p. 19; see also P.R. Chari, "The Nuclear Balance Between the Super Powers, India Quarterly, Vol. XXXII, No. 64 (October-December, 1976), p. 381.

[33] Lincoln P. Bloomfield, "Arms Control and International Order", Int. Orgn., (1969), p. 637 at p. 638.

New types of weapon to counter ICBM's

The U.S. has been studying new types of nuclear weapons capable of attacking newly deployed Soviet mobile Inter-Continental Ballistic Missiles (ICBMs).

Six Leader's Appeal for Disarmament.—It may be recalled here that last year the U.S.S.R. suspended nuclear tests (which was later on extended to 6 August, 1986) and urged U.S. to join the moratorium. The six leaders—Prime Minister Rajiv Gandhi of India, Mr. Andreas Papandreon of Greece, Mr. Inguar Carlsson of Sweden, President Miquel De La Madrid of Mexico, Raul Alfonsion of Argentina, and former President Julius Nyerere of Tanzania—meeting in Mexico in August 86 urged the U.S. to join the Soviet freeze and also offered a detailed plan for monitoring a test ban, with their over instruments and observers. The six leaders said in their declaration, "We cannot accept that a few countries should decide the nuclear fate of the world". But unfortunately the appeal was rejected by the U.S. The initiative taken by India and five other countries received wide support at the U.N.

U.S. Developing Anti-matter weapon.—It has been reported that the U.S. has been seriously considering the possibility of developing a new kind of weapon systems using anti-matter. It is pointed out that when anti-matter meets ordinary matter, the result is total annihilation.

U.S. Raising Arsenal for Germs War.—It is also reported that the U.S. is quietly increasing its research into germs by cloning some of the world's rarest and deadliest of diseases to increase its arsenal for germs warfare. Seventeen years ago, President Nixon had curtailed germs warfare and dismantled the military's biological arsenal. At present, the Medical Research and Development Command spend about $42 million to fund 47 bio-technology projects this year, this amounts to a tenfold increase since 1981.

Failure of U.S.—U.S.S.R. Summit.—The long-awaited Disarmament Summit between American President, Ronald Reagan and Soviet Union leader Mikhail Gorbachov was held on October 11 and 12, 1986 at Reykjavik (Iceland). The summit proved to be a failure as it did not produce any tangible agreement on the vital issue of reduction of nuclear weapons.

The Intermediate Nuclear Forces Treaty or I.N.F. Treaty.—On 9 December, 1987, American President Ronald Reagan and Soviet Leader Mikhail Gorbachov signed the Intermediate Nuclear Forces Treaty or I.N.F. Treaty. It is a great achievement in the field of disarmament. Under this treaty, both the great powers have pledged to destroy nuclear missiles stationed at earth and having intermediate range of 500 to 5000 kilometres. Under the treaty Britain undertook to destroy its missiles situated in Britain, West-Germany, Italy and Belgium. On the other hand, Soviet Union would destroy S.S. 4, S.S. 20, S.S. 12 and S.S. 23 missiles. It is evident from this treaty that if there is will and determination on the part of Soviet and American leader, the world can be saved from the holocast of the nuclear weapons.

Indian Proposals to Ban Nuclear Arms.—On 9 November, 1988, India introduced three proposals, (i) A freeze on nuclear weapons; (ii) A convention on the prohibition of the use of nuclear weapons; and (iii) Assessing Scientific and technological advances and their impact on international security—in the U.N. General Assembly to freeze nuclear weapons production and ban their use. While introducing these proposals, Indian delegate, Mr Atal Behari Vajpayee, warned that unless wisely directed, new strides of science and technology might push mankind closer to a deadlier end. He said, "New technologies will inevitably spawn new weapons system as has been the case throughout history. But these will be more subtle, deadlier and difficult to curb. He therefore suggested, "we must give science and technology to human face".

U.S.—U.S.S.R. Agreement to ban Chemical Weapons.—On July 18, 1989, U.S. and U.S.S.R. reached an agreement on key issues banning chemical weapons including a time table for destroying them and procedures for inspecting factories. While the Geneva Protocol of 1925 prohibited the use of chemical weapons but not their manufacture or stockpiling, the draft treaty, which took eight years in the making, would ban development, production, possession and transfer of chemical weapons.

U.S.—U.S.S.R. Summit on Naval Arms Control.—On 3rd December, 1989, U.S.—U.S.S.R. Summit on Naval Arms control concluded. Presidents Mikhail Gorbachov and George Bush hailed their first summit as the start of a new era in U.S. Soviet relations. Though the summit achieved some success, yet substantial differences remained on arms control and Central America.

U.S. Pledge to Destroy Chemical Weapons

In May 1991, the U.S. President Bush pledged to destroy all U.S. chemical weapons stockpiles in the next ten years with a promise never to use them under any circumstances.

Signing of SAART Treaty

President Mikhail Gorbachov of the then U.S.S.R. and President George Bush of U.S. signed on July 31, 1991 the 'historic' Strategic Arms Reduction Treaty (SAART) to reduce their nuclear arsenals by about 30 per cent. The treaty was signed after negotiations for nine years. It is the first ever treaty to bring about the real reduction in super power long-range (inter-continental) nuclear arsenals which the two super powers specifically built to cause heavy damage to each other. However, the cuts fall short of the 50 per cent aimed at by the super powers when they started talks in 1982 yet the treaty is significant because it reduces the most dangerous and destabilising nuclear forces. Even with the proposed 30 per cent cut, the two sides will have 4,900 ballistic missiles each. The treaty limits the strategic nuclear delivery vehicles (SNDVs) to 1,600 each. The treaty provides for a joint commission on verification and inspection. The treaty is valid for 15 years, unless superseded earlier by a subsequent agreement.

Major Voluntary Cuts announced by the U.S. and the U.S.S.R.

On 6 October, 1991 President Gorbachov announced sweeping cuts in Soviet nuclear arsenal in response to voluntary cuts announced earlier by U.S. President George Bush. Then on 28 September, 1991, President Bush once again announced a sweeping, unilateral reduction in U.S. nuclear strength in response to changes in Moscow.

Problem of Nuclear Proliferation arising as a result of the breaking up of the Soviet Union

Since the nuclear arsenals of the Soviet Union were spread in several republic, the breaking up of the Soviet Union has led to the fears and apprehension about the proliferation of nuclear weapon. The fears of the U.S. are quite genuine that until all the nuclear arsenals of the former Soviet Union are brought under the unified command of Russian or any other single entity, the problem of proliferation of nuclear arsenals shall continue to persist.

Register of Conventional Arms.—On 9th December, 1991, the General Assembly passed a resolution[34] calling for the creation of a universal and non-discriminatory register of conventional arms as of Ist January, 1992. States are requested to report annually to the Secretary-General and their inventories and export/import of battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, attack helicopters, warships and missiles of missile systems. According to Secretary-General Javier Perez de Cuellar, such a register would "foster a climate that is conducive to voluntary restraint and more responsible behaviour".[35]

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[34] Resolution 46/36L.

[35] See U.N. Chronicle, Vol. XXIX, No. 1 (March, 1992) p. 74.

Convention on the Prohibition, Production, Stockpiling and use of Chemical Weapons and on Their Destruction, 1993.—The Convention on the Prohibition, Production, Stockpiling and use of Chemical Weapons and on their Destruction, 1993, (hereinafter referred as Chemical Weapons ban Convention) was formally approved by the General Assembly on 30th November, 1992. This Convention was opened for signature by U.N. Secretary-General Boutros Boutros Ghali at a special meeting in Paris in January 1993. The 24-article chemical weapons ban convention has three annexes and a text on the preparatory commission for the organization for the Prohibition of Chemical Weapons. Under Article I, each State party undertakes, never under any circumstances to develop, produce, otherwise, acquire, stockpile or retain chemical weapons, or transfer them, directly or indirectly, to anyone, to use or engage in any military preparations to use chemical weapons; and to assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Convention. Further, each State is obliged to destroy chemical weapons and such production facilities it owns or possesses or that are located in any place under its jurisdiction or control, as well as all chemical weapons it may have abandoned on the territory of another State Party. Each State Party will use riot control agents as a method of warfare.

Article III provides that each party will submit to the organization, not less than 30 days after the convention enters into force, declarations with respect to chemical weapons and their facilities, specifying their precise location and quantity, and providing a general plan for their destruction.

Article XII provides for principal safeguard of the convention to protect State Parties against violations of the basic obligations by other State Parties. It provides the means to remedy any situation which contravenes the provisions of the convention. It provides that the organization may require a State Party deemed not in full compliance with the convention to take remedial action and, in the event it fails to do so, apply a number of penalties, including sanctions. In case of particular gravity, the conference of State Parties would bring the issue to the attention of the General Assembly and the Security Council.

It may be noted that the convention is of unlimited duration and will enter into force 180 days after the date of the deposit of the 65th instrument of ratification, but in no case earlier than two years after its opening for signature. Thus the convention offers the long-awaited opportunity to eliminate a whole category of chemical weapons of mass destruction.

So far 190 countries have become parties as of May 2015. India signed this convention on 14 January, 1999 and ratified it on 3 September, 1996. The convention is administered by Organization for the Prohibition of Chemical Weapons (OPCW). OPCW was established on 29th April, 1997. OPCW was awarded Nobel Peace Prize on 11 October, 2013.

Convention on Prohibition on Restriction on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effect, 1981.—117 countries had become parties to this convention. As many as five Protocols to this Convention have been made.

Nuclear Arms Reduction Treaty (START-II) Between Russia and America.—On 3rd January, 1993, Boris Yeltsin of Russian Federation and George Bush of United States of America signed START-II at Moscow. This Treaty is also required to be ratified by four Nuclear Weapons former republics of Soviet Union. This treaty envisages reduction of 2/3 nuclear stockpiles within ten years. Boris Yeltsin has described this treaty as the "Treaty of the Century". The ratification of the treaty by the said four republics of former Soviet Union is doubtful because only Russia and Kazakistan have so far ratified START I.

American President Bill Clinton's Declaration not to conduct Nuclear Test till October 1994.—On 3rd July, 1993, President Bill Clinton of U.S. declared that the U.S. would not conduct any nuclear test till October 1994 and invited other countries to do the same. He said that if other countries also accepted such a moratorium, it would help to create an environment conducive to conclude a wide nuclear test ban treaty. The American President, however, clarified that the self-imposed moratorium would continue till any other nuclear State does not conduct a nuclear test. He warned that if any State violated this prohibition, America would be entitled to conduct additional test to compensate for the tests not conducted during the period of moratorium. This is undoubtedly a courageous and praiseworthy step of President Bill Clinton. Other States should emulate this example.

U.S.-Russia Sign Accord on Ukraine N-Arms.—On 14 January, 1994, President Bill Clinton of the U.S., Boris Yeltsin of Russian Federation and Ukrainian President Leonid Kravchuk signed an agreement to scrap Ukrain's ex-Soviet atomic weapon. The agreement calls for dismantling the world's third largest nuclear arsenal with 176 missiles and more than 1,500 warheads, and transfer of its key components to Russia in the shortest possible time. The most sophisticated weapons 46 SS-24 strategic missiles are to deactivate within the next ten months. The Accord also provides writing off of $30 billions of Ukraine's oil and gas and that U.S. and Russia will not target each other with nuclear missiles. Thus the accord removes the last problem of the cold war.

Comprehensive Test Ban Treaty (CTBT).—In June 1995, a conference was held in Geneva to adopt the Comprehensive Test Ban Treaty (CTBT). This Treaty contains a comprehensive plan to prohibit nuclear tests. This Treaty seeks to remove the shortcomings of the Treaty on Non-Proliferation of Nuclear Weapons. But so far as the question of destroying of existing nuclear stockpiles is concerned, this treaty does not contain any time-bound programme. India was required to clarify her position before 28 June, 1995. According to India, this treaty seeks to perpetuate the monopoly of nuclear States and discriminates against non-nuclear States. Moreover, there is no time bound programme for destroying existing nuclear stockpiles. Since objections raised by India were not removed, India made it clear that she will not sign this treaty. Despite the pressures of Western States, India refused to change her decision towards the treaty. On 20 August, 1995, India formally voted against the adoption of the treaty while voting against the Treaty Indian representative made it clear that the Treaty will not be able to achieve the objectives of universal disarmament. India took this stand notwithstanding, the strong criticism and pressure of America and its allies.

In June 1997 it came to be known that America has developed a super nuclear weapon which can even destroy targets under the ground. This has made a mockery of CTBT. On the one hand, America has been pressurizing countries like India to sign the Treaty, on the other hand, America has been developing devastating weapons, thereby acting against the letter and spirit of the Treaty : The U.S. underground sub-critical tests of Neveda is a glaring example of this.

On 17 June, 1997, India was elected as the first Chairman of the 41-member Executive Council of the Organisation of Chemical Weapon (OPCW), the international body to enforce the implementation of the Chemical Weapons Convention (CWC). This vindicates several aspects of India's foreign policy. This shows that India's stand is not only praised by other States but also vindicates India's stand toward CTBT. India has made it clear that she will not be intimidated into signing the CTBT despite threats of isolation or penalties. While America is keeping all its options open for the use of nuclear weapons such as its use against attackers who hit American forces with chemical or biological weapons, it seeks to tie down even the hands of countries like India even in respect of developing nuclear weapons even when its preservation or survival is at stake. So far American bullying tactics have worked but there must be a limit or end to it.

Considerable changes have come in the situation after India conducted Pokhran II tests and in its reply Pakistan also conducted nuclear tests. America and Western countries imposed strong sanctions against both India and Pakistan. Once again western countries pressurized India to sign the CTBT, on her part India replied that she was prepared to sign the CTBT provided that some basic changes were made in the treaty and India's conditions were accepted.

On the other hand, strong sanctions were also imposed against Pakistan which adversely affected its financial position. Under pressure Pakistan declared that it was prepared to sign the CTBT. In his visit to America, the then Prime Minister of Pakistan told America that Pakistan was prepared to sign the CTBT without conditions provided that sanctions against it were lifted. Thus Pakistan's stand on CTBT was not clear the only point conceded by Pakistan was that it gave up the condition that it would sign the CTBT after India signed it. On the other hand, India's stand was quite clear and there was no change in her policy towards the CTBT.

Comprehensive Test Ban Treaty Review Conference.—Comprehensive Test Ban Treaty Review Conference was held in Vienna in the first week of October 1999. This Conference was attended by 90 countries the Conference, appealed to the countries whose ratification is necessary for the Treaty to come into force to ratify the treaty at an early date. Without naming such countries, the Conference asked them to expedite the ratification of the Treaty. Among the five major nuclear nations, ratification by America, Russia and China is necessary for CTBT to come into force. Apart from these countries, India, Pakistan and North Korea are the countries who have not signed the CTBT. It may be noted that while on the one hand, America exhorts other countries to sign and ratify CTBT, America itself has not yet ratified the Treaty. The main reason for this is that according to the majority party in the American Senate, the CTBT does not take proper care of America's security interests. Thus there is a vast difference in what America preaches and what it does.

Before the start of the Review Conference, 154 countries had already signed the CTBT and 51 countries had ratified it. There are 44 countries including the five original nuclear powers who have nuclear capability out of these 44 countries 41 countries have signed the CTBT and 26 countries have ratified it.

CTBT has not yet entered into force. As per condition the Treaty would come into force 180 days after all 44 Annexure II countries ratified the Treaty. Annexure II countries namely China, Egypt, India, Iran, North Korea, Pakistan and United States of America have not so far signed. So far 159 countries have ratified the CTBT.

Without naming India and Pakistan, the speakers of the Conference appealed to the countries who have not signed the CTBT to announce moratorium before entry into force of the Treaty. The main aim of Conference was to find out the means in accordance with international law to achieve consensus to expedite the process of ratifications of the treaty so that the treaty may come into force at an early date. Undoubtedly, the opposition of American Senate and its reluctance to ratify the treaty has caused great upset to the efforts of the Conference on the question of expeditious ratification of the treaty for bringing the treaty to even into force at an early date.

Before the Review Conference, 154 (one hundred fifty-four) countries had already signed CTBT and 51 (fifty-one) had ratified the CTBT. Forty-four countries have nuclear capacity including five original nuclear countries. Out of these 44 (forty-four), 26 (twenty-six) countries have already ratified the Treaty (*i.e.*, CTBT).

So far there are 184 signatories to this Treaty but only 168 countries have ratified the Treaty.

Convention on the Prohibition of the use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction.—This convention was opened for signature at Ottavia on 3-4 December, 1997 and entered into force in March, 1999. Article 1 of this convention provides that each State undertakes never under any circumstance—

(a) to use anti-personnel mines;

(b) to develop, produce or otherwise acquire, stockpile, retain or transfer to anyone directly or indirectly, armed personnel mines;

(c) to assist, encourage, or induce, in anyway, anyone to engage in any action, prohibited to a State Party under this convention. Further, each State Party undertakes the destruction of all anti-personnel mines in accordance with the provisions of this convention.

This Treaty was concluded on 18 September, 1997. It was opened for signature on 3 December, 1997. It entered into force on 1 March, 1999. So far it has been ratified by 164 countries.

Biggest Arms Reduction Pact between U.S. and Russia.—On 8th April, 2010 American President Barak Obama and Dimiti Madneden entered into the biggest agreement to reduce arms. Through this agreement the two countries agreed to reduce 1/3 nuclear war arms, missiles and submarines and the air-crafts carrying them. After this agreement with each of the two countries 1550 nuclear arms to be used in war.

But unfortunately, while the said two countries had agreed to huge reduction of nuclear arms, on the other hand America is developing nuclear missile which can strike any part of the world within an hour.

Conclusion.—"Effective, adequate disarmament depends primarily upon the development of a climate of trust and mutual understanding among the major powers".[36] Moreover, " .... progress towards disarmament depends heavily on concurrent progress towards an international legal order. No international disarmament Organisation of itself can make the peace by transforming the nature of international relation".[37]

It has been rightly observed, "As long as mens want ingenuous ways of killing or dominating one another, the natural world, through the medium of science, will provide them. The same ingenuity and knowledge of nature can be applied quite otherwise, for creating a healthy, pleasant and exciting environment for all mankind. But the worst forebodings will surely be fulfilled, and even the most modest visions of a better world will be smashed, if present military tendencies continue our loss will be a double one—both what we have and what we might have made unless peace comes".[38] As remarked by Mr A.A. Mironov of the United Nations Institute for Training and Research, if arms race is allowed to continue further the whole of civilization will be wiped out or, as the saying goes, will go with the wind.[39] In a report prepared for the Secretary General of the U.N., International Panel of Scientists and scholars observed, "the arms race must be stopped not only because of the immediate perils it holds for all nations, but because the longer it continues, the more intractables the problems of economic growth, social justice and the environment will become".[40]

The arms race is spiralling at an alarming rate and absorbing some $ 350 billion a year in armaments, three quarters of which, is borne, by six countries, the U.S., the U.S.S.R., China, France, the U.K. and the Federal Republic of Germany. This disclosure was made in a report of panel of experts which also warned that the continuation of the arms race was irreconcilable with an acceptable rate of development and the establishment of peace, security and a new world economic order. In the view of the experts, effective disarmament presupposed simultaneous progress in two directions : curtailment of the qualitative arms race and reduction of military budgets.[41] America's 'Star War' has further complicated the problem of disarmament. It is estimated that there are 50,000 nuclear weapons in the world, out of which 18,000 are of strategic importance. According to Scientists 500 to 2000 nuclear weapons of strategic importance are enough to cause nuclear winter which may not only cause death of crores of people but may destroy most of the agriculture of the world. It is also feared that if nuclear war takes place, the whole human race may be erased from the face of the earth. Thus day by day the problem of disarmament is becoming more and more complex. Nearly 2,700 years ago Hebrew Prophet Issaih said : "They shall beat their swords and plowshares and throw their spears into pruning brooks".[42] This prophecy remains still unfulfilled. One may argue that a beginning has been made through measures such as the outer space treaty, sea bed treaty, non-proliferation treaty and the recent agreement on START II. But it is clear from the foregoing discussion that most of the nuclear limitation treaties which the U.S. and the U.S.S.R. have put through so far has only been a non-permanent move aimed at preventing the non-nuclear countries from acquiring atomic weapons than a positive step towards limiting their own armaments. So a real beginning, which requires a climate, a trust and mutual understanding, has yet to be made. "The recently concluded INF Agreement between the U.S.S.R. and the United States and the START negotiations now underway have ignited a new spirit of hope that the two super powers may now be embarked on a new and more promising pathway towards disarmament. But this is still only a first step along a pathway that is likely to be long and difficult one".[43] Let us hope that the forces of peace will ultimately triumph and the goal of disarmament will be achieved. The end of cold war has rekindled hopes for success of disarmament efforts. As pointed out by Secretary-General Boutros Boutros Ghali on 27th October, 1992 speaking before a special meeting of the First Committee (Political and Security) in Observance of the Disarmament Week (24th to 30th October, 1992), "The end of bipolarity has not diminished the need for disarmament. If anything, it has increased it".[44] Thus any sense of complacency may prove to be fatal and suicidal.

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[36] Goodspeed, note 4, at p. 321.

[37] Daniel S, Cheever, "The U.N. and Disarmament", Int. Orgn. (1965), p. 463 at p. 482.

[38] Nigel Calder, Unless Peace Comes, p. 217.

[39] "Whole Civilization will go with the Wind if Arms Race Allowed to Continue", U.N. Monthly Chronicle, Vol. XII, No. 4 (April, 1975), p. 50.

[40] "U.N. Experts call to stop Arms Race", National Herald, November 5, 1971.

[41] U.N. Monthly Chronicle, Vol. XIV, No. 9 (October, 1971), p. 41.

Reference may be made to the recent attack of Russia in Syria against ISIS. United States of America was already involved in its fight against ISIS in Syria and Iraq. But the show of new arms by both USSR & US is likely to result to increased arms race. According to some analysts the increase in sale of arms seems to be the aim of both the great powers. But a more recent seems to scuttle all plans to annihilate ISIS (Islamic State of Iraq and Syria).

Though ISIS is at backfoot in Syria and Iraq, it has spread its members all over Europe and other countries and terrorist attacks are taking place in these countries.

The conflict between North Korea and America has put all efforts of disarmament at naught and started a furious disastrous arms race. All efforts of putting restrains on North Korea, including sanctions issued by the Security Council of the United Nations, have so far failed. Because of the rigid attitude by North Korea several times the world was on the verge of war. To add fuel to fire, North Korea tested Hydrogen bomb on 4th September, 2017. This has stunned the whole world.

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[42] Referred in World Disarmament—A decade of progress, The American Reporter, March 22, 1972, p. 5.

[43] Maurice Strong, "The United Nations in an Interdependent World", International Affairs (Moscow, January 1989), p. 11 at p. 12.

[44] U.N. Chronicle, Vol. XXX, No. 1 (March, 1993) p. 75.

CHAPTER 45

INTERNATIONAL ATOMIC ENERGY AGENCY (IAEA)

The IAEA is neither a specialized agency of the U.N. nor an independent inter-governmental organisation. It has a special status and is an agency "under the aegis of United Nations". It is based on a statute which was concluded on 23rd October, 1956. The statute entered into force on 29th July, 1957. Since its adoption, the statute has been amended three times.

Objective.—According to Article II of the statute, the IAEA hereinafter called the 'Agency' shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, as far as it is able, assistance provided by it or at its request or under its supervision or control are not used in such a way as to further any military purpose.

Functions.—According to Article III of the statute, the Agency is authorised :

- (i) To encourage and assist research on, and development and practical application of atomic energy for peaceful uses throughout the world.
- (ii) To make provision, in accordance with the statute for material, services, equipment and facilities to meet the needs of research and development and practical application of atomic energy for peaceful purposes.
- (iii) To further the exchange of scientific and technical information on peaceful uses of atomic energy.
- (iv) To encourage the training of scientific experts in the field of peaceful uses of atomic energy.
- (v) To establish and administer designed to ensure that special fissionable and other material, services, equipment, facilities and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose.
- (vi) To establish or adopt, in consultation and where appropriate in collaboration with the competent organs of the U.N. and with specialized Agencies concerned standards of safety for protection of health and minimization of danger of life and property, and to provide for the application of these standard to its own operation making use of materials, service, equipment, facilities and information made available by the Agency on its request or under its supervision; and to provide for the application of these standards at the request of the parties, to operation under any bilateral or multilateral arrangements, or at the request of a State, to any of that State's activities in the field of atomic energy.
- (vii) To acquire or establish any facilities, plant, equipment useful in carrying out the authorised functions, wherever the facilities plant equipment otherwise available to it, in the area concerned are inadequate unavailable only on terms it deems unsatisfactory.

Membership.—Article IV of the statute of IAEA provides that the original members of the Agency shall be those State members of the U.N. or any of the specialized Agencies which shall have signed the Statute within ninety days after it is opened for signature and shall have deposited instrument of ratification, other members are those which deposit an instrument of acceptance of this Statute after their membership has been approved by the General Conference upon the recommendation of the Board of Governors.

So far 171 countries have become members of IAEA. India joined IAEA in 1957. Pakistan also joined IAEA in 1957.

China joined IAEA in 1984. Combodia which joined in 1958, withdrew on 26th March, 2003.

Structure.—The IAEA comprises of the following main organs :

(A) General Conference;

(B) Board of Governors;

(C) Secretariat.

(A) General Conference.—The General Conference consists of representatives of all members—It meets in annual session and in such sessions as are convened by the Director-General at the request of Board of Governors. The General Conference elects a President at each annual session in order to facilitate an effective meeting. The President only serves for the duration of the session in which he is elected.

The General Conference is IAEA's lessor policy making body. It meets in September every year and approves the actions and the budgets passed by the Board of Governors. It also approves the nominees of Director-General.

Two-thirds majority is required for statute amendment or suspension of a member's privileges. For all other issues, a simple majority is required. Its functions are identical to those of the General Assembly of the United Nations. Serving as a forum on current issues and policies it discusses the issues tabled by other organs of the IAEA, Board of Governors and Director General, and the member States.

(B) The Board of Governors.—The Board of Governors is a policy-making body of IAEA. The Board of Governors consists of thirteen member designated by the out going Board and twenty-two members elected by the General Conference.

The Board meets annually and is responsible for making most of the policy of IAEA. It makes recommendations to the General Conference about the activities of IAEA and budget. It publishes IAEA standard, and appoints the Director-General subject to the approval of the General Conference. Each member of the Board has one votes. Two-third majority is required for budget matters. A single majority is required for other matters.

(C) The. Secretariat.—The Secretariat is headed by a Director-General who shall be appointed by the Board of Governors with the approval of General Conference for a term of four years. Under the authority and control of Board of Governors, the Director-General is responsible for the appointment, organisation and functioning of the staff.

The IAEA was headed by Hans Blix from 1981 to 1997. Hans Blix became unusually well-known on account of 2002-2003 search for weapons of mass destruction in Iraq.

The IAEA and its Director-General, Mohammed El Baradei were jointly awarded the Nobel Peace prize on 7th October, 2005. El Baradei's appointment as Director-General was confirmed until 2009 at the 49th session of the General Conference. The present Director-General is Rafael Grossi.

Headquarters.—IAEA secretariat headquarters are at Vienna. Its regional and operational offices are located in Geneva (Switzerland), New York (USA), Toront (Canada) and Tokyo (Japan).

IAEA and Iran

The issue of Iran came into highlight when in February, 1986 it was found that Iran acquired nuclear know-how and materials through international black market. Dr. Abdul Qadeer Khan the father of Pakistan's nuclear arsenal confessed that he was running the international black market, probably the world's first one, for nuclear materials. He visited Iran and signed a nuclear agreement with Iran in 1987. This fact was discovered by IAEA in 2003. It was discovered by IAEA and western intelligence that Iran's secret programme included raw materials, uranium, enrichment, plutonium reprocessing, technology, procurement and weapons design. In February, 2003, Mohammed El Baradei visited Iran with a team of Inspectors to investigate Iran's nuclear programme. He could not find any evidence about Iran's pursuing nuclear programme. On 18th December, 2003. Iran signed the Additional Protocol at the IAEA headquarters at Vienna and promised to act in accordance with its provisions pending completion of ratification of the protocol.

On 9th August, 2005, it was reported that Ayatollah Ali Khonmenei issued a fatwa forbidding the use of nuclear weapons. In September, 2005 a report of the International Institute for Strategic Studies indicated that Iran was still many years away from acquiring a nuclear weapon's capability.

But despite the foregoing reports, it was found on 6th January, 2006 that Iran resumed certain aspects of nuclear energy research and development in spite of international displeasure and pressure especially from the United States of America, the European Union and Russia.

On 4th February, 2006, the Board of Governors of IAEA decided to request IAEA Director-General to make a report concerning Iran to the United Nations Security Council. To this effect in March, 2006, the IAEA Board of Governors passed a resolution by 27 to 3 while 27 voted for the resolution Cuba, Syria and Venezuela voted against the resolution. The remaining 5 (Algeria, Libya, Indonesia, South Africa and Belurus) abstained from voting.

Despite this decision Iran remained firm on its stand and made it clear that it will not enter into agreement with Western Countries and America.

Despite its untiring efforts America failed to obtain consensus with China and Russia. After constant efforts of two weeks, the Security Council had to postpone its meeting. China and Russia are opposed to sanctions against Iran. Therefore, the Security Council had to adopt to a middle way. It need not be emphasized that a resolution of Security Council is binding. That is why, instead of passing a resolution, in the absence of consensus among the members, the Security Council issued a statement on 5 April, 2006. The statement asked Iran to suspend its uranium enrichment programme within a month and to cooperate with IAEA.

America was of the view that after expiry of period of one month of the said, statement of 5 April, 2006, it may be possible to issue sanctions against Iran. On the other hand Iran announced on 12 April, 2006, that Iran possessed enriched uranium but that was for the production of electricity.

IAEA Director-General, Mohammed El Baradei reported on 28 April, 2006 that Iran was not cooperating with IAEA. He said "gaps remain in the agency's knowledge with respect to the scope and content of Iran's centrifugal programme" and that "The agency cannot exclude the possibility notwithstanding the explanations provided by Iran that the plutonium analysed by the agency was derived for peaceful purposes. China and Germany also do not want Iran to get nukes.

On 7th May, 2006 western countries and America circulated a draft U.N. resolution that would demand Iran's abandon of uranium enrichment programme or face threat of unspecified measures. On 7th June, 2006, the U.S. and European Union offered Iran the possibility of carrying out uranium enrichment programme in their territory if it is prepared to meet certain stringent conditions. Getting not a proper response from Iran, western countries and America concluded that they "have no choice but to return to the United Nations Security Council and take forward the process that was suspended two months ago".

On the other hand, Iranian President, Mahmcod Ahmadinejad warned that Tehran would stop U.N. inspections and quit the Non-Proliferation Treaty and would not cooperate with the IAEA if subjected to increased pressure.

Now the Western Countries and the U.S. are planning to introduce a proposal in the U.N. Security Council that would give Iran a short time to suspend uranium enrichment and construction of a nuclear reactor that produces plutonium or face the prospect of economic and diplomatic sanctions. The resolution would also call for the suspension to be verified by the IAEA, the nuclear watchdog of the U.N. and other international experts. But the greatest obstacle in the way is the opposition of China and Russia. Iran being still defiant, the stalemate thus still continues.

Evaluation :

IAEA is a non-subsidiary body of the United Nations. The IAEA is neither an independent inter-governmental organisation nor a specialized agency of the U.N. It is not under the direct control of the U.N. body, but reports to both the General Assembly and the Security Council.

The IAEA exists to ensure safe, secure and peaceful uses of nuclear science and technology. It performs the three main functions : (i) inspection of existing nuclear facilities to ensure peaceful use; (ii) information and standards to ensure the stability of nuclear facilities and (iii) as a hub for the sciences seeking peaceful application of nuclear technology.

With the increase of nuclear proliferation in 1990, the tasks of IAEA included inspection and investigation of suspected violations of Non Proliferation Treaty under the mandate of the United Nations. But IAEA is not capable of taking any coercive action nor can it issue sanctions against any defaulter. It can only refer the matter to the United Nations Security Council which is competent to take coercive measures.

However, 164 members body of IAEA has 237 safeguards agreements in force in 152 countries involving 2302 safeguards inspections performed by 2004. It has 2244 professional and support staff. It has $ 304 million total regular budget. It has so far rendered signal international service for more than 48 years.

IAEA was awarded Nobel Peace Prize in 2005.

IAEA and Indo—U.S. Nuclear Deal :—

N.B.—For this please see Appendix II.

CHAPTER 46

AMENDMENT OF THE U.N. CHARTER*

We will discuss the question or problem of the amendment of the Charter under the five headings—(i) Whether wholesale change or amendment of the Charter is feasible and necessary? (ii) Is desirable change possible without amendment of Charter? (iii) Procedure for amendment. (iv) Amendments made so far and their consequences. (v) Some proposals for the amendment of the Charter.

(i) *Whether wholesale change or amendment of the Charter is feasible and necessary* ?—In view of the failures of the U.N. (particularly in the field of peace and security) some critics have suggested the need of the complete review of the U.N. Charter. The Charter is like a constitution and should be amended from time to time to adapt it to the changing times and circumstances. Principal argument put forward in support of a review is that the majority of Member-States had not taken part in the establishment of the Organisation at the San Francisco Conference and that its structure was insufficient for existing their influence in its activity and the Charter must be adapted to changes which have taken place since 1945. It may, however, be noted here that a complete change, a review of the Charter is neither necessary nor feasible. As remarked by Prof. Goodspeed. "But any attempt at a wholesale revision or a 'showdown conference' to force recalcitrant nations into line might not only raise false hopes but result in accentuating existing bitterness and weakining even further whatever unity exists within organization. Structural changes involving more machinery and more law will not eliminate the serious disturbances which exists in the world today. Defects in charter are not the cause of basic differences separating peoples".[1] Thus, "To hold a special Conference to revise the Charter would be a frustration removing activity of a quite different order. It would deal, article by article with the fundamental law of the United Nations, and it would inevitably bring into the open some very fundamental disagreements on basic principles." [2] Further, "A mighty impediment to charter review, which is virtually unmentioned in the General Assembly debates, is that whereas in the immediate aftermath of the traumatic and exhaustive experience of World War II it was possible for a large number of States to sink their differences to the extent necessary to make the compromises which gave birth to the charter, that sort of situation does not exist today at any rate in the perception of most States." [3]

(ii) *Is desirable change possible without wholesale amendment of the Charter*** ?—The charter of the U.N. was conceived as a living thing, adjustable to meet the challenges of the times.[4] Alvarez, Judge of the International Court of Justice has aptly observed : "An institution once established, acquires a life of its own, independent of the elements which gave birth to it, and it must develop, not in accordance with the views of those who created it but in accordance with the requirements of International life".[5] In another advisory opinion the International Court of Justice observed that under International law, the powers of the institution should be regarded not only those which are expressly mentioned under the Charter but also those which, by necessary implication are necessary for the performance of its duties.[6] Thus "the evolution of the law of the U.N. is possible without amendment of the charter.........."[7] Desirable changes are possible without major changes in the charter. In past changes have been possible by liberal interpretation of the existing provisions. Most of the problems confronting the world community are not because of defects of the charter but due to the attitude of the Member States of the U.N.

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* See also for I.A.S. (1959), Q. No. 5; P.C.S. (1968), Q. No. 7; P.C.S. (1964), Q. No. 6. For answer see also matter discussed under the heading, "India and the United Nations" in this Chapter.

[1] Stephen S. Goodspeed, the Nature and Function of International Organization, Second Edition, p. 659.

[2] Arthur Lall, "Problems and Prospects of Revision of the U.N. Charter", India Quarterly, Vol. XXXI. No. 2. (April-June, 1975), p. 111 at p. 113.

[3] Ibid. at p. 115.

** IAS (2009) Q. 7(a).

[4] See Int. Orgn. Vol. XIX, No. 3 (Summer 1965), p. VI.

[5] Advisory Opinion on Admission of a State to Membership in the U.N., I.C.J. Rep. (1948), p. 4 at p. 68.

[6] Advisory Opinion on Reparation of Injuries Suffered in the Service of the U.N., I.C.J., Rep. (1949), p. 182.

(iii) *Procedure for amendment.*—Articles 108 and 109 deal with the amendment of the charter of the U.N. Article 108 provides that amendments to the present charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council. Thus no amendment can be made unless agreed by all the permanent members of the Council. In other words, a single permanent member of the Security Council can undo the efforts of all other Members to make an amendment of the charter. Article 109 envisages a general conference of the Members of the U.N. for the purpose of reviewing the charter and most of the controversy regarding the amendment centres round this provision. "The main problem that confronts the organization in regard to changes in the charter is inherent in Article 109 itself. For the purposes solely of amendment of the charter this whole article is redundant." [8] Further, "The thrust at the United Nations has been to strive to implement this article. This movement is doomed to failure—short of a new global disaster so awesome that it forces the emergence of a general will among nations to rethink and redesign the type of world system within which they should try to live at peace." [9]

Article 109 provides that a General Conference of the Members of the United Nations for the purpose of reviewing the present charter may be held at a date and place to be fixed by a two-thirds vote of the Members of the General Assembly and by a vote of any nine Members of the Security Council. Each Member of the United Nations shall have one vote in the Conference.[10] Any alteration of the present charter recommended by a two-thirds vote of the Conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all the permanent members of the Security Council.[11] If such a Conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present charter, the proposal to call such a conference shall be placed in the agenda of that session of the General Assembly and the Conference shall be held if so desired by a majority vote of the members of the General Assembly and by vote of any seven Members of the Security Council.[12]

(iv) *Amendment made so far and their consequences.*—Leaving apart a few minor changes, the Charter is, to a large extent, still the instrument which was adopted in 1945. "The United Nations wheel has not turned full circle; it simply has not moved. But one must hasten to add a comment : it would be reading the superfices to conclude that this necessarily indicates that the United Nations is useless." [13] That the Organization has come thus far (it has now completed more than 41 years of its existence) is to attribute to the vision of those who drew the founding plans, a testimonial to the soundness of the guiding principles upon which it was built.[14]

Amendments to Articles 23, 27 and 61 were adopted by the General Assembly on 17th December, 1963 and came into force on 31st August, 1965. The amendment to

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[7] J.A.C. Gutteridge, the U.N. in a Changing World (1969), p. 3.

[8] Arthur Lall, note 2,at p.111.

[9] Ibid., at p. 113.

[10] Article 109, Paragraph 1. This is the provision as amended on 20th December, 1965 and having come into force on 12th June, 1968.

[11] Article 109, Paragraph 2.

[12] Article 109, Paragraph 3; This paragraph has been retained in its original form in its reference to a vote, of any seven members of the Security Council, for it has been acted upon in 1955 by the General Assembly, at its tenth regular session, and by the Security Council.

[13] Arthur Lall, see supra note 2, at p. 111.

[14] Int. Orgn., Vol. XIX, No. 3 (Summer 1965), p. 5.

Article 23 enlarged the membership of the Security Council from eleven to fifteen. The amended Article 27 provides that decisions of Security Council on procedural matters shall be made by an affirmative vote of nine members (formerly seven) and on all other matters by an affirmative vote of nine members (formerly seven), including the concurring votes of five members of the Security Council. The amendment to Article 61 enlarged the membership of the Economic and Social Council (ECOSOC) from 18 to 27.

An amendment to Article 109, adopted by the General Assembly on 20th December, 1965, came into force on 12th June, 1968. It provides that a General Conference of Member States for the purpose of reviewing the charter may be held at a date and place to be fixed by a two-thirds vote of members of the General Assembly and by a vote of any nine members (formerly seven) of the Security Council.

Lastly, a further amendment to Article 61 was adopted by the General Assembly on 20th December, 1971 and came into force on 24th September, 1973. It increased the membership of the ECOSOC from 27 to 54. Thus so far, the Charter has been amended only three times.

As a result of these amendments, the ECOSOC has become a more representative principal organ. As regards the Security Council, "The only effect of these changes which might be important, but was not foreseen or discussed, is that under the original Charter the permanent members could block a decision without a veto, if all of them abstained, while under the revised charter a vote of nine non-permanent members can push a decision through even if all the permanent members should indicate their displeasure by an abstention. As the permanent members are reluctant to veto a resolution which is strongly supported by all the three "Southern" blocks (Africa, Asia and Latin America), there may be some resolution in the future which might pass despite an abstention of as many as six members, including four or five permanent members. This was less likely in the past, but the Congo case has shown how far the U.N. can go though some of the permanent members don't like the direction".[15]

(v) *Some proposals for the amendment of the Charter.*—As noted earlier a wholesale revision of the Charter is neither feasible nor necessary. However, specific articles of the Charter may be amended as done in the past. Thus, "The other more practicable approach to revision of the Charter is for U.N. membership to focus on specific issues and develop tentative proposals after full study of each case." [16] Further, "Timing is a very important consideration in changes of this kind. By the middle of sixties, for example, the time was ripe to increase the size of the Security Council and Economic and Social Council (ECOSOC). Now that the Trusteeship Council is winding up its duties perhaps the time is ripe to give some thought to maintaining six principal U.N. organs by *creating a Social Council to deal with human rights and other social questions, and by redesigning ECOSOC as an Economic Council.* It would be difficult for the Permanent Members to maintain opposition to such proposal, even if their first reaction was cool.

Such an amendment would upgrade economic and financial matters, as well as social questions including the growing field of human rights. There is no guarantee that this would lead to great results, but it should, in a measure, increase the chances of beneficial results.[17] Yet another proposal which merits consideration is to delete all references to "enemy States" in the Charter. It has also been proposed "to strengthen the capacity of the United Nations to be an influence in making and keeping peace" and for this "the representative character of the Security Council should be improved...... A Change is required at the core of the Security Council. Without disturbing the rights of the present incumbents, this change should seek to represent all the regions of the world in the consensus-making core of the Council. Only the recognition of the rights of all the regions would lay the basis for a fair and effective world organization." [18]

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[15] Louis B John, "The Development of the Charter of the United Nations; the Present State" in the Present State of International Law and the other Essays (1973), p. 39 at pp. 49-50.

[16] Arthur Lall, note 2, at p. 117.

[17] Ibid. at p. 118.

[18] Ibid. at p. 119.

On 17th December, 1974, the General Assembly through a resolution,[19] established an *ad hoc* committee for the review of the Charter and on the strengthening of the role of the Organisation. On 15th December, 1975 the General Assembly decided that the said *ad hoc* committee should be reconvened as a Special Committee on the charter of the United Nations and on strengthening of the role of the Organization to examine in detail the observations received from Governments concerning suggestions and proposals regarding the charter and strengthening of the role of the U.N. with regard to maintenance and consolidation of international peace and security, development of co-operation among all nations and promotion of international law in relations between them. The General Assembly also decided to enlarge the 42-member committee by including five additional Member States, Barbados, Belgium, Egypt, Iraq and Romania. The said resolution was recommended by the sixth Committee following the committee's consideration of the report of the *ad hoc* committee on the Charter of the U.N.[20]

During the debate in the Sixth Committee of the General Assembly, a divergence of opinion on the question of the review of the charter was revealed. One group of countries favoured a gradual process of examination of different charter provisions and of their validity in the situation with a view to enhancing the effectiveness of the U.N. in maintaining international peace and security. In the view of a number of delegations, the veto in the Security Council contradicted the principle of sovereign equality of States and was based on relations of domination and oppression, characteristic of a world where some States made all the decisions. A number of countries on the other hand, defended the permanence of the principles and purposes of the charter and expressed opposition to attempt to revise it under current conditions.[21]

The Special Committee on the Charter of the United Nations and on the strengthening of the role of the organization, at its sessions held from 14th February to 11th March, 1977 in New York, completed the first reading of the view of the Government concerning aspects of the functioning of the U.N. The Committee adopted its report to the General Assembly. It also decided to annex to the report two papers containing suggestions for revising the Charter and strengthening the Organization's role.[22] The Committee also decided to annex to its report to the Assembly the report of its Working Group. According to the Working Group, some countries were of the view that the composition and structure of the Security Council remained fully valid and well founded since the main task of the United Nations was to maintain international peace and security, other countries wanted to enhance the Membership of the Council to increase its effectiveness.[23]

The second section of the first paper sets out specific charter amendments by Columbia, Ecuador, Mexico the Phillipines, Romania and Yugoslavia. It made the following main suggestions :

(i) The Statehood of an applicant for membership should be decided by the International Court of Justice on the basis of a set of general criteria for Statehood, adopted by the General Assembly. It also suggested the elimination of the requirement of a two-thirds majority vote in the Assembly and unanimity among the permanent members of the Security Council for the admission of new States.

(ii) The functions of the Trusteeship Council be expanded to encompass the task of protecting human rights in general so that the Council would become a "Human Rights and Trusteeship Council".

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[19] Gen. Ass. Resolution 3349 (XXIX) of 17th December, 1974.

[20] U.N. Monthly Chronicle, Vol. III, No. 1 (January, 1976), p. 71.

[21] Ibid.

[22] U.N. Monthly Chronicle, Vol. XIV, No. 4 (April, 1977), p. 52; one paper (A/AC, 182/L, 12/Rev 1) was submitted by 16 countries: Algeria, Argentina, Columbia, Congo, Cyprus, Ecuador, Egypt, El Salvador, Kenya, Mexico, Nigeria, Phillipines, Romania, Sierra Leone, Tunisia and Yogoslavia. The other (A/AC 182-L 16) was submitted by Italy and Spain.

[23] Ibid.

(iii) Romania suggested inclusion of "the affirmation of the need of a new world economic order designed to put an end to the present division of the world into 'rich countries' and "poor countries".

(iv) Yogoslavia suggested that a U.N. document on national minorities (regulation and protection of the rights of minorities) should be adopted and "incorporated into the charter as a competent part".

(v) The Phillipines proposed that the Commission on Human Rights be elevated to full Council on a level with the Economic and Social Council and the Trusteeship Council.[24]

The second paper (submitted by Italy and Spain) contained many suggestions made in the first paper. It also made some other proposals which are as follows :

(i) Elaboration of a Universal treaty on the peaceful settlement of disputes.

(ii) Deletion of "obsolete clauses" in the charter referring to enemy "States".

(iii) Strengthening of the role of the Commission on Human Rights.

(iv) Election of non-permanent members of the Security Council with "due regard" paid to their "contribution to the maintenance of international peace and security." [24]

The Special Committee on the Charter of the U.N. and on the strengthening of the role of the organization held its session from 27 February to 24th March, 1978 in New York. It received 22 working papers from Governments suggesting possible reforms in the peaceful settlement of disputes and other areas of concern to the Committee. Although the Committee was unable to complete its work, it made progress in fulfilling its mandate.[25]

Enemy clause certain to be deleted

There seems to be general agreement that enemy clause appearing in Articles 53, 77 and Article 107 has become redundant. Therefore, whenever the U.N. charter is amended, it is certain that for deleting enemy clause these articles will be suitably amended. This clause does not identify any country but Article 53 says, the term enemy state "applies to any state which during the world war II has been an enemy of any signatory of the present charter". Since Japan and Germany are the members of the U.N. this clause has become obsolete. Sooner this clause is deleted the better.

Enlargement of the Security Council.—The end of cold war has witnessed a dramatic increase in Security Council activities and this new reality raised questions about its "representative" character. A number of State representatives pleaded for the enlargement of the Council in the 1993 session of the Special Committee of the U.N. and on the Strengthening of the Role of the Organization.

N.B.—For this, please see also Chapter on "The Security Council."

Proposals on peaceful settlement of Disputes.—Among the proposals listed were those suggesting, preparation of a General Assembly declaration on the peaceful settlement of disputes as a first step towards a treaty on the subject, establishment of a permanent Assembly Commission to fulfil the functions of mediation, good offices and conciliation, preparation of a practical United Nations manual on the subject, non-use by the Security Council of the veto in the matters of the peaceful settlement of disputes; establishment by the Council of a Standing Committee of fact finding and mediation experts; greater use by the Council of Committees and a more active role by the Council, including review of situations of potential crisis, establishment and utilization of regional machinery in settlement of disputes; and greater use of the International Court of Justice to settle disputes and as a source of law.[26]

The working papers submitted on the maintenance of international peace and security proposed additions to Charter Article 2 regarding the principles of the U.N. and enlargement of the membership of the U.N. The working paper submitted on the importance of diplomatic negotiations called for establishment of a permanent commission of the Assembly to fulfil the functions of mediation, good offices and conciliation.[27]

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[24] U.N. Monthly Chronicle, Vol. XIV No. 4 (April, 1977), p. 52.

[25] U.N. Monthly Chronicle, Vol XV No. 4 (April, 1978), p. 70.

[26] Ibid. at pp. 70-71.

The Special Committee on the Charter of the U.N. and on the strengthening of the Role of the organization concluded its 1983 annual session on 6 May, 1983 by expressing disappointment at its failure to make substantial progress. The Committee's inability to reach agreement on substantive items on its agenda was contrasted with the success of its previous session (*i.e.* 1982 session) when it completed work on the Manila Declaration on the Settlement of International Disputes. The General Assembly, at its 1982 session, approved the Manila Declaration without a vote and requested the committee to accord priority regarding the maintenance of international peace and security to continue its work on the peaceful settlement of disputes, and to consider proposals on the rationalization of the existing procedures of the United Nations.[28]

Besides the above suggestions many other suggestions for amending the Charter have been made by authors and jurists. These include the clear definition of the term 'domestic jurisdiction': some restrictions on the exercise of veto by permanent members of the Security Council; strengthening the legislative activities of the General Assembly; amendment of Article 99 or addition of Article 99 (A) to empower the Secretary-General to bring to the attention of the Security Council matters relating to human rights, expanding and strengthening of the role of the International Court of Justice, etc. But it may be noted that none of the proposed amendments can be made unless all the permanent members decide to cast their affirmative votes for it. However, some suggestions such as renaming Trusteeship Council as "Human Rights and Trusteeship Council," deletion of the term "enemy States" from Article concerned and breaking of ECOSOC into Economic Council and Social as two principal organs and abolishing Trusteeship Council etc. can be incorporated into the Charter because even the permanent members can be pursuaded not to oppose them. In any case, in the present circumstances, general review of the Charter is neither desirable nor necessary. It has been rightly remarked : "In conclusion, it does not appear that a good case has been made out for undertaking a general review of the Charter at the present time. The failures of the United Nations cannot be attributed to any shortcomings within the Charter itself. It is primarily the non-observance of the principles enshrined in the Charter that has undermined the effectiveness of the United Nations. The Charter itself has revealed a remarkable degree of flexibility in accommodating new situations that had not been foreseen by its founding fathers. There is, however, ample room to carry on the struggle for a more equitable international politico-economic order within the framework of the present Charter. The special committee could play an important role in this regard." [29]

The peaceful settlement of disputes and strengthening of the U.N. role in international peace and security were among the issues discussed at the 1993 session of the Special Committee on the Charter of the U.N. and on the Strengthening of the Role of the Organization. The session was held at Newyork from 1st to 19th March, 1993.

India and the General Review of the United Nations Charter.—Since the inception of the United Nations Charter, time and again, views have been expressed for and against the general review of the United Nations Charter. It is pointed out that the development of nuclear weapons and the inter-continental missile have raised new problems upsetting the traditional concepts of peace and security upon which the United Nations was built. There are proposals for abolition or limitation of the use of veto. It may be noted here that "None of the permanent members, particularly the United States and the Soviet Union, would ever agree to a situation whereby the United Nations could undertake sanctions without their consent. Any amendment of the Charter which would permit this would be immediately killed in the Security Council, a fact which should be obvious." [30] According to the Soviet view, "The majority rule can not be applied to the relations between different social systems. Such relations are inevitably to be based on mutual respect for the sovereign equality of nations, peaceful negotiation, and reasonable compromise." [31]

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[27] U.N. Monthly Chronicle, Vol XV No. 4 (April, 1978), p. 71.

[28] U.N. Chronicle, Vol. XX, (No. 7 of 1983), p. 101.

[29] P.C. Rao and Mrs. R. Lakshmanan, "What is Wrong with the United Nations Charter, I.J.I.L., Vol. 16 (1976), p. 500 at p. 516.

[30] Stephen S. Goodspeed, The Nations and Function of International Organisation, Second Edition, p. 655.

There are other proposals regarding the modification of Article 37, amendment of provision relating to domestic jurisdiction (Article 27), expanding mechanisms for the maintenance of the peace and security, etc. Then there are proposals for world government whether limited in scope, calling for the creation of institutions of a super-national character.[32] There are some who favour the revision of the United Nations Charter in such a way as to transform that organisation into a United States of world. On the other hand, there are others who would leave the United Nations more or less as it is but would like many of its members join in establishing separate federal structure with real power.[33]

There have been some amendments (regarding the increase in number of members of the Security Council and the Economic and Social Council) of the United Nations Charter but neither is the climate conducive for any wholesale revision on general review of the Charter nor is it possible. India is against the general review of United Nations Charter. Thus "………India retained its constitutional conservatism in the sense that it did not formally initiate resolutions seeking extra constitutional changes." [34] India made it clear at the legal committees of the United Nations (which had before it a draft resolution tabled by the Phillipines and about 25 other nations for the establishment of an *'ad hoc'* committee to consider proposals and suggestions regarding review of the Charter) that it was against the general review of the United Nations Charter but was prepared to consider amendments to make the United Nations "more effective and meaningful." [35] While explaining India's view, Mr Rikhi Jaipal, India's permanent representative said that in India's judgment what was needed was not a general review of the Charter but adherence to its provisions by all member States without exception. He added, "The time is not yet ripe and the International climate is not yet right for a revision of the Charter." [36] Referring to the veto issue he further added, "I wonder whether the veto system is any more discriminatory than the system of voting which bears no relationship to the size and population of member States or to other such factors……… The Charter is based on certain principles and certain rights which if applied or exercised with good sense and judgment can strengthen the United Nations but which if applied indiscriminately and without regard to consequences can only lead to a situation in which the United Nations will be as strong as its weakest link." [37] As regards the veto provisions, all the permanent members excepting China, were in favour of continuing the present Charter without change.

Thus wholesale revision of the United Nations Charter is neither possible nor necessary. In the view of Miss Gutteridge, "……… the evolution of the law of the United Nations is possible without amendment of the Charter." [38] Harlan Cleaveland has also written, "The United Nations system as a whole has opportunities to serve mankind which are limited only by the capacity of its members to work together and keep on working together." [39]

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[31] Victor P. Karpov, "Soviet Concept of Peaceful Co-existence and its Implication from International Law" in the Soviet Impact on International Law, Edited by Hans W. Baade (New York, 1965), p. 14 at p. 17.

[32] For a most ambitious plan in this respect see Grenville, Clark and Louis Sohn, World Peace. Through World Law (Cambridge, Mass : Harvard University Press, 1960).

[33] See Norman D. Palmer and Howard C. Perkins, International Relations—The World Community in Transition, third Edition (1970), pp. 761-762.

[34] Swadesh Rana, "The Changing of Indian Diplomacy at the U.N.", Int. Orgn. (1970) p. 48 at p. 57.

[35] National Herald, 7th December, 1974.

[36] Ibid.

[37] Ibid.

[38] J.A.C. Gutteridge, The United Nations in a Changing World (1960), p. 3.

[39] Harlan Cleaveland, "The Evolution of Rising Responsibility", Int. Org., Vol. XIX No. 3 (1965), p. 828.

CHAPTER 47

EVALUATION OF THE WORK OF THE UNITED NATIONS*

Initial hopes.—"The San Francisco Conference was concerned as an act of faith in the future and remorse for the past."[1] The devastating effects of the Second World War had compelled the nations of the world to establish an Organisation which might be able to establish peace and security in the world and might 'save the succeeding generations from the scourge of war'. The great powers of the world, the prominent among them being America, Britain, Russia, France and China performed commendable work and co-operated with each other to end the war. This mutual co-operation among the great powers created hopes among the nations of the world that in future also they would co-operate and would be able to maintain peace and security in the world. In fact, this was the fundamental assumption on which the whole structure of peace and security provided under the Charter is based. It was expected that these great powers would continue to co-operate even after the war. Consequently these great powers were made the permanent members of the Security Council and were also given veto power so that they could perform their functions effectively.

The Role of Great Powers.—"It did not take long for San Francisco hopes of great powers, unanimity to fade." [2] Immediately after the establishment of the United Nations the conflicts and bickerings among the great powers started. The conflict over the issue of Germany, conflict over Guerilla war in Greece, difference on the question of Korea, etc., were the glaring examples of such conflicts among the great powers. The conflict among the great powers and the repeated exercise of veto proved to be detrimental for the effective functioning of the Security Council. The Security Council could not take any action in a case where the interest of any of the permanent members was involved, not only this, the Security Council could not also take any action in regard to any member-State of the United Nations if that State could muster or get the support or blessings of any of the permanent members of the Security Council. Consequently, the Security Council became unable to perform its primary responsibility of the maintenance of peace and security which the Charter entrusted upon it.

In the Gulf War (1991), effective action could be taken due to the end of cold war between the U. S. and the U. S. S. R. The Gulf War (1991), however, shows that the balance of power which more or less continued for 45 years has now been disturned. While on the one hand, America has emerged as the most powerful nation, due to internal and economic crisis in the Soviet Union, Soviet Union failed to maintain its power and position as a super power. In fact, throughout the Gulf War (1991) the Security Council functioned under the dictates of the U. S. and the U. S. S. R. remained a mere spectator. After the formal cease-fire of the Gulf War, entry of U. S. forces in Iraqi areas through Turkish boundaries, to establish camps for Kurdish people and to provide them military protection etc., were the acts which not only deserved condemnation but also constituted violation of Iraqi political independence and Sovereignty. The position of Soviet Union declined so much so that it could not do anything except remaining a silent spectator. Subsequently the breaking up of the Soviet Union confirmed that U. S. is now the sole super power.

Maintenance of Peace and Security.—[3]**This has been critically discussed earlier in Chapters on "The General Assembly" and "The Security Council", "The

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* See also for P.C.S. (1970), p. No. 3; I.A.S. (1962), p. No. 11.

[1] Lawrence S. Finkelstein, "The United Nations. Then and now." Int. Organ., Vol. XII No. 3 (Summer 1965), p. 367 at 369.

[2] Ibid., at p. 382.

[3] See also S. K. Kapoor, "The Maintenance of International Peace and Security," Lawyer (November, 1972), p. 170.

** See also for P.C.S. (1988), Q. 2 (a). For answer see Chapters on "General Assembly" and "Security Council."

Secretary-General"and "Regional Arrangements". Besides this, in this edition, a new Chapter entitled, "Maintenance of International Peace and Security-Preventive Diplomacy, Peace-making. Peace-keeping and Post-Conflict Peace Building" has been added for the benefit of readers. Therefore, a detailed discussion is not proposed to be made here, only a brief reference of the contribution of the U. N. will be made here.

Sometimes it is said that the U. N. has made no contribution for the maintenance of Peace and Security. This statement is far from true. It is true that because of the mutual conflicts of great powers, the Security Council has not been able to perform properly its primary responsibility for the maintenance of international peace and security but at the same time it cannot be denied that in a number of conflicts the Security Council has contributed to the maintenance or restoration of international peace and security. Among such conflicts, conflicts of Korea (1950), Palestine, Suez-crisis (1956), Congo (1960-61) and Middle-East (1973) deserve a special mention. It must, however, be added that U. N. has been successful only in stopping the hostilities or armed conflict. It has failed and failed miserably in finding out the political solution of the problem.[4] Yet it deserves the credit for having prevented the escalation of conflicts into world wars.[5] It has been aptly remarked, "The United Nations was created, first and foremost, as an instrument for ensuring world peace and security. It has, indeed, played a significant role in maintaining world peace, principally through the consultative procedures of the Security Council for the Peaceful Settlement of Disputes and, in some specific instances, the deployment of U. N. peace-keeping forces." [6] It may also be noted that in appreciation of the significant role played by U. N. Peace-Keeping Forces for world peace, they have been awarded Nobel Peace Prize for the year 1988.

Regional Arrangements[7].—Due to the failure of the United Nations to perform its chief objective of maintaining peace and security in the world, the nations of the world were compelled to enter into regional arrangements such as North Atlantic Treaty Organisation (NATO), South East Atlantic Treaty Organisation (SEATO), Middle East Defence Organisation (MEDO), Central East North Treaty Organisation (CENTO), "The crippling of the United Nations intended peace and security functions as a result of great powers conflict led to search for alternative security arrangements." [8] "The framers of the Charter intended to establish a flexible framework within which existing and future regional agencies and the United Nations might function together harmoniously, the one extending support and encouragement to the other in their mutual complimentary tasks." [9] However it may be noted that due to the confict among the great powers the regional agencies not only evaded the performance of their function of assisting the Security Council, but also evaded the control and supervision of the Security Council. It would not be wrong to say that some of the regional agencies are little more than the old fashioned military alliances which foment great power rivalries, weaken the effectiveness of the United Nations and undermine the principle of collective security. Thus "Even apart from veto the Security Council was affected from its beginning by some disabilities, some open and some concealed, threatening its paralysis as an executive organ of international community." One of the disabilities was "the liberty of action of members to enter into regional arrangements under Articles 52-54." [10]

Place of General Assembly.—After the establishment of the United Nations, the most important constitutional change that took place was the constant expansion of the powers and functions of the General Assembly. It assumed a much more important place than the Charter intended it to have. In this connection, the most remarkable event was the passing of the Uniting for Peace Resolution, on November 3, 1950. It was the fundamental assumption of the framers of the Charter that there could be no alternative to the unity and co-operation of the great powers so far as the maintenance of International peace and security was concerned. Their assumption proved to be correct. In the words of a prominent jurist, "the original expectation was correct that there could be no substitute for great powers co-operation, in the peace and security field." Consequently, despite the fact that the Uniting for Peace Resolution has conferred some important powers upon the General Assembly in respect of maintenance of peace and security, it cannot be an adequate substitute for the co-operation of great powers. The Congo experience finally proved that even after the successful functioning of peace and security measures under the General Assembly, co-operation among major powers (permanent members) is necessary. In Congo, the United Nations undoubtedly performed a very commendable work, but by doing so it plunged itself into an unprecedented financial crisis because of the huge expenses incurred in sending the forces first to Egypt (Suez-crisis) then finally to Congo. In the present unipolar world when the U. S. has emerged as the sole super power, the demand for greater democratisation the U. N. is gathering momentum. There is every likelihood that the General Assembly, which is the most representative principal organ of the U. N., will occupy a place of prominence and continue to expand its role and significance. The General Assembly has become nearly universal for it has now the representation of as many as 192 (one hundred ninety-two) member states of the United Nations.

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[4] See also Quincy Wright, "The Foundations for a Universal International System" in Asian States and the Development of Universal International Law, Edited by R. P. Anand (1972), p. 167.

[5] See Nagendra Singh, Recent Trends in the Development of International Law and Organisation Promoting Inter-State Co-operative and World Peace (1969), p. 52.

[6] Maurice Strong, "The United Nations in an Inter-dependent World", International Affairs (Moscow, January 1989), p. 11.

[7] For a little more detailed study see Chapter on "Regionalism".

[8] Finkelstein, note 1, at p. 382.

[9] Francis O. Wilcox, "Regionalism and the United Nations", Int. Org., XIX, (1965) p. 789 at p. 792.

[10] Julius Stone, Legal Control of International Conflicts, p. 243.

The Role of the Secretary-General.—In consequences of the mutual conflict and non-cooperation among the great powers the powers and functions of the Secretary-General also expanded. The Uniting for Peace Resolution, 1950, conferred upon him important powers in respect of peace and security. Under this resolution Dag Hammarskjold, the second Secretary-General of the United Nations, performed commendable work in respect of peace and security first in Egypt (Suez-crisis of 1956) and then in Congo (1960-61). But as pointed out earlier, the Congo experience made it clear for once and all that even the Secretary-General could not be a substitute for the co-operation among the major powers. As pointed out by a jurist, "It (Secretary-Generalship) was always an unsatisfactory substitute for arrangements contemplated by the Charter."

However, it should not be concluded from the above discussion that the United Nations has proved to be a complete failure and that it has made no contribution for the maintenance of peace and security. In fact, there are several examples wherein the United Nations has performed commendable functions even in the sphere of maintaining world peace. In this connection, the case of Korea (1950), Palestine, Suez (1956), Congo (1961) and Indo-Pakistan Conflict (1965) and, above all, Gulf War (1991) deserve special mention. It must, however, be conceded that excepting the case of Congo, the United Nations could be successful only in stopping the armed conflict for a temporary period. It failed miserably to achieve a political solution of the problem. In case of Gulf War (1991), however, the U. N. was completely successful in restoring political independence and integrity of Kuwait. This has therefore become the most successful operation ever made by the United Nations.

Besides its contribution for the maintenance of peace and security, the United Nations has made commendable contributions in the following spheres :

(1) *Colonialism.*—The United Nations has performed commendable functions for ending colonialism. Most of the States which were the colonies of some major powers have now become independent and are at present the members of United Nations. There are, however, still 18 non-self-governing territories. On 25th November, 1992 the General Assembly reaffirmed its declaration of the decade beginning in 1990 as the International Decade for the Eradication of Colonialism. Thus "eradication of colonialism is one of the priorities of the organization for the decade beginning in 1990." Complete decolonization by 2000 is being pursued by the U. N.

(2) *Human Rights and Fundamental Freedoms*[11].—The functions performed by the United Nations in the field of human rights and fundamental freedoms have been really

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[11] For detailed study see Chapter on "Human Rights".

praise-worthy. The most glaring example of such functions is the adoption of the 'Universal Declaration of Human Rights, 1948 and International Bill on Human Rights'.

Economic and Social Field[12].—The General Assembly of United Nations, the Economic and Social Council and the specialised agencies of the United Nations have performed important functions in the economic and social fields. Even if we leave aside the functions of the United Nations in other spheres, it has become an indispensible organisation because of the functions it has performed in this sphere.

Thus "whether as symbol or as instrument it would seem to be clear that it has been much of the former than the latter and the United Nations continues to justify its existence in many fields of activity for the promotion of human welfare and a spirit of community, however short it has come of the role once envisaged for it as a legal authority sufficiently adequate for keeping the peace." [13]

Conclusion.—As rightly written by an author ".........the United Nations continues to justify its existence in many fields of activity for the promotion of human welfare and of a spirit of community, however short, it has come of the role once envisaged for it as a legal authority sufficiently adequate for keeping the peace." [14] It cannot be denied that the major defects and deficiencies of the U. N. conflicts among the great powers and lack of their mutual co-operation have not yet been overcome. As pointed by Finkelstein, "The Organisation has never been able to overcome the limitations which result from the lack of great power consensus." [15] It cannot also be denied that in the sphere of maintaining world peace, there is a crisis before the United Nations which has not so far been satisfactorily resolved. But if we evaluate the functions of the United Nations as a whole, we cannot but conclude that it has proved its worth and it is difficult to imagine a world without it. To quote Finkelstein again "The U.N.......demonstrated its usefulness to point where it would be difficult to see a world which did not have a U. N." [16] Professor L. M. Goodrich has also remarked, "The United Nations has shown a remarkable capacity for a development within the limits of the existing Charter. There is no reason to believe that possibilities of future development have been exhausted." [17] Thus we see that despite the failures, weaknesses and many defects, the United Nations survives and it has become indispensible and it would not be wrong to say that it has become an Organisation of inescapable importance. As pointed out by Secretary-General of the U. N. Javier Perez De Cuellar, "The world is changing so quickly today that change itself has become a subject for study. The nations and peoples of the world are interdependent and the waves of change send out their ripples to every corner of the earth. In this situation, the United Nations remains the only international organization capable of coordinating global perspectives, and the United Nation's Charter remains the most universally accepted document for setting the legal framework for contemporary international affairs. Despite its shortcomings, the United Nations is indispensable." [18] Further, "Even more today than when it was created, the

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[12] For a detailed and critical study see Chapter on "International Economic Cooperation and the Evaluation of a New International Economic Order."

[13] Robert R. Wilson, "The United Nations as Symbol and as Instrument", AJIL, Vol. 64 (1970), p. 139 at p. 143; See also R. S. Pathak, "The Functioning of International Law in the International System", I.J.I.L., Vol. 24 (1984) p. 1 at p. 9.

[14] Ibid.

[15] Lawrence S. Finkelstein, "The U. N. : Then and Now" Int. Orgn., Vol.XIX, (1965) p. 367 at p. 390.

[16] Ibid.

[17] In the words of another eminent author, "Newspaper reports from the United Nations too often emphasize the difficulties and the disagreements, but behind them there is a story of solid accomplishments......While much remains to be done, especially with respect to peace keeping, one may conclude that the U. N. has found it possible to adopt promptly to the new requirements of the technological age. It has been able to maintain a balance between on the one hand, the needs for stability and for preserving the integrity of its Charter, and on the other hand, the requirements of innovative change in the U. N.'s own functioning in modernizing international law through new law-creating processes.' Louis B. John, "The Development of the Charter of the U. N. : the Present State" in the Present State of International Law and other Essays (1973), p. 39 at p. 59.

[18] "The Role of United Nations in World Affairs", International Affairs (Moscow, October 1988), p. 88.

United Nations continues to reflect and enshrine the hopes and aspirations of the entire human family as well as the imperatives for its survival and well being." [19]

The work of the U. N. is constantly increasing. If all the paper work produced by the U. N. Organisation in the year 1980 was put together it would stretch 270,000 km and in two years it would reach the moon. But the present financial crisis will greatly upset U. N. efforts in different fields. This is evident from the fact that the present U. N. Secretary-General, Mr. Boutras Boutras Ghali has already done away with twelve U. N. departments and has assigned their work to other existing departments.

In the field of maintenance of international peace and security the vacation of Iraqi aggression in Kuwait leading to the eventual freedom of Kuwait is indeed a great achievement. But the Gulf War (1991) has brought about unprecedented situation. The United Nations seems to be at the crossroads in more senses than one. The end of cold war as a result of several disarmament agreements between the U. S. and the U. S. S. R. was a welcome change. But with the collapse of the Soviet Union, the U. N. became entirely different than it was for several decades. During the Gulf War (1991) and afterwards the U. N. became a new important instrument of American policy. As pointed out by Ingvar Carlsson, Julius Nyerere in their study, "New world order by reshaping U.N.", "The transformation of relations between East and West has ended the cold war, freeing mind and resources that for so long were bound by sterile confrontation. Though the openings presented by this new situation are real, the process is fraught with danger, especially regarding the extreme difficulties facing the Soviet transformation." They have rightly suggested :

"World leaders must act now to build a new system for peace and security or the 1990s may become a decade of dangerous instability. Whenever International law is broken resolute action must be taken by the United Nations. Fears must be allayed that double standards played a role in making possible international response to the Iraqi invasion of Kuwait. And we must make sure that military culture is not given a new lease on life. A system of security must be built on principles of sovereignty and universality, not on the military might of individual powers.

We do need a new world order, but one founded on the vision of belonging to one global neighbourhood. It should be based on a sense of common responsibility, in which the notion of security is expanded to include economic and ecological, as well as military dimensions. Such an order will be far better suited to the interdependent realities of the next century than the old system of competitive and confrontational power blocs."

In the study "Tomorrow's United Nations", the two U. N. experts Brian Unquhart and Erskine Childers, pointed out, "apart from conflict resolution, the future concept of security has to embrace many global problems and challenges including the widening gulf between the rich and poor—"the afluent North and much of a poverty-stricken and increasingly South."

Pointing out the difference between the 1990s and the world of 1945 when the U.N. system was set up, they added :

"We live in a period when Governments, the basic units of the U. N. system, have less and less control over the forces that are shaping the future. Nationalism and sovereignty are increasingly problematic concepts. Their relationship to international responsibility and to the realities and hard facts of contemporary life are inevitably changing."

According to the study main areas of responsibilities for the U. N. system include conflict preventing diplomacy, peace-keeping settlement of disputes, arms reduction, strategies to overcome mass poverty, environment and promotion of human rights.

The study was sponsored jointly by the Ford Foundation (U.S.A.) and the Dag Hammarskjold Foundation (Sweden) and the authors consulted eminent international

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19. Maurice Strong note 6, p.21.

persons and experts including Dr. Shridath Ramphal, Dr. I. G. Patel, Mr. Robert McNamara, Mr. Julius Nyerere, Mr. James Callaghan, Mr. Maurice Strong and Lestern Brown.

Thus we see that though the U. N. is now free from tensions which arose from the East-West relationship in its first forty years, it still faces "formidable problems for the world community in the vast complex of socio-economic and environmental issues on which the future conditions of life on the planet may well depend".

On 4th April, 2000, U.N. Secretary General Kofi Annan called for concerted efforts to make globalisation work for all. He unveiled a "forward looking" report outlining the main challenges facing the United Nations in the 21st century and suggesting an action plan to address those. The report entitled "we the peoples; the Role of the United Nations in the 21st century" was prepared ahead of the Millennium Summit of the U.N. in September 2000. Reminding the members that the U.N. was founded on the theme of "we the peoples", the Secretary General presented his Millennium Report at a plenary meeting of the General Assembly. In his report he said :

"We are at the service of the world's people, and we must listen to them. They are telling us that our past achievements are not enough. They are telling us we must do more and do it better". As regards poverty, he said : "It shows that the world has been far too tolerant of gross injustice and human misery, and it argues that we have to change that".

Last year the U.N. celebrated its 50th anniversary. That in itself is a great achievement. But one of the most disturbing thing that cast its shadow on the celebrations was its acute financial crisis. Instead of expanding its activities financial constraints have compelled it to curtail its functions in different fields. Though the U.N. is still struggling to solve formidable problems and finds itself surrounded by strifes and confrontations and is immersed in never ceasing financial crises, yet the U.N. is plodding its way slowly but steadily and looks like a light house and a ray of hope in a sea stirred by ever threatening storms. Indeed the United Nations is "the best hope of all humanity".

As pointed out by the former Chinese Vice-Premier Qian Qichen, "The world's hope lies in an effective, united and powerful U.N." He added that all nations should work to build a safe and stable international environment by abiding by the United Nations Charter and the five principles of co-existence. Further as an organisation with the most recognized authority, the United Nations has scored acknowledged achievements in safeguarding regional and world peace as well as promoting the progress and development of mankind. All is good so far as it goes. But the American wilfulness and disregard of norms and rules is proving a formidable obstruction. A glaring example of this is American invasion of Iraq in March, 2003 without any sort of authorization of the U.N. This undermines the authority of the U.N. and raises strong doubts about the utility and significance of the U.N.

The recent conflict between North Korea and America, South Korea and Japan also shows that the Security Council has been a helpless spectator. Lack of unanimity among the permanent members is the reason for the ineffectiveness and failure of the Security Council.

The present situation in the world is very grim and alarming. On 4th September, 2017, North Korea successfully tested Hydrogen bomb thus acclerating the nuclear arms race and aggravating the conflict with South Korea and America. On the other hand, United States of America retaliated by saying that it does not rule out attacking it. Earlier North Korea had tested Inter continental ballastic missile. Thus North Korea is fully prepared and equipped to attack. If such an eventuality takes place the whole world will be endangered and huge devastation may be caused. In any case the situation is grim and most alarming. The Security Council being responsible for the maintenance of International peace and security ought to monitor and prevent the breach of peace. But the Security Council, as it is, is crippled and not at all capable of fulfilling its responsibility.

PART V

THE LAWS OF WAR

CHAPTER 48

SETTLEMENT OF INTERNATIONAL DISPUTES*

It has always been the objective of international law to develop means and methods through which the disputes among the nations may be resolved through peaceful means and on the basis of justice. In this connection, the rules of international law are partly in the form of customs and partly in the form of law-making treaties. The two Hague Conferences of 1899 and 1907, the covenant of the League of Nations and the United Nations Charter deserve special mention in this connection. A dispute has been defined as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons." [1] In an international dispute, the dispute must be between States. In a case of a wrong done to a national of one State, it does not become an international dispute until it is taken up by the Government of the State of the injured national. Secondly, the dispute must lead to some action by the aggrieved State. Thirdly, the dispute must relate to a reasonably well-defined subject-matter.[2] A distinction is made between legal and political disputes. But the distinction is difficult to apply in practice to actual disputes in the world, the factors in situation and the influences on governments are so complicated that most disputes have legal and political elements.[3]

The methods of the settlement of international disputes may be divided into two main categories : (1) pacific means of settlement; and (2) compulsive or forcible means of settlement.

Pacific means of settlement of international disputes**

Following are the pacific means of settlement of international disputes :

(1) Arbitration; (2) Judicial settlement; (3) Negotiations; (4) Good offices; (5) Mediation; (6) Conciliation; (7) Enquiry; and (8) Settlement of international disputes under the auspices of United Nations Organisation.

We will now discuss critically each of these methods one by one.

(1) *Arbitration.****—By arbitration we mean the method through which a dispute is referred to certain persons called arbitrators. Their decision is known as the award. These arbitrators are selected by the parties to the dispute. Although they are selected or appointed on the basis of the consent of the parties to a dispute, their decision or award is binding upon the parties. Article 15 of the Hague Convention of 1899 provides : "International arbitration has for its object the settlement of differences between States by Judges of their own choice and on the basis of a respect for law." This definition emphasises two elements—(i) consent of parties to arbitration; and (ii) settlement on the basis of respect of law.[4]

The history of settlement of international disputes through arbitration may be traced from very ancient times. But in modern times its history dates back from Jay treaty of

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* See also for I.A.S. (1973), Q. No. 5.

[1] Mavrommatis Palestine Concessions (Preliminary Objections) case P.C.I.J., Series A. No. 2, p. 11.

[2] International Disputes—The Legal Aspect (Report of a Study Group of the David Davies Memorial Institute of International Studies, (1972), pp. 57-58.

[3] Ibid, at p. 58

** See also for I.A.S. (1957), Q. No. 9; P.C.S. (1977) ; UPPCS (2001) Q. 10(a) ; UPPCS (2002) Q. 8(b) ; UPPCS (2007) Q. 10(a).

*** See also for I.A.S. (1972), Q. No. 8 (b); I.A.S. (1969), Q. No. 7 (a); I.A.S. (1968), Q. No. 11 (c); I.A.S. (1958), Q. No. 6 (b); P.C.S. (1966), Q. No. 7 (b); P.C.S. (1978), Q. No. 5; P.C.S. (1984), Q. 4—For answer see also forcible means discussed in the Chapter ; P.C.S. (1987), Q. 7 (a) ; C.S.E. (1994) Q. 5(d) ; UPPCS (2003) Q. 8(b) ; IAS (2006) Q. 8(b).

[4] Hazel Fox, "Arbitration", Note 2, pp. 101-102.

1794 between England and America. The next important event in the development of settlement of international disputes through arbitration was *Alabama Claims Arbitration, 1872*. In this case, America had claimed compensation from Britain on the ground that it had violated the laws of neutrality. The arbitrators gave their award in favour of America and held that Britain was lible to pay a compensation. As remarked by Judge Hudson, "The success of Alabama Claims Arbitration stimulated a remarkable activity in the field of international law decisions." [5] The next important event was the adoption of Hague Convention of 1899, wherein international law relating to arbitration was codified. Yet another important result of the Hague Conference of 1899 was the establishment of the Permanent Court of Arbitration. This work was completed by the Hague Conference of 1907.

Permanent Court of Arbitration.*—It comprises of three institutions : (i) Panel of Experts; (ii) Administrative Council; and (iii) International Bureau. Each signatory power selects four persons competent in questions of international law and of highest moral reputation. They are inscribed in a list called panel of experts and the aggrieved States select five experts from this panel to constitute temporary arbitration Court. Situated in Hague, the Administrative Council comprises of the diplomatic representatives of the parties to the convention. The International Bureau comprising of a General Secretary and certain other employees is also situated in Hague. States wishing to avail the services of the Court are helped by this office through correspondence etc., and it also serves as a mediator for the States who want to make use of the court. Some of the more important decisions or awards by the court are *North Atlantic Fisheries case (1910), Muscat Dhows case (1905), Savarkar's case (1911), The Island of Palmas case (1928), Canberro's case (1912), Russian Indemnity case (1912)*, and Pious Fund case (1920). It may be noted that though the Permanent Court of Arbitration still exists and is situated in Hague yet states do not make frequent use of this Court. Despite attempts in the General Act for the Pacific Settlement of International Disputes (1928) to rationalise and systematize further the recourse to arbitration, the Court has fallen into disuse.

"The Permanent Court of Arbitration was relative success and in the early years of this century influenced a more frequent recourse to arbitration as a method of settling international disputes while it may be said to have moulded the modern law and practice of arbitration.[6]

"............The Permanent Court of Arbitration was relative success, and in the sense is neither a court nor permanent. As pointed out by Fawcett. "...........the 'court' is permanent only in the sense that it has a registry, the International Bureau, which has its seat at the Hague, keeps the archives and acts as an intermediary between States desiring to use the court." [7] Instead of being a court, it comprises of a panel of names from which arbitrators for temporary arbitral tribunals are chosen. As stated by P. E. Corbett, "though it never sits and has no jurisdiction this body of jurists rejoices in the name, 'Permanent Court of Arbitration." [8]

Some Arbitration Courts were established after the first world war. In the modern times also the importance of the settlement of the international disputes through arbitration has not lessened. A glaring recent example is that of Kutch Arbitration of 1968 for the settlement of dispute between India and Pakistan. However, "Arbitration is essentially a consensual procedure. States cannot be compelled to arbitrate unless they agree to do so either generally and in advance or *ad hoc* in regard to a specific dispute. Their consent even governs the nature of tribunal established.[9]

It is one of the recognized principles of international law that the award given by the arbitrators is binding. The International Court of Justice has also reaffirmed this principle

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5. International Tribunal, 1944), p. 5.
* See also for P.C.S. (1966), Q. No. 5.
6. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 488.
7. J. E. S. Fawcett, The Law of Nations (1968), p. 116.
8. P. E. Corbett, The Growth of World Law, (1971), p. 35.
9. Starke, note 6, at p. 436.

in *Arbitral Award Made by the King of Spain on 23 December, 1906 (Honduras* v. *Nicaragua).*[10] The facts of this case are as follows :

Honduras and Nicaragua signed a convention on 7 October, 1894 for the demarcation of the limits between the countries. One of the articles of the convention provided that, in certain circumstances, any points of the boundary line which were left unsettled should be submitted to the decision of the Government of Spain. In October 1904, the King of Spain was requested to determine that part of the frontier line on which the Mixed Boundary Commission appointed by the two countries had been unable to reach agreement. The King gave his arbitral award on 23 December, 1906. The validity of the award was contested by Nicaragua. Both the countries agreed in July 1957 to refer the matter to the International Court of Justice for its decision. Honduras claimed that failure by Nicaragua to give effect to the arbitral award constituted a breach of an international obligation and requested the court to declare that Nicaragua was under an obligation to give effect to the award.........After going through the evidence produced, the Court found that Nicaragua had in fact freely accepted the designation of the King of Spain as arbitrator, had fully participated in the arbitral proceedings, and had thereafter accepted the award. The International Court of Justice, therefore, held that the award was binding and that Nicaragua was under an obligation to give effect to it.

A brief reference of the Kutch Award will not be out of place here :

The Kutch Arbitration Award (1968)[11].—The Rann of Kutch is a place on the border of Gujarat and West Pakistan. There was a dispute between India and Pakistan in regard to some land in the Rann of Kutch. Pakistan claimed 3,500 sq. miles of the land. On the issue of the said land, there took place an armed conflict in 1965. After the cease-fire both India and Pakistan agreed to refer this matter to arbitration. One arbitrator, Ales Bebber of Yugoslavia, was nominated by India; the other arbitrator, Nasrollah Entezam of Iran, was nominated by Pakistan, and the third was to be nominated with the mutual agreement of both States. Since India and Pakistan could not agree upon a third arbitrator, on the request of both the countries Judge Gunnar Lagergen the Chairman of the Arbitral Court was nominated by the Secretary-General of the United Nations. The Arbitral Court gave its award on 19th February, 1968. According to the award, 320 sq. miles (*i.e.,* about 10% of the Pakistani claims) of the land belonged to Pakistan and the rest belonged to India.

This award has been severely criticised and termed as 'political' and 'partial'.[12] Since the arbitrator nominated by India gave his decision in favour of India and the arbitrator nominated by Pakistan, gave his decision in favour of Pakistan, the decision of Chairman Gunnar was to be decisive. In his decision, Judge Gunnar wrote ".........It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory which is wholly surrounded by Pakistan territory also be declared as such." [13] This is the passage because of which the award has been termed 'political'. But as pointed out by R. P. Anand, ".........the primary object in settling boundary disputes is and should be to achieve stability and finality......But the very nature of things, it may be surmised, settlement of any international dispute, through whatever means is bound to have political overtones and political repercussions. But that does not necessarily make it a political settlement." [14] As pointed out earlier, the award of the arbitration court is binding on the parties. Consequently, India accepted and agreed to implement it.

An important case relating to the implementation of the Kutch Award is *Maghanbhai Ishwarbhai & Others* v. *Union of India.*[15] Through the exchange of letters India and

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[10] Judgment of 18, November, 1960.

[11] For detailed and critical study see : R. P. Anand, Studies in International Adjudication, (1969), pp. 218-49; J. Gilliswater, "The Rann of Kutch Arbitration", A.J.I.I., Vol. 65 (1971), p. 346; Mukund G. Untawala, "The Kutch-Sind Dispute. A case Study in International Arbitration", I.C.L.Q., Vol. 23, Part 4 (October, 1974), pp. 818-839.

[12] See R. P. Anand, note 11, at pp. 218-19.

[13] The Kutch Award, p. 153.

[14] R. P. Anand, note 11 at pp. 238-39.

[15] A.I.R. 1969 S.C. 783

Pakistan agreed to implement the Kutch Award. In this case, the petitioners contended that the implementation will amount to cession of Indian land and therefore it required approval or ratification by the Indian Parliament. The Supreme Court rejected the contention of the petitioners and held that the settlement of boundary or land cannot be called the cession. The Supreme Court observed : "A settlement of a boundary dispute cannot therefore, be held to be a cession of territory. It contemplates a line of demarcation on the surface of the earth. It only seeks to reproduce, a line.........ordinarily an adjustment of a boundary which international law regards as valid between two nations, should be recognised by the Courts and the implementation thereof can always be with the executive unless a clear case of cession is involved when Parliamentary intercession can be expected and should be had. This has been the custom of Nations whose constitutions are not sufficiently elaborate on this subject."

Arbitration is recognised as one of the means of pacific settlement of disputes. Article 33, paragraph 1 of the U. N. Charter provides that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation *arbitration,* judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The international law of arbitration now exists in the form of (i) International Covenants of Human Rights; (ii) International Public Law; (iii) Private International Law; and (iv) Bilateral arbitration agreements enforced under international arbitral conventions such as the Geneva Protocol on Arbitration Clauses 1923, Geneva Convention on the Enforcement of Foreign Arbitral Awards 1927 and the Newyork convention on the Recognition and Enforcement of Foreign Awards 1958.[16]

Indian Council of Arbitration (ICA).—In 1965, the Indian Council of Arbitration Council was established as the apex arbitral organisation at the national level for promoting the amicable and quick settlement of industrial and trade disputes by arbitration. It provides facilities for settlement of international commercial arbitration disputes. Its rules of arbitration have now been revised on the basis of the Arbitration and Conciliation Act, 1996. The Indian Council of Arbitration (ICA) has recommended to all parties desirous of making reference to arbitration by the ICA, the use of the following arbitration clause in writing in their contracts :

"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the ICA and the award made in pursuance thereof shall be binding on all the parties."

Advantages and disadvantages of arbitration as a method of settling international disputes.—Since arbitration is essentially a consensual procedure, it has certain advantages over other pacific methods of settlement of disputes. As pointed out by Starke, "There will always be a place for arbitration in the relations between States. Arbitral procedure is more appropriate than judicial settlement for technical disputes and less expensive, while if necessary, arbitrations can be conducted without publicity, even to the extent that parties can agree that award be not published. Moreover, the general principles governing the practice and powers of arbitral tribunals are fairly well recognised. Lastly, arbitral procedure is flexible enough to be combined with the fact-finding processes which are availed of in the case of negotiation, good offices, mediation, conciliation and enquiry." Moreover, "it should not be forgotten that arbitration in its present form offers States the certainty of a binding award. Stripped of its former grandiose pretensions to solve all international disputes, arbitration continues to offer a useful supplement to the International Court of Justice as regards disputes requiring a purely legal solution particularly in connection with minor disputes or issues involving technical matters unsuitable for decision by so large a number of judges as provided by the International Court. As regards other 'mixed' disputes, States should not overlook the advantages of a process which combines judges of their own choice and respect for the law." [17] Despite these advantages arbitration now serves as a residual procedure, where other procedures for settlement are lacking.[18]

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[16] See V. S. Deshpande, "Towards an International Law of Arbitration" I.J.I.L. Vol. 27. No. 4 (Oct.-Dec. 1987), pp. 556-563.

"It may be outmoded in that its former usefulness in fact finding can be equally well done by a commission of inquiry and its former reconciliation of national interests by means of a broad, rather than strict, application of the law can now be more effectively achieved through a conciliation commission." [19] To meet this criticism, it has been suggested that a permanent arbitral or equity tribunal should be established and in addition to any jurisdiction given to it by States under treaties, it may be equipped with an advisory jurisdiction. "Questions by means of this jurisdiction can be referred to it by a political body such as the General Assembly or Security Council of the United Nations in pursuance of their powers to recommend the peaceful adjustment of situations under Articles 14 and 37 of the Charter. The opinion or recommendation of the tribunal, made on such a reference, will have no binding force of themselves but would only become enforceable when approved by the political body which orginally referred the matter to the tribunal, and would then only be enforceable with respect to States which had expressly conferred on the United Nations the power to enforce the tribunal's recommendations...........Thus, it is hoped this proposed 'Court of Arbitral Justice' might provide a suitable forum for courts to discuss questions of peaceful change and offer the Security Council and the General Assembly a new method of finding on objective basis for any decision which they might be entitled to take with respect to a dispute under the existing provisions of the Charter." [20]

(2) *Judicial Settlement* *.—So far as the judicial settlement of international disputes is concerned, at present there is only one such Court called the International Court of Justice which is the successor of the Permanent Court of International Justice which was established under the League of Nations. At present International Court of Justice occupies important place so far as the settlement of international disputes through judicial process is concerned. Its, functions, jurisdiction and achievements have been discussed in a sparate Chapter. So please see the Chapter of *International Court of Justice* for a detailed study of the judicial settlement of international disputes.

Distinction between Arbitration and Judicial Settlement.**—As noted earlier, International Court of Justice situated at Hague is available to States for judicial settlement. Resort to arbitration, on the other hand, can be had under the Permanent Court of Arbitration, as well as outside it. There is a great difference between the arbitration and judicial settlement. Following are the main points of distinction between the two :

(1) The International Court of Justice is a Permanent Court governed by its statute. It has its own rules of procedure which are binding on all the parties who submit their disputes to the Court. On the other hand, the Permanent Court of Arbitration is neither a court nor permanent. It comprises of a panel of names from which arbitrators for temporary arbitral tribunals are chosen. Besides the Permanent Court of Arbitration, Arbitration Courts are appointed for a temporary period by the parties to the dispute.

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[17] Hazel Fox, note 2, at p. 127.

[18] Ibid, at p. 103.

[19] Hazel Fox, note 2, at p. 126.

[20] Ibid at pp. 126-127.

* See also for I.A.S. (1969), Q. No. 7 (b). For answer see Chapter entitled "The International Court of Justice."

** See also for I.A.S. (1966), Q. No. 7; P.C.S. (1967), Q. No. 4; For answer see also matter discussed earlier under the heading "Arbitration" and Chapter entitled "International Court of Justice"; see also for P.C.S. (1982), Q. No. 7,b) ; IAS (2009) Q. 5(a).

(2) The International Court of Justice is situated at Hague having a permanent registry and renders judicial service. Arbitration Courts being temporary have no permanent seat.

(3) Proceedings of International Court of Justice are public and its proceedings, judgments, etc., are published. The judgments of Arbitration Courts are more properly known as awards and may or may not be published depending upon the agreement between the parties to dispute.

(4) The International Court is open to all States. But its jurisdiction depends upon the consent of States. Arbitration is also a consensual procedure but it is consensual to the extent that consent is necessary even for the establishment of the court. Arbitration Court is available to States as well as individual and other legal persons.

(5) Disputes submitted to International Court of Justice are decided in accordance with international law and the Court applies sources of international law as enumerated in Article 38 of the Statute of the Court and also in the order as given therein. The Court has also the power to decide a case *ex ecquo et bono* if the parties agree thereto. The Arbitration Court also settles differences between parties on the basis of respect of law. But strict application of law is neither required nor insisted in an arbitral procedure. In practice often arbitrators waive a strict application of law in order to resolve the dispute.[21]

(6) The International Court of Justice is elected in such a way so that it represents "the main forms of civilization and of the principal legal systems of the world." [22] The constitution of the arbitration court depends upon the consent of the parties to the dispute and therefore it can never be as representative as the International Court of Justice.

(7) The International Court of Justice has developed a consistent practice in its proceeding and has contributed to the development of International law. Arbitration Courts have also developed certain practices in its proceedings but their decisions or awards are often not regarded as legal decisions because they are generally the mixture of law and politics. They confuse law with a diplomatic solution at pleasing both parties.

(8) Judicial settlement is given a place of prominence under the U. N. Charter. International Court of Justice is the Principal Judicial Organ of the United Nations.[23] The U. N. Charter recognises arbitration as one of the pacific methods of settlement of disputes,[24] but it has not been given that prominent role which has been given to the International Court of Justice. Article 36 specifically provides that in making recommendations under this Article the Security Council should also take into consideration that legal disputes as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.[25] There is no parallel provision in the Charter in respect of arbitration.

(9) The Statute of the International Court of Justice is an integral part of the Charter.[26] Since the U. N. is an Organisation (have 192 members States at present) which has attained nearly universality, the International Court and Judicial settlement has gained immensely from being linked to the Charter. Arbitration simply finds mention in the Charter.

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[21] See for example, the Casablanca case, Hague Court Reports, Ist series (1916), p. 110 and the North Atlantic Coast Fisheries case, Ibid, p. 141.

[22] Article 9 of the Statute of International Court of Justice.

[23] Article 92 of the U. N. Charter.

[24] See Article 33 of the Charter.

[25] Article 36, paragraph 3.

[26] Article 92.

(10) "Arbitration brings together, the concepts of third party settlement and the application of the rules of law. Courts of law take the matter further and formalise these concepts into a complete system." [27]

On the basis of aforementioned points it may be concluded that adjudication of disputes is certainly a better and more useful method of settlement of disputes. It is an advanced means of settling disputes and should be regarded as natural a means in international society as it is within the States.[28] It may, however be noted that "international adjudication has failed to inspire that confidence which a judicial organ does within nation States. This is primarily because of the absence of an international community in the real sense of the term and the consequent absence of a cohesion and a felling of shared interests between States. Only 60 (sixty) members of the United Nations have accepted the compulsory jurisdiction of the I. C. J., many of them with wide reservation." [29]

Forum Prorogatum.—The operation of the doctrine of **forum prorogatum** has not been envisaged under the Charter of the U.N. or the Statute of the International Court of Justice. In fact, it has been developed as a separate head of jurisdiction through the practice of the Court itself. The precedent in this respect has been established by the Permanent Court of International Justice. The doctrine of **forum prorogatum**, states the Court will have jurisdiction in a matter in which it does not otherwise have jurisdiction where a respondent consents to the jurisdiction subsequent to the commencement of proceedings against it. This principle was enunciated by the Permanent Court of International Justice in the **The Right of Minorities in the Upper Silesia (Minority Schools)**[30] in the following words :

> "And thus seem to be no doubt that the consent of a state to the submission of dispute may not only result from an express declaration but may be inferred from acts in conclusively established."

Thus, there are many ways in which the respondent state may signify consent to jurisdiction. It may make an express declaration or demonstrate consent by its conduct, such as simply replying to the application instituting the proceeding and duly participating in it without raising any objection to the Court's jurisdiction.

In the *Corfu Channel* case [*U.K.* v. *Albania (Preliminary Objections*][31] the Court initially obtained jurisdiction from the letter of 2 July, 1947 which had been sent by Albania to the Court.

The doctrine of **Forum Prorogatum** may also operate where the Court already has jurisdiction *ratione personae*. Thus if the pleading of by an appellant beyond the subject-matter in which consent has been given by both the parties but not only does the respondent not consent, but as well points forward arguments to counter those pleadings, the Court might infer *ratione materiae*.

Thus the Court does not apply the doctrine of **Forum Prorogatum** lightly. There is always as strong onus on the applicant invoking it to demonstrate that the other party has given an unequivocal indication of its voluntary and indisputable acceptance of the jurisdiction of the Court.

Consent contained in Treaties and Conventions.—Under Article 36 (1) of the Statute of International Court of Justice, the Court also has jurisdiction in all matters of treaties multilateral and bilateral invests the Court with jurisdiction. Thus any party may institute proceedings by way of unilateral application concerning the application on interpretation of the treaty against any other party.

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[27] P. J. Allott, "The International Court of Justice", note 2, p. 128 at pp. 129-30.

[28] Ibid, at p. 157.

[29] S. Dayal, "Peaceful Settlement of International Disputes", Punjab University Law Review (1974-1975), p. 113 at p. 117; one more member having conferred compulsory jurisdiction on the court, the figure has now risen to 47.

[30] 454 [(1928) PCIJ Rep. Series A. No. 12].

[31] 456 [1948 I.C.J. Rep. 15].

Doctrine of Forum Prorogatum and the Advisory Proceedings of the International Court of Justice.—The jurisdiction of the International Court of Justice in a contentious case is based entirely on the consent of the parties. The doctrine of the **forum prorogatum** affords an informal way for a state to express consent to the jurisdiction of the Court. As traditionally understood the doctrine refers to the Court's jurisdiction by agreements of the parties to a case after proceedings have been instituted.

(3) *Negotiations.*—Negotiations are also the means for the settlement of international disputes. It is much less a formal method than judicial settlement.[32] Sometimes disputes are settled through negotiations only. But if negotiations fail to resolve dispute, then other methods, such as, good offices, mediation, etc., may be used along with negotiations.*

(4) *Good Offices.*—When two States are not able to resolve their disputes, a third State may offer its good offices for the same. These offices may also be offered by international organisation or some individuals. The third State, individual or international organisation creates such an environment as may be conducive for the settlement of the disputes. Some general suggestions may also be put forward but the third party does not take active part in the negotiations. For example, the United Nations Security Council offered its good offices in the disputes between Indonesia and Netherlands in 1947. The recent example of offering good offices is that of France to America and North Vietnam to settle their mutual dispute so as to end the Vietnam War.

(5) *Mediation.***—Mediation is yet another method through which efforts are made to settle international disputes. In the case of mediation the third State or individual not only offers its services but also actively participates in the talks to resolve the dispute.[33]

Distinction between 'Good Offices' and 'Mediation'.—The main distinction between good offices and mediation is that in case of good offices, the third party simply offers its services, and does not actively participate in the talks, whereas, in the case of mediation, third party actively participates in the talks and makes suggestions so as to resolve the dispute between the States. A good example of mediation and good offices is that of Tashkant Agreement in the end of 1965 and beginning of 1966, wherein Russia succeeded in bringing about an agreement between India and Pakistan. As pointed out by Starke, "The initiative of Soviet Government at the end of 1965 and early in 1966 in bringing representatives of India and Pakistan together at Tashkant to settle the conflict between them, and in creating a propitious atmosphere for settlement, seem to have lain somewhere between good offices and mediation." [34]

(6) *Conciliation.****—In wider sense, conciliation is a method through which the other States or the impartial persons try to resolve the dispute peacefully through different means. Often the matter is referred to a Commission or Committee which submits its report and recommends certain measures for the settlement of disputes. These proposals are, however, not binding upon the parties. In the words of Judge Hudson, conciliation is "a process of formal proposals of settlement after an investigation of the facts and an effort to reconciliate to accept or reject proposals formulated." [35] The Hague Conventions of 1899 and 1907 made provisions for a Conciliation Commission. In the present time also conciliation is adopted as a method of settlement of an international dispute. A recent example of this is the 1965 Convention of the Settlement of Investment

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[32] "Negotiations are the simplest method of peaceful settlement of disputes in the sense that in negotiations the parties to the dispute alone are involved in the procedure." H. G. Darwin, "Negotiation", note 2, at p. 77.

* UPPCS (1989) Q. 7.

** See also for P.C.S. (1973), Q. No. 2 (b) ; UPPCS (1989) Q. 7(a).

[33] Article 4 of the Hague Convention on the Pacific Settlement of Disputes, 1899 has described the role of the mediator as reconciling the opposing claims and appearing the feelings of resentment which have arisen between States at variance.

[34] Starke, note 6, at p. 513.

*** See also for P.C.S. (1973), Q. No. 2 (b)

[35] Hudson, International Tribunals, (1944), p. 323.

Disputes between States and the Nationals of other States which provides for Conciliation Commission for the settlement of dispute. Conciliation has following four advantages :—

"(1) It offers the parties to the dispute information and a knowledge of the opponent's case which is invaluable.

(2) It affords an opportunity to the lawyers and politicians involved in the dispute at a national level to refer the matter to a small body of independent and qualified persons for their objective appraisal of the issues and for proposals for their settlement.

(3) It takes full account of the sensitivity, susceptibilities and prestige of governments in that it is easier to accept a third party's solution than that offered by the opponent.

(4) It leaves unchanged the liberty and sovereignty of the parties. There is complete secrecy, no obligation to accept the Commission's proposals, no loss of rights or abandonment of position. A State retains its sovereign control to the last stage of the proceedings." [36]

The above points are also relevant for comparing conciliation with mediation. Moreover, "conciliation is to be distinguished from mediation in that it involves an enquiry by an independent body rather than a third State acting as a negotiator; it is to be distinguished from a commission of inquiry in that in addition to elucidating the facts a conciliation commission proceeds to make positive proposals for the settlement of the dispute and finally it is to be distinguished from arbitration and judicial settlement in that it involves no obligation on the parties to accept the decision of the conciliation commission as binding." [37]

(7) *Enquiry.*—Enquiry is also a method which is often resorted to for the settlement of disputes. It may be noted that it is not an independent method and is often used alongwith other methods. The main objective of the enquiry is to make investigation of the relevant matters so as to establish facts which may help the ultimate solution of the problem. For example, often Enquiry Commission is appointed in relation to the settlement of border disputes. The Commission clarifies the facts after making enquiry into the relevant facts.

(8) *Settlement of International disputes under the auspices of the United Nations Organisations*.*—A detailed discussion of this has already been made in the Charter of the United Nations. However, briefly speaking, following are some of the provisions for the settlement of international disputes under the United Nations Charter :

(i) It is one of the purposes of the United Nations that the State members should settle their disputes through peaceful means. Under Art. 2 of the Charter, the member States have undertaken to resolve their disputes through peaceful means and not to resort to force or threat of force to resolve international disputes.

(ii) The General Assembly of the United Nations may make recommendations for the peaceful settlement of International disputes.[38]

(iii) Articles 33 to 38 of Chapter VI of the Charter made the provisions for the peaceful settlement of international disputes. In accordance with these provisions if there is a likelihood of danger to international peace and security, then the States should resolve their disputes through judicial settlement, negotiations, good offices, mediation, conciliation, enquiry or any other peaceful means of their choice. In this connection, the Security Council may also make recommendations in regard to the settlement of disputes through peaceful means.[39]

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36. Hazel Fox, "Conciliation", note 2, at p. 100.
37. Hazel Fox, "Conciliation", note 2 p. 95.

* See also for I.A.S. (1969), Q. No. 7 (c); I.A.S. (1966), Q. No. 8 ; U.P.P.C.S. (2001) Q. 10 (b).

38. Article 14 of the Charter.
39. Article 33.

The Security Council has been given wide powers in respect of pacific settlement of disputes. It may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.[40] The Security Council may, at any stage of a dispute of the nature referred above or of a situation of the like nature, recommend appropriate procedures or methods of adjustment.[41] The legal disputes should as a general rule be referred to the International Court of Justice.[42] It is very rarely that the Security Council has utilized this power. It is also provided that if the parties fail to settle their dispute by the means indicated in the said Article they *shall* refer it to the Security Council. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36, or to recommend such terms of settlement as it may consider appropriate.[43] Lastly, if all the parties to any dispute so request, it may make recommendations to the parties with a view to a specific settlement of the dispute.[44]

But as remarked by Bowett, "The Security Council was never intended as an organ appropriate for settlement of inter-State disputes generally. Its 'jurisdiction' is limited under Chapter VI of the Charter to disputes 'the continuance of which is likely to endanger the maintenance of international peace and security.' [The exception to this where *both* parties to a dispute request the Council to make recommendations (Article 38)]. Moreover, even in dispute of this character, the procedures afforded by the Council under Chapter, IV are *supplementary* to, and not exclusive of traditional, procedures to which the parties must first of all refer their disputes............Recourse to the Security Council should therefore be regarded as a recourse to a *secondary* means of settlement, when the primary, traditional means have failed." [45] Further, "The jurisdiction of the Security Council is also limited in that, not only must the dispute be one the continuance of which is likely to endanger the maintenance of international peace and security, it must not be dispute involving matters 'essentially within the domestic jurisdiction of any State'. The limitation of the famous 'domestic jurisdiction' clause of Article 2 (7)—is a limitation common to all U. N. Organs. It represents the most frequent ground for challenge to the jurisdiction of these organs............Two further limitations on the competence of the Council exist. The one is to be found in Article 107 which has affected the Security Council only in the Berlin case in 1948 when the Soviet Union denied competence on this ground and voted any resolution—this is a limitation of limited effect and one which becomes increasingly anachronistic. The other is to be found in Chapter VIII of Charter and involves the question whether Article 52 gives a form of 'priority' of competence to regional arrangements over local disputes." [46] As regards the competence of the General Assembly he aptly writes : "The Charter does not contain detailed provisions on the powers of the Assembly with regard to pacific settlement of disputes comparable to Chapter VI. However, such powers are implicit in the very general terms of Articles 10-14 and even explicit in Articles 12 (1) and 35 (2). By and large the limitations on competence which apply to Security Council apply equally to the General Assembly." [47] It has rightly been pointed out that, "the United Nations record both in resolving international disputes by agreement and helping them become quiscent is by no means impressive though it has played significant role at least in 'defusing' a tense situation." [48]

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[40] Article 34

[41] Article 36, paragraph 1.

[42] Article 36, paragraph 3.

[43] Article 37.

[44] Article 38.

[45] D. W. Bowett, "The United Nations and Peaceful Settlement", in International Disputes—The Legal Aspects (1972), p. 179 at pp. 179-180.

[46] Ibid, at pp. 180-181.

[47] Ibid. at p. 183.

[48] S. Dayal, note 29, at p. 122; see also Northedge and Donelan, International Disputes—The Political Aspect, op. cit., pp. 224-25. For compulsive means of Settlement by the U. N. see Chapter on "the Security Council".

Despite the above mentioned provisions in the Charter the General Assembly on 24 October, 1970, adopted the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the U. N.*[49] The Declaration provides that every State has the duty to refrain from organising, investigating, assisting or participating in acts of civil strife or terrorist acts in another State acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. It emphasises the obligation of States to refrain from the use of threat or use of force and their duty to settle their disputes through negotiations, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their choice. The Declaration added that the principles of the Charter embodied in this Declaration "constitute basic principles of international law" and appealed to all the States "to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles." As remarked by an eminent author, "This is but one important example of the legislative activity of the General Assembly leading to the creation of new international law applicable to all States.........This is not treaty making but a new method of creating customary international law." [50]

Reference may be made here to the Manila Declaration on the Peaceful Settlement of International Disputes which was drafted by the Special Committee on the Charter of the U. N. and on the strengthening of the Role of the organisation in its February, March 1982 session and approved by the General Assembly at its 1982 session. The Manila Declaration, in its preamble, reaffirmed the Declaration on Principles of International Law concerning friendly relations and co-operation among states in accordance with the Charter of the U. N. The Manila Declaration declared that states shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means : negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice, including good offices. In seeking such a settlement, the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute.[51]

Further, neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the state parties to the dispute.[52]

The declaration further provides that member states should make full use of the U.N., including the procedures and means provided for therein particularly chapter VI, concerning peaceful settlement of disputes.[53] Member states reaffirmed the important role conferred on the General Assembly by the Charter of the U. N. in the field of peaceful settlement of disputes and stress the need for it to discharge effectively its responsibilities.[54] Member states should strengthen the primary role of the Security Council so that it may fully and effectively discharge its responsibilities in accordance with the Charter of the U. N., in the area of the settlement of disputes or any situation the continuation of which is likely to endanger the maintenance of international peace and security.[55] States should be fully aware of the role of the International Court of Justice which is the principal judicial organ of the U. N. Their attention is drawn to the facilities offered by the International Court of Justice for the settlement of legal disputes especially since the revision of the Rules of the Court. States may entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future. Further, states should bear in mind : (a) that legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the statute of the court; (b) That it is desirable that they : (i) consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation of application of such treaties; (ii) study the possibility of choosing in the free exercise of their sovereignty, to recognise as compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its statute, (iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice. Besides this, the organs of the U. N. and the specialized agencies should study the advisability of making use of the possibility of requesting advisory opinions on the International Court of Justice on legal questions arising within the scope of their activities provided that they are duly authorised to do so. Last but not the least, recourse to judicial settlement of legal dispute particularly referred to the International Court of Justice should not be considered as an unfriendly act between states.[56]

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[49] G. A. Res. 2625 (XXV) of 24 October, 1970, G. A. Official Records, Twenty-fifth Session, Suppl. No. 28 (1971), pp. 121-124.

[50] Louis B. John, "The Development of the Charter of the U. N. : The Present State", in the Present State of International Law and other Essays (1973), p. 39 at p. 52; For contra see Robert Rosen Stock, "The Declaration of Principles of International Law concerning Friendly Relations : A survey", A.J.I.L., Vol. 65 (1971), p. 713 at p. 715.

[51] Paragraph 5, Part I of the Declaration.

[52] Paragraph 13, ibid.

[53] Paragraph 1, Part II of the Manila Declaration.

[54] Paragraph 3, ibid.

[55] Paragraph 4, ibid.

The Special Committee on the Charter of the U. N. and on the Strengthening of the Role of the Organisation at its 1988 session (Newyork, 22 February 11 March) a draft "Declaration on the prevention and removal of disputes ana situations which may threaten international peace and security and on the role of the United Nations in this field." [57] Comprising of a preamble, a 25-paragraph operative part and conclusion, it makes following important recommendations—

(i) The Security Council should sometimes hold meetings, including at a level of Ministers, or consultations to review international situation and search for effective ways of improving it.

(ii) The Council should consider appointing the Secretary-General as rapporteur in a specified dispute.

(iii) The Council should consider sending, at an early stage, fact-finding or good offices missions or establishing appropriate forms of United Nations presence including observers and peace-keeping operations, to prevent further deterioration of the dispute in the areas concerned.

(iv) The Secretary-General should consider approaching the states concerned in order to prevent a dispute from becoming a threat to the maintenance of international peace and security. He should also make use of fact-finding missions where appropriate.[58]

It has been aptly pointed out, "Highly developed though the structure and the role of international organisation have become, each individual State in virtue of its sovereignty remains for the most part legally free to accept or reject in relation to itself any solution proposed for changing an existing situation." [59] The apparent failure of States in many instances to have recourse to appropriate means of settlement cannot reasonably be attributed to the inadequacy of the several procedures available, although it cannot be denied that there are some weaknesses in the existing structure of International Organisation in regard to the provision made for the settlement of disputes.[60] As a matter of fact, "The sense of responsibility and urgency which is present in the international community with regard to the obligation of States to refrain from threat or use of force does not yet exist with regard to their obligation to settle their international disputes by peaceful means." [61]

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[56] Paragraph 5, Part II of the Manila Declaration.

[57] See U. N. Chronicle, Vol XXV, No. 2 (June 1988), p. 63.

[58] Ibid.

[59] International Disputes—The Legal Disputes (The David Davies Memorial Institute of International Studies, 1972), p. 4.

[60] Ibid, at p. 37

(iv) International Court of Justice as the principal Judicial organ of the United Nations also performs important functions in regard to the settlement of international disputes through peaceful means.[62]

(v) The Secretary General of the United Nations may also become instrumental in the settlement of certain disputes through mediation or by offering his good offices.[63]

Compulsive or coercive means of settlement[*]

If the international disputes are not resolved through peaceful means then the States resort to compulsive or coercive means which are as follows :

(1) Retorsion; (2) Reprisal; (3) Embargo; (4) Pacific Blockade; (5) Intervention; and (6) Settlement under the U. N.

(1) *Retorsion.*[**]—When a State behaves in a discourteous manner with another State, International Law confers right upon the State affected to resort to retorsion. The word 'retorsion' means retaliation. But the affected State can take only those means or measures as retorsion which are permitted under international law. For example, in retorsion diplomatic relations may be ended, privileges of diplomatic agents may be withdrawn and economic facilities may be stopped. A recent example of the settlement of international dispute through coercive means is that of Pakistan and Iraq, in connection with the discovery of certain arms in the Iraqi embassy situated in Pakistan. The Government of Pakistan declared the Iraq Ambassador *non-persona gratia* or undesirable person and asked him to leave Pakistan immediately. Pakistan took this action because some arms were recovered in the Iraqi Embassy and it was alleged that these arms were to be supplied to persons in Pakistan to be used against the established Government. The Iraqi Government reacted against this and took resort to retorsion by declaring the Pakistan Ambassador in Iraq an undesirable person asked him to leave the State of Iraq immediately. It may be contended that if Pakistan was justified in taking the action as it did against the Iraqi Ambassador, so far as legal position is concerned, the Iraqi action in declaring the Pakistan Ambassador undesirable person was also in accordance with the rules of international law. The United Nations Charter has to some extent affected the right of retorsion because in accordance with the provisions of Charter no State can take any action in the form of retorsion as may endanger international peace any security.[64]

(2) *Reprisals*[***].—Yet another compulsive means of settlement of international dispute is reprisal. According to Starke, "Reprisal connotes coercive measures adopted by one State against another for the purpose of settling some disputes brought about by the latter's illegal or unjustified act." [65]

A leading case on reprisal is the *Naulilaa Incident.*[66] In this case, the tribunal laid down the following, principles :

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[61] International Disputes—The Legal Disputes (The David Davies Memorial Institute of International Studies, 1972), at p. 50.

[62] For a detailed study of this see Chapter on "The International Court of Justice."

[63] For this see Chapter on "Secretary-General."

[*] See also for I.A.S. (1961), Q. No. 8; for answer see also Chapter on "The Security Council." ; See also for P.C.S. (1995) Q. 6(a) ; UPPCS (2004) Q. 5 ; IAS (2002) Q. 8(b) ; IAS (2005) Q. 5(d).

[**] See also for P.C.S. (1982), Q. No. 7 (e); P.C.S. (1984) Q. 5.

[64] Starke, note 6, at p. 520.

[***] See also for I.A.S. (1976), Q. No. 8; I.A.S. (1974), Q. No. 6 (a); P.C.S. (1982), Q. No. 7 (c).

[65] Starke, note 6 at pp. 484-85. In the words of Oppenheim : Reprisals are such injurious and otherwise illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory Settlement of a difference created by its own international delinquency", International Law Vol. II, Seventh Edition, p. 136.

[66] Special Tribunal : *Germany* v. *Portugal,* (1928) 2 RIAA 1012, 1019. For the fact of this case see Appendix II.

(a) Reprisals are illegal unless they are based upon a previous act contrary to international law.

(b) There must be a certain proportion between the offence and the reprisals as a necessary condition for the legitimacy of the latter.

(c) Reprisals are only legitimate when they have been preceded by an unsuccessful demand of redress. In fact, the employment of force is only justified by necessity.

The facts of the *Naulilaa Incident* are as follows —

In October 1914 when Portugal was neutral, a German group entered the Portugese-African territories from the German South West Africa. Thereafter the incident that took place was due to misunderstading at the Portuguese Port, Naulilaa. It was mainly due to the inefficiency of German interpreters. Lt. Sereno thought that he was being threatened and, therefore, he took the action in his self-defence. As a result of this misunderstanding shots were fired resulting in the death of a German Officer and his two subordinate officers. As a reprisal, the Governor of German South-West-Africa sent a military party to the Portuguese territory which had a confrontation with the Portuguese soliders which were sent to the Southern border territory of Angola to suppress the people of a certain tribe. The Portuguese soldiers were defeated in this confrontation. Thereafter, the German military party returned back to German territory, but after the Germans had gone, the natives there revolted, resulting in a great harm to the State of Portugal. As a reprisal Portugal expelled the German Consul from its country. The Arbitral Court had to decide how far Germany was responsible for the above-mentioned incident and how far the action taken by Germany should be justified. The Court had also to decide how far Germany was responsible for the subsequent events, particularly the revolt of the people resulting in a great harm to the State of Portugal. Germany contended that her action was justified as a valid reprisal. The Arbitral Court held that Germany was liable to pay compensation as her action was not justified as a reprisal.

Recent example of the use of this means for the settlement of the International disputes is the Israeli action in bombarding certain areas of Lebanon from where the Arab Guerillas operated attacks from time to time in different parts of the territory of Israel. A question may, however, arise whether in the present time this right of reprisal is in keeping with the provisions of the United Nations Charter. As a matter of fact, the United Nations Charter has greatly affected the right of the States to resort to reprisal. No State is entitled to resort to reprisal which may endanger international peace and security.

Moreover, as pointed by an eminent Indian author,[67] "There seems to be general agreement among jurists that forcible reprisals are no longer valid in international law.For example, Mc Dougal and Feliciano are of the view that the prescriptions and policies embodied in the U. N. Charter forbid the unilateral use of force and violence by way of reprisal for lesser wrongs or 'tortious' conduct.[68] Similarly, Quincy Wright has commented that the Charter prohibits the use of armed force as a measure of reprisal except in case of defensive necessity or explicit authorisation by the United Nations.[69] If there was any ambiguity in the legal status of forcible reprisals, as a form of coercion short of war, says Ian Brownlie, it was removed by Article 2, para 4 of the U. N. Charter.[70] Stating that forcible reprisals are illegal, Rosalyn Higgins exhorts that the remedying of international wrongs no longer lies within the jurisdiction of individual States, but can only be accomplished by peaceful procedures or by the authority of the United Nations.[71]

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[67] M. K. Nawaz, "Limits of Self-Defence : Legitimacy of use of Forces Against Economic Strangulation?" I.J.I.L., Vol. 16 (1976), p. 252 at pp.255-256.

[68] Mc-Dougal and Feliciano, Law and Minimum World Public Order (1961), pp. 207-208.

[69] Q. Wright, "Legal Aspect of the U-2, Incident", A.J.I.L., Vol. 54 (1960), p. 836.

[70] I. Brownlie, International Law and the Use of Force by States (Oxford, 1962), p. 281.

[71] Rosalyn Higgins, the Development of International Law through the Political Organs of the United Nations (Oxford, 1963), p. 217.

The general consensus among jurists is now echoed in the Friendly Relations Declaration, contained in Resolution 2625 (XXV), which says : 'States have a duty to refrain from acts of reprisals involving the use of force.'[72]

Thus the law of the United Nations interdicts forcible reprisals."

It is generally believed that the right of reprisal can be validly and justifiably used only when the other State has committed an International crime or violated any rule of international law. Moreover, the reprisal will be justified only when its objective is to satisfactorily settle the international disputes.

*Difference between Retorsion and Reprisal.**—The main distinction between reprisal and retorsion is that while in retorsion only that action can be taken which is permitted under international law and depends upon the direction and sweet-will of the States. Whereas in reprisal, those actions can also be taken which might otherwise be illegal but are allowed as reprisal in certain special circumstances. As pointed out by Starke, "......... reprisal consists of acts which would generally otherwise be quite illegal, whereas retorsion consists of retaliatory conduct to which no legal objection can be taken." [73]

(3) *Embargo.*—Embargo is yet another compulsive means for settlement of international dispute. It is a type of reprisal. By embargo we mean that if a State violates international law or commits some international crime then the affected State becomes entitled to create obstruction in the transport of its ships which are within the territory of the affected State.

(4) *Pacific Blockade.***—Pacific Blockade is yet another compulsive means of settlement of international dispute. Through pacific blockade the ingress and egress of the ports of the States are blockade so that the ships of other States may not reach those ports and the ship of the blockade State may not go out of the ports. However, there is a distinction between pacific blockade and the blockade which is often resorted to during war. Pacific blockade is a blockade which is used in peace time. It is often resorted to as a reprisal because through blockade of the ports of a State, that State may be compelled to settle its disputes. Some scholars are of the view that this means has become old and international law now does not permit it. Even if it is argued that it has not become an old method yet it cannot but be conceded that the Charter of United Nations has greatly affected this right. That is to say, this means cannot be resorted if it is likely to endanger international peace and security. However, the United Nations may itself use blockade as a means to take collective measures under Art. 42. The advantage of this means for the settlement of international dispute is that it is less violent than war.

An example of peaceful blockade is that of the blockade of Cuba by America in 1962. America blockaded the port of Cuba because America contended that Russia was going to supply some nuclear weapons to be stationed at Cuba and which might prove detrimental for the security of America and which was alleged to be the violation of Havana Convention by Cuba. But as pointed out by Starke, the Cuban blockade is different from the old blockades permitted under international law. He has pointed out the following three points in this connection :

(a) In the first place, it was not only the blockade of the Cuba's coast but its objective was to prevent the incoming of nuclear weapons in Cuba.

(b) Secondly, this involved not only the search of Cuban ships but also the ships of other countries which were within that area.

(c) Thirdly, as declared by the President of America, America resorted to this blockade on the recommendation of the Organisation of American States.

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[72] For the meaning and scope of this provision, see Milan Sohoviced, Principles of International Law Concerning Friendly Relations and Co-operation (New York, 1972), p. 104.

* See also for P.C.S. (1982), Q. No. 7(c).

[73] Starke, note 6 at p. 520.

** See also for I.A.S. (1957), Q. No. 6 (g).

(d) "Fourth, the quarantine was conducted in a manner unlike that characteristic of traditional pacific blockades, *e.g.* under a 'clearcet' scheme, shippers could obtain before hand a clearance certificate to send cargoes through the zone subject of the quarantine". Thus, "If not permissible under the Charter, the effect of the quarantine in interfering with the freedom of the high seas raised serious issues as to justification under International Law." [74]

(5) *Intervention.**—A separate Chapter is devoted to the rules of international law relating to intervention. Please see that Chapter for the settlement of international disputes through intervention which is prohibited in principle but is permitted under certain exceptional circumstances.

(6) *Settlement under the Auspices of the U.N.*—The Charter of the U.N. provides for coercive means of settlement of international disputes under Chapter VII entitled "Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression. It provides for two main things, (a) collective Intervention or Enforcement Action, and (b) Individual and collective self-defence while collective or enforcement action has already been discussed in detail in Chapter on "Security Council" ; individual and collective self-defence has been discussed in detail in Chapters on "Intervention", "Collective Security" and "Regionalism".

The International Centre for Settlement of Investment Disputes (ICSID).—The International Centre for Settlement of Investment Disputes or ICSID was established in 1965 under the Convention for the Settlement of Investment Disputes between the States and the National of other States (1965). It was sponsored by the World Bank and the Convention came into force in 1966. Its aim was to provide a machinery and procedure for the investment disputes to encourage private foreign investment. Thus in respect of a dispute at the international level, the person or individual making private investment becomes a party to the investment dispute.

This Centre *i.e.* ICSID provides for the settlement of investment disputes and provides procedure for the same. It consists, *inter alia,* of a plenary Administrative Council and its chairman is the Chairman of the World Bank. It also has a General Secretary. The basis of the jurisdiction of the Centre is consensual which is either written in the contract or which (consent) may be given when the dispute arises, there also exists separate panels of conciliators nominated by the parties. The conciliators act in their personal capacity or on the basis of jurisdiction.

The settlement procedure is initiated by making a request to the Secretary-General. The request or application should make it clear whether the settlement is to be effected through Conciliation or Arbitration. The parties are free to choose conciliation or arbitration as a method of settlement. The number of arbitrators or conciliators should be odd such as 3,5,7 etc. Once the Tribunal or Commission is established, it applies the rules of the Centre *i.e.* ICSID. The recommendations of the Conciliation Commission are not binding. But the award of the Arbitration Tribunal is binding and is enforced like a judicial decision in the states of parties to the contract. The grounds for setting an award are very limited and few such as unjust constitution, beyond or exceeding power, corruption, different from the basic rule of procedure not to give reason or failure to give reason.

Article 64 of the Convention provides for referring to the International Court of Justice matters of interpretation but the validity of an award cannot be challenged in the International Court of Justice.

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[74] Starke, note 6 at pp. 523-524, Prof. Q. Wright has also expressed the view that American intervention in Cuba was illegal and cannot be justified under International Law. "The Cuban Quarantine". A.J.I.L. (1963), p. 536; see also G.G. Fenwick, "The Quarantine Against Cuba: Legal or Illegal ?" Ibid. p. 588; Myres S. Mc. Dougal, 'The Soviet Cuban Quarantine and Self-Defence', ibid., p. 597.

* See also for P.C.S. (1990) Q. 9(b) ; For answer see chapter on "Intervention" and see also Appendix II.

As mentioned above, one of the special features of the settlement of investments disputes by the Centre (ICSID) is that alongwith states individuals are directly parties to the dispute. It is really praiseworthy to empower individuals to be parties before International tribunals. Thus the view of Kelsen that individuals can get rights under international law only 'mediately' has become old and obsolete.

CHAPTER 49

WAR, ITS LEGAL CHARACTER AND EFFECTS

Definition of 'War'.[*]—According to Hall, "when differences between State reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of peace, the relation of war is set up, in which the combatants may use regulated violation against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant." [1] Starke has also pointed out that "war in its most generally understood sense was a contest between two or more States primarily through their armed forces, the ultimate purpose of each contestant or each contestant group being to vanquish the other or others and impose its own conditions of peace." [2] According to Prof. Oppenheim, the chief objective of war is to overwhelm the enemy and to impose conditions upon it.[3]

According to the old definition of war, is mainly a contest between the armed forces of the belligerent States. But in the modern period it is often seen that war takes place not only between the armed forces of the belligerent States, but also affects the citizens of the States concerned. The most glaring example of this is the dropping of atom bombs at Nagasaki and Hiroshima, during the Second World War which caused devastation unprecedented in the annals of the World. It may, therefore, be said that the old definition of war does not conform to the modern wars. According to Oppenheim the time honoured distinction between members of the armed forces and civilians has been deeply affected by following five developments which have appeared during and since the First World War : (1) Growth of the numbers of combatants; (2) Growth of numbers of non-combatants engaged in war preparation; (3) The development of aerial warfare; (4) Economic measures; and (5) The advent of totalitarian States.[4] He further adds, "However, while these factors have had the effect of blurring the established distinction in many respects and of necessitating a modification of some of the existing rules, they have left intact the fundamental rule that non-combatants must not be made the object of direct attack by the armed forces and the civilian population." [5]

Non-war-armed conflict.[**]—As remarked by Lord Mac Naughten, "The law recognises a State of peace and State of war but it knows nothing of an intermediate State which is neither one thing nor the other—neither peace nor war." As pointed by another author[6] "the legal condition of war has not arisen since 1945, and upon an optimistic view of international relations and the role of the United Nations is unlikely to occur in the near future. But the text books of international law distinguish only conditions of war and peace, not the conditions of limited hostilities which have occurred, and unhappily will continue to occur. The question that arises is how much of the traditional law of war is applicable to this twilight situation which is neither peace nor war and is unrecognised by many jurists". He further adds, "Finally, a definition of limited war will prove to be, helpful in classifying the concept of law to be utilized. It is proposed that the expression 'limited war' covers the situation of hostilities not amounting to declared war, which, are limited in respect of (a) the area of operations; (b) the weapons employed; and (c) the targets engaged. We have sufficient experience of limited war in this sense for international lawyers to be able to propose new rules for what is new phenomenon." [7] As pointed out by Starke, significant changes have come in the modern wars. In the modern period, many armed conflicts have taken place in which neither the war was declared, nor the rules of war were followed and nor there were the effects of war in accordance with the laws of war. In this connection, he cites the examples of the Korean conflict from 1950 to 1953; Indo-China War; Cango conflict of 1960 to 1963 and Indo-Pak, conflict of 1965. Since the declaration of war is not made, neither are there full effects of war in accordance with laws of war nor the duties and rights of the neutral States are properly defined and determined. In view this consideration, Starke has called such wars as non-war armed conflicts. In his view following are some of the reasons for the development of this category of war :

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[*] See also for C.S.E. (1988), Q. 8 (a).

[1] This definition was approved in *Driefentin Consolidated Gold Mines* v. *Janson* (1900) 2 Q.B. 339 at p. 343.

[2] J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 527.

[3] In his words, "War is a contention between two or more States, through their Armed Forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases". L. Oppenheim, International Law, Vol. II. Seventh Edition, Edited by H. Lauterpacht (1963), p. 202, see also H. Lauterpacht, "The Limits of the Operation of War", BYBIL (1953), p. 206.

[4] Ibid., at pp. 207-208.

[5] Ibid, at p. 208.

[**] See also for I.A.S. (1974), Q. No. 6 (d); I.A.S. (1974). Q. No. 8 (a); I.A.S. (1964), P.C.S. (1966), Q. No. 9.

[6] D.P.O. Council, "International Law and Contemporary Naval Operations", BYBIL, Vol. XLIV (1970), p. 19 at pp. 2-24.

(1) The States concerned do not want that their conflicts should be regarded as the violation of obligations arising out of international treaties. For example, they do not want that the conflict should be regarded as the violation of the Paris Pact of 1928 through which the States had renounced war as an instrument of national policy.

(2) The belligerent States also do not want that the States not taking part in the wars may declare their neutrality so as to evade the rules of neutrality.

(3) It is also their desire to localize the conflict and not to allow it to take the form of general war.[8]

Further, practice in the non-war conflicts has revealed the tendency of States to apply most of the rules governing a war *stricts sensu* to non-war hostilities. For example, the Geneva Red Cross Conventions were expressly applicable to such non war armed conflicts. But every such armed conflict must vary in its special circumstances and the rules to be applied must also depend upon the circumstances. In case the U.N. Security Council is taking enforcement action "actual decisions or recommendations adopted by the Security Council under Articles 39 et. seq. of the United Nations Charter, for the guidance of States engaged in the hostilities, may fill the place of rules of international law." [9]

Need for Amendment of the laws of war*.—According to Judge Nagendra Singh, in view of change in the methods of war of development of devastating weapons, particularly nuclear weapons, it has become necessary to bring about changes in the laws of war.[10] Besides this, following are the reasons which have necessitated changes in the laws of war : (1) Development of the concept or total war; (2) Expansion of the world community as a result of the independence of new States; (3) Development of human rights; (4) Need for protecting the civilian population from the scourge of war; (5) Need for enforcement of human rights during war; and (6) The laws of war were codified long ago; since then revolutionary changes have taken place. They should, therefore, be revised and recodified. The First and Second World Wars exhibited the inadequacy of the existing laws of war.[11] Josef L. Kunz has, therefore, rightly remarked, "That the Laws of War are actually in a chaotic state and urgently need revision, is a fact which cannot be challenged.[12]"

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[7] D.P.O. Council, "International Law and Contemporary Naval Operations", BYBIL, Vol. XLIV (1970) at p. 85.

[8] Starke, note 2, at p. 529

[9] Ibid, at p. 532

* See also for P.C.S. (1980), Q. 10 (a)

[10] See Recent Trends in the Development of International Law and Organisation Promoting Inter-State co-operation and World Peace (1966), pp. 108-27.

[11] As pointed out by Pro. D.P.O'. Connel, "Since 1945 the laws of war has tended to be neglected by International lawyers, partly, no doubt, because they have remained optimistic that war had been excluded from their doctrine, but partly because many have lacked the technical knowledge to evaluate the military factors which bear upon the traditional rules of the laws of war and test their validity". Note 6, at p. 19.

[12] Josef L. Kunz. "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision". A.J.I.L. Vol. 45 (1951) p. 37 at p. 53. See also H. Lauterpacht, "The Problem of the Revision of the Law of War", BYBIL, Vol. XXIX (1952) p. 360.

Despite the urgent need for the amendment in the laws of war, there is no likelihood of sincere efforts to amend them for the obvious reason that war, nay even use of force has been prohibited under the charter for the settlement of international disputes. It is feared, and rightly too, that if laws of war are amended they may put the existing position of outlawry of war to the reverse gear.

*Commencement of War.**—From very ancient period, there has been the practice of giving some sort of information or making some declaration or giving some ultimatum in regard to the commencement of war. During sixteenth century there was a custom of sending heralds to give information of the outbreak of war or otherwise declaration was made through some messenger, etc. This practice ended by the end of sixteenth century. In seventeenth century, Grotius expressed the view that declaration is essential. Despite this view, many wars took place in which no formal declaration was made. By the end of nineteenth century, however, it was generally accepted that some sort of ultimatum or warning was necessary before the start of war. In this twentieth century, there is no uniformity in the practice of the States in regard to the commencement of war. In 1904 Japan started war against Russia without any formal declaration or ultimatum. In 1907, the Hague Convention propounded the rule that a formal declaration was necessary for the start of war and an ultimatum should also be given before resorting to war. It was also provided that information regarding the commencement of war should also be given to the neutral States. But as is well known, these rules were flagrantly violated during the two World Wars. Despite this in the present time it is still a valid rule of international law that some declaration or ultimatum is necessary for the commencement of war.

Legal Regulation of War.**—Legal regulation of war was probably the most important development of twentieth century. As pointed out by Oppenheim, "Prior to the General Treaty for the Renunciation of war the institution of war fulfilled in International law two contradictory purposes. In absence of an international organ for enforcing the law, war was a means of self-help for giving effect to claims based or alleged to be based on International Law. Such was the legal and moral authority of this notion of war as an arm of the law that in most cases in which war was in fact resorted to in order to increase the power and positions of a State at the expense of others, it was described by the States in question as undertaken for the defence of a legal right. This conception of war was intimately connected with the distinction which was established in the formative period of International Law and which never became entirely extinct between just and unjust wars......... In the absence of an International Legislature it fulfilled the function of adopting the law to changed conditions. Moreover quite apart from thus supplying a crude substitute for deficiency in international organisation, war was recognised as a legally admissible instrument for attacking and altering existing right of States independently of the objective merits of the attempted change......... International Law did not consider as illegal a war admittedly waged for such purposes. It rejected, to that extent the distinction between just and unjust wars. *War was in law a natural function of the State and a prerogative of its uncontrolled sovereignty.*"[13] Further, "The Hague Conferences of 1899 and 1907 and the movement or the Pacific Settlement of international disputes marked the beginning of the attempts to limit the right of war both as an instrument of law and as a legally recognised means for changing legal rights. At the same time more direct attempts were made to limit the right of war."[14]

In connection with the efforts made to limit the right of war or even to out-law war following deserve special mention :—

(a) Hague Conventions of 1899 and 1907; (b) Covenant of the League of Nations; (c) Treaty of Mutual Assistance, 1923; (d) Geneva Protocol of 1924 ; (e) Locarno Treaty of

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* See also for I.A.S., (1955), Q. No. 7; C.C.S. (1980), Q. 10 (a).

** See also for I.A.S. (1974), Q. No. 7; I.A.S. (1959) No. 8; I.A.S. (1958), Q. No. 5; I.A.S. (1975), No. 5(b) ; I.A.S. (1961), Q. No. 9 ; I.A.S. (1965), Q. No. 7 ; P.C.S. (1982), Q. No. 8 ; P.C.S. (1965), Q. 5—For answer see also Chapter on "Collective Security" ; C.S.E. (1988), Q. 8(a) ; C.S.E. (1990).

[13] Oppenheim, note 3, at pp. 177-178 : emphasis supplied.

[14] Ibid, at p. 179.

1925; (f) Pact of Paris of the Kellogg Briand Pact (1928) ; and lastly (g) the Charter of the United Nations.

The Hague Convention of 1907 relating to the limitation of the Employment of Force for the recovery of contract prohibited recourse to force a legal remedy for enforcing contractual obligations. Moreover, the Hague Convention IV of 1907 on the laws and customs of war on Land imposed certain restrictions on the means of injuring the enemy, sieges and bombardments.[15] But these provisions concerned the restriction on the means of injuring the enemy rather than limiting the right of war. In this connection efforts made in the League of Nations, Pact of Paris and the Charter of U.N. are very important and require a little detailed reference. The Covenant of the League of Nations under Articles 12 to 16 imposed certain restrictions upon the States in regard to their right to resort to war. These Articles provided that before resorting to war the States should settle their disputes through arbitration, judicial settlement or by inquiry. Even if their disputes were not satisfactorily resolved through these means, they could not, under the said provisions, go to war before the lapse of three months. It was also provided that if any State went to war violating the provisions of the Covenant then that State would be deemed to be the enemy of the whole League of Nations. Thus the Covenant of the League of Nations for the first time imposed certain restrictions upon the right of the States to resort to war.[16] The next important event in this connection was the *Paris Pact* of 1928 which is also popularly known as *Kellogg-Briand Pact*. In this Pact the States agreed to renounce war as an instrument of national policy in the settlement of international disputes. Article 1 of the Treaty of Renunciation of War, 1928 (*Kellogg Briand Pact*) provides : "The High Contracting Parties solemnly declare in the names of their respective peoples that they *condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.*" Article II further provided that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be which may arise among them *shall never be sought except by pacific means.* As aptly remarked by Brierly, "The Pact of Paris—the Kellogg Briand Pact is an instrument of outstanding importance signed or adhered to by a great many members of the International Community it declares in the most categorical terms the absolute illegality of war in pursuit of national policies. Moreover having been concluded outside the League, it did not perish with the League, and being fully consistent with the provisions of the Charter, retain its full force today. The Pact was the culmination of a strong movement in the early days of the League to outlaw any recourse to war otherwise than in self defence and it was preceded by a number of draft treaties and resolutions which declared aggressive war to be an international crime." [17] But he adds, "In forbidding war as an "instrument of national policy" the Pact did not forbid recourse to war in self-defence, and in the negotiations concerning the Pact did not forbid recourse to war in self-defence, and in the negotiations concerning the Pact several States made express declarations emphasizing that self-defence is a natural right not touched by the Pact. But the Pact did intend to render wholly illegal all resort to war otherwise than in self-defence or as a sanction for the violation of the Pact." [18] The shortcomings of the Pact are uncertainty as to how far the prohibition of resort to war includes measures of force short of war; the absence of any provisions for authoritative ascertainment of breaches of the Pact, the failure to provide for collective enforcement of its obligations at least to the extent of a mitigation of the rigidity of the established rules of neutrality to the disadvantage of the law breaker and the absence of duty expressly laid down in the Pact to submit disputes between its Signatories to binding settlement. These defects seriously impair the political

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15. See Articles 22 to 28 of Annex to the Convention : Regulations Respecting the Laws and Customs of War on Land.
16. As pointed out by Brierly, "The Covenant changed the whole foundations of the law, (1) by creating express obligations to employ pacific means of settling disputes and not to resort to war without first exhausting those means, and (2) by establishing a central organisation of States empowered to pass judgment on the observance of those obligations by individual States and to apply sanctions in the event of the obligations being violated". J.L. Brierly, the Law of Nations, Sixth Edition (1963), p. 408.
17. Ibid., at pp. 408-409.
18. Ibid, at pp. 409-410.

significance and the prospects of observance of the Pact. But in law the terms of the Pact are very comprehensive and the danger of the purpose of the Pact being frustrated lies not in the normal operation of its provisions but in the possibility of their violation by the Signatories." [19] Further, "Henceforth war could not legally, be resorted to either as a legal remedy or as an instrument for changing the law. *Resort to war ceased to be a discretionary prerogative right of States signatories of the Pact; it became a matter of legitimate concern for other Signatories whose legal rights are violated by recourse to war in breach of the Pact; it became an act for which a justification must be sought in one of the exceptions permitted by the Pact of Paris."* [20] Moreover, being permanent in nature any purpose and representing a fundamental change in the legal structure of international society, the Pact of Paris must be regarded as continuing in being and as one of the corner stones of the International Legal system. This is so although it has not been expressly incorporated in the Charter of the United Nations.[21]

By the establishment of the United Nations Charter in 1945 the legal regulation of war reached its zenith. The United Nations Charter contains the following provisions restricting and even prohibiting war by States :

(1) Preamble of the Charter says "that armed force shall not be used, save in the common interest."

(2) It is an important principle of the United Nations that the States shall settle their disputes peacefully.[22] Article 2, paragraph 4 provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the U.N. Thus instead of the word 'war', the Charter mentions the words 'threat or use of force.' The scope of the Charter is thus wide enough because it prohibits not only war but the use of force or threat thereof.

(3) Chapter VI provides certain methods for the peaceful settlement of international disputes. They include negotiations, good offices, conciliation, judicial settlement, inquiry or any other peaceful means of choice.[23]

(4) Under Chapter VII, Security Council is empowered to take collective action against the State which has committed aggression or has otherwise committed a breach of international peace.[24]

The most important achievement of the United Nations is probably that it has prohibited war and there are only a very few exceptions wherein a State can resort to war. Even in these exceptions, a State can resort to war only in accordance with the provisions of United Nations Charter. The Charter prohibits not only resort to war but also to force generally and to threats of war and physical force.[25]

It is clear from the above discussion that in the modern time, there is sufficient legal regulation over war. It cannot, however, be denied that the above-mentioned rules are frequently violated. The violation, however, does not mean that the rules do not exist or there is no legal regulation over war. In fact, States generally accept these restrictions and do their best not to violate them.

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[19] Oppenheim, note 3, at 196.

[20] Oppenheim, note 3, at pp. 196-197.

[21] Ibid, at p. 197.

[22] See Article 2, Paragraphs 3 and 4.

[23] See Articles 33-38.

[24] See Articles 39-50.

[25] As remarked by Oppenheim, "...... although the Charter of the United Nations goes beyond Paris Pact inasmuch as its members have renounced not only the right of war—Other than in individual and collective self-defence—but also the resort to force, that fact does not imply any contradiction between the two instruments. The same applies to the fact that unlike the Pact of Paris, the Charter provides a 'positive duty to submit to the Security Council disputes which the parties have failed to settle by means of their choice. The Charter thus adds to the obligations of the Pact in many ways—in particular by prohibiting recourse to force generally as distinguished from the mere prohibition of war. Inasmuch as the Pact does not provide for a legal possibility of unilateral withdrawal from its obligation it ranks highest than the Charter itself", note 3, pp. 195-196.

Effects of the outbreak of War*

For the convenience of our study we will discuss the effects of the outbreak of war under the following headings :

(1) General Effects; (2) Diplomatic and Consular relations; (3) Treaties; (4) Trading and Intercourse in Commerce; (5) Contracts ; (6) Enemy property; and (7) Combatants and non-combatants.

(1) *General Effects.*—Besides affecting the neutral States, war mainly affects the belligerent States. According to Oppenheim, it is wrong to say that due to the outbreak of war all the relations of the belligerent states and that of their citizens come to an end. Although peaceful relations of the belligerent States end, international law prescribes certain limitations and prohibitions and the relations of the belligerent States during war are governed by the laws of War.[26]

(2) *Diplomatic and Consular Relations.*—At the outbreak of the war the diplomatic and consular relations between the belligerent States are broken immediately. Consequently the belligerent States recall their diplomatic agent from each other States. Often at the outbreak of war, the receiving belligerent States hand over the passport to the diplomatic agents of the enemy country which means that they should immediately return to their home State. In this connection Art. 44 of the Vienna Convention on Diplomatic Relations, 1961 provides that it is the duty of the receiving States to provide necessary facilities to such agents so that they may return safely to their home State. In other words, we may say that until the diplomatic agents return to their respective countries and so long as they remain within the receiving State, it is the responsibility of the receiving State to see that their person and property are protected.

As of October, 2018, 192 countries have become parties to Vienna Convention on Diplomatic Relations, 1961.

(3) *Treaties.***—According to the old view, all treaties are terminated between belligerent States after the outbreak of war. In the present times, many significant changes have come in this respect. The present practice of States shows that all the treaties between the belligerent States do not come to an end. Some treaties are completely terminated, some remain in force, while some others are simply suspended during war times.

There are two main tests in this connection—(a) Subjective test; and (b) Objective test. According to the subjective test, in order to ascertain whether the treaty concerned is to be terminated at the outbreak of war, intention of the parties to the treaties is examined. If it is clear from the intention of the parties that the treaties are only for peace time, then they are terminated at the outbreak of war. In case it is clear from the intention that the treaties will remain in force irrespective of the war, then the treaties remain in force. According to the objective test, the termination or remaining in force of the treaties depends upon the facts whether the provisions of the treaty can be enforced in the context of war or to put it more precisely whether they are inconsistent or not with the outbreak of war.

On the basis of the above tests the practice of the States and the views of the jurists, Starke[27] has summed up as follows :

(i) Those treaties between the belligerent States for which common political action or good relations are essential, terminate at the outbreak of war. An example of such type of treaty is a treaty of alliance.

(ii) Treaties regarding the establishment of completed situations or the fixation of boundaries remain unaffected by war.

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* See also for P.C.S. (1976), Q. No. 6.

[26] Oppenheim, note 3, at p. 301.

** See also for I.A.S. (1974), Q. No. 6(c) ; I.A.S. (1959), Q. No. 9; P.C.S. (1985), Q. 10 (d); C.S.E. (1988), Q. 8 (a).

[27] Starke, note 2, at pp. 508-509.

(iii) The treaties or conventions regulating the conduct of war remain binding during war upon the parties to such treaties or conventions. The Hague Conventions of 1899 and 1907 are such types of Conventions.

(iv) These multilateral law-making treaties which are related to health, medicines, protection of industrial property, etc., are not completely terminated at the outbreak of war. They are simply suspended and are revived after the end of war.

(v) Sometimes there are express provisions in the treaties which make it clear whether the treaties will remain in force at the outbreak of war.

(vi) There are some types of treaties, such as, treaties relating to extradition which are simply suspended at the outbreak of war.

(vii) "A State complying with the resolution by the U. N. Security Council concerning action with respect to threats as to the peace, breaches of the peace or acts of aggression, must either terminate or suspend the operation of a treaty, as to which it is a party, if the treaty would be incompatible with the Security Council's resolution (Institute Resolution, Art. 8)."

Thus much depends upon the provisions of the treaties, intention of the parties, nature of treaty, etc.

(4) *Trading and Intercourse in Commerce.*—All trading and intercourse between the belligerent States are prohibited during the war. It is a well-recognized rule of international law that the treaties relating to trading and intercourse between the belligerent States stand terminated at the outbreak of war.

(5) *Contracts.**—The effect on the contracts at the outbreak of war between the belligerent States is a matter of municipal law rather than that of international law. Consequently, belligerent States are free to make rules and to enforce them in accordance with the contracts. International law leaves them free to make necessary laws regulating the validity or invalidity of contracts at the outbreak of war. The practice of the States, however, shows that the executory contracts become completely void whereas executed contracts remain unaffected at the outbreak of war.

(6) *Enemy property.***—Enemy property may be of two kinds—public enemy property and private enemy property.

Public enemy property.—At the outbreak of war all movable public enemy property situated in the enemy States may be seized. The position in regard to the immovable public enemy property is however, different. Immovable public enemy property may be temporarily taken but cannot be permanently seized. After the outbreak of war, it is determined as to what should be done in regard to this property. Consequently the sale or disposal of the immovable public enemy property is not possible during war. It can only be used by the belligerent State during war.

Private enemy property.—The practice of the States shows that the private enemy property situated in the territory of the belligerent State may be taken over for a temporary period. After the end of the war its fate is decided in accordance with the provisions of the peace treaty concluded, if any, between the belligerent States. The belligerent State is not entitled to seize the private enemy property, but can only take it if it is necessary for local needs. In short, we may say that private property can be temporarily taken only when it is essential for military purposes of the belligerent States. Its plunder or seizure is contrary to International Law. For example, when India occupied certain Pakistani territories in the Indo Pak War of 1971, it did not acquire the right to take private property of the inhabitants of those areas and to dispose them off. India, however, acquired the right to take over or use that property if it was necessary for the administrative purposes or for maintaining law and order in that area. In an American case, *Silesion American*

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* See also for C.S.E. (1988), Q. 8 (a).

** See also for I.A.S. (1959), Q. No. 9; I.A.S. (1956), Q. No. 11.

Corpn. v. *Clake*,[28] Marshall, C.J. held that for successful waging of war, private property could be confiscated. But as rightly remarked by Judge C. Jessup : "It is a sound general proposition that the confiscation of private property of aliens is a breach of international law".[29] There are, however, certain exceptions in this connection. The rules of international law mentioned above are not applicable in case of enemy ships in the sea. The ships of enemy, whether they are public or private, can be seized during war.

(7) *Combatants and non-combatants.**—Under International law, the soldiers of the belligerent States are divided into two categories—lawful and unlawful. At the outbreak of war, lawful soldiers, can be killed, grievously hurt, arrested or made prisoners of war. Lawful soldiers are ordinarily those soldiers who are in the regular army. Unlawful combatants, however, enjoy certain facilities or concessions. They may also bearrested and made prisoners, but they cannot be killed or grievously hurt during war. As pointed out by Starke, "Traditionally international law maintains a distinction between combatants and non-combatants, inasmuch as non-combatants are not in principle to be wilfully attacked or injured. Certain classes of non-combatants, for example merchants, seamen, may, however, be captured and made prisoners of war".[30]

In its thirtieth Session, the General Assembly, on 15 December, 1975, adopted a resolution,[31] concerning respect for human rights in armed conflict. Through this resolution, the Assembly called upon all parties to armed conflicts to comply with their obligations under humanitarian instruments and to observe international humanitarian rules. The Assembly urged all participants in the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* to do their utmost to reach agreement on additional rules which might help to alleviate suffering brought about by armed conflicts and to respect and protect non-combatants and civil objects in such conflicts.[32]

It may be noted here that in June 1977 a Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in armed conflicts was held and on 8 June, 1977 two Protocols to the Geneva Convention of 1949 were adopted. The first Protocol is the Protocol Additional to the Geneva Convention 12 August, 1949, and relating to the Protections of victims of International Armed Conflicts. Articles 43 to 45 of this Protocol contain some provisions relating to combatants. Article 43 provides that members of the armed forces of a Party to an armed conflict (other than medical personnel and chaplains) are combatants, that is to say they have the right to participate directly in hostilities. Article 44 provides that any combatant, as defined in Article 43 (as noted above), who falls into the power of an adverse Party shall be a prisoner of war. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. A combatant who falls into the power of an adverse party while failing to meet the requirements set forth above shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoner of war by the third convention and by this Protocol. Article 45 further provides that a person who takes part in hostilities and falls into the power of an adverse party shall be presumed a prisoner of war and therefore shall be protected by the third convention if he claims the status of prisoner of war or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the Detaining Power or to the Protecting Power.

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[28] (1947) 332 U.S. 429, 475; For contra see *U.S.* v *Percheman,* (1883), 7 Peters 51, 86-87.

[29] "Enemy Property", A.J.I.L., Vol. 49 (1955), p. 37; See also judgment of Cardozo, J. in *Shapleigh* v. *Mier,* (1937) 299 U.S. 468 at p. 470; See also A.I.R., 1954 S.C. 447 at pp. 450-57.

* See also for I.A.S. (1960), Q. No. 7; I.A.S. (1955), Q. No. 11 ; I.A.S. (1958), Q. No. 7(a); I.A.S. (1969) Q. No. 8(b) ; For answer see also Chapter on "The Laws of Land Warfare". "The Laws of Marine Warfare" and "The Laws of Aerial Warfare" ; P.C.S. (1982), Q. No. 4(c); P.C.S. (1983), Q. 8 (a).

[30] Starke note 2, at p. 548: See also Leaster Nurick, "The Distinction between combatant and non-combatant in the Law of War", A.J.I.L., Vol. 39 (1945), p. 680.

[31] Gen. Ass. Resolution 3500 (XXX).

[32] U.N. Monthly Chronicle, Vol. XXIII No. 17 (January 1976), p. 72; Reference may also be made to General Assembly Resolution 3103 (XXVII) of 12 December, 1973 where the Assembly declared "Basic Principle of the Legal Status of the combatants struggling against colonial and Alien Domination and Recist Regimes".

Concept of "Total War".—In accordance with the traditional definition of war, war is a contest between the armed forces of the belligerent States. Its object is to overwhelm the enemy and impose conditions upon the enemy. As pointed out earlier, this definition has become inadequate in view of the scientific developments and development of destructive weapons in the modern times. In the modern time, war not only affects the armed forces but also the civilian and the nature of the war is such that observance of the rules of war becomes impossible. Such, a war has, therefore, been called "total war". The term 'total war' was first used by Grotius. In his view, thirty year's war of Europe was a 'total war'. According to Josef L. Kunj, the religious wars of 16th and 17th century were fought with such cruelty and barbarity that they can be called 'total wars'. He further added that 'total wars' do not depend upon the unprecedented development of natural sciences.[33] "It is also clear that the total war will make illusory even such laws of war as are considered 'compatible with total war', such as rules concerning prisoners of war, sick and wounded and so on ...."[34]

*Fides etiam hosit servanda (Non-hostile relations of belligerents).**—As noted above due to outbreak of war, non-hostile relations between the belligerent States, come to an end. But there are certain exceptions to this rule. Due to necessity of circumstances, considerations of humanity and some other factors, some kinds of non-hostile relations of belligerents may continue. As pointed out by Oppenheim, "It is a universally recognised principle of International Law that, where such relations arise, belligerents must carry them out in good faith. *Fides etiam hosit servanda* is a rule which was adhered to in antiquity, when no International Law in the modern sense of the term existed. But it had then a religious and moral sanction only. Since in modern times war is not a condition of anarchy and lawlessness between belligerents, but a contention in many respects regulated by law, it is obvious that where non-hostile relations between belligerents occur, they are protected by law. *Fides etiam hosit servanda therefore, a principle which nowadays enjoys a legal as well as moral sanction*".[35] Non-hostile relations may originate from Multilateral treaties or Convention (such as Geneva Convention of 1949) for the Amelioration of the condition of the wounded and sick, in Armed Forces in the Field,[36] or from special agreements between belligerents. Such agreements may be entered into in respect of flags of truce, passports, cartels, surrender, capitulations and armistices.

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[33] Josef L Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision', A.J.I.L., Vol. 45 (1951), p. 37 at p. 40.

[34] Ibid, at p. 61.

* See also for I.A.S. (1972), Q. No. 10(e); I.A.S. (1961), Q. No. 12(a).

[35] Oppenheim, Note 3, at p. 534.

[36] For example Article 16 of the Convention imposes the obligation upon either belligerent to return to the enemy all objects of personal use, letters, etc. found in battlefield or left by those who have died in hospital.

CHAPTER 50

ENEMY CHARACTER*

Immediately after the outbreak of war between the States, a significant change comes in relations which are governed in accordance with the needs of war. States bring about changes in their behaviour against the enemies in accordance with the objectives of war. States determine their behaviour or treatment in accordance with the enemy character of the individuals, goods, corporations, ships, etc. Therefore, in order to regulate their activities and behaviour it is necessary to determine the enemy character of individuals, goods, corporations, etc. Once the enemy character of individuals, goods, corporations, etc. is determined, the belligerent State regulates its behaviour towards the enemy State accordingly. Efforts were made to formulate the rules for determining enemy character in Second Hague Conference of 1977 and Geneva Naval Conference. But no tangible success could be achieved. During the First World War different tests and standards were used to determine the enemy character of individual goods, ships and corporations. From the practice of the States and the rules that have been formulated so far, we can derive the following conclusions :

(1) *Enemy character of individuals.***—Enemy character of individuals can be studied under the two headings—(a) Enemy character of the individuals of the belligerent States; and (b) Enemy character of the individuals of neutral States.

(a) Enemy character of the individuals of the belligerent States.—In regard to the enemy character of individuals there is no uniformity in the practice of different States. They determine the enemy character of individuals of belligerent State in accordance with the different tests and standards. For example, in Britain and America the enemy character of individuals is determined on the basis of their residence and domicile. On the other hand, the enemy character of the individuals in the continental countries (European countries excepting England) is determined on the basis of their nationality. In other matters, there is hardly any difference between the practice of Britain and America on the one hand and continental countries on the other hand. As pointed out by Starke : "Hostile combatants and subject of an enemy State residents in enemy territory are invariably treated as enemy persons and residents in territory subject to effective military occupation by enemy is assimilated for this purpose to be residents in enemy territory." [1]

(b) Enemy character of individuals of neutral States.—The individuals of the neutral States who do not reside in the territory of enemy State are not deemed to be having enemy character. But if they participate in any activities against the belligerent State, then they may be deemed to having enemy character. Similarly, in accordance with the practice prevailing in America and England, if the individuals of the neutral States carry goods etc., to the enemy State or territory or continue intercourse with them, then they will be deemed to be having enemy character or in other words they will be treated as enemies. But the citizens of the enemy States living in the neutral States will not be deemed to be having enemy character.

(2) *Enemy character of Corporations.****—The enemy character of corporations is determined mainly by (a) their permanent residence, (b) their registration. If a corporation is registered in enemy State, then it will be deemed to be having enemy character. The enemy character of the corporation is also determined by its permanent residence. By a permanent residence of the corporation is meant its existence and conduct of business. In regard to the enemy character of corporations, the leading case is *Daimler Co. Ltd.* v.

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* See also for I.A.S. (1971), Q. No. 11 (d); I.A.S. (1967), Q. No. 7 ; I.A.S. (1965), Q. No. 9.

** See also for PCS (1987), Q. 8(a).

[1] J. G. Starke, Introduction to International Law, **Tenth Edition (1989)** p. 543.

*** See also for P.C.S. (1965), Q. No. 6(b) ; **P.C.S. (1977), Q. No. 7(c).**

Continental Tyre and Rubber Co. Ltd.,[2] wherein important principles were propounded. In this case the most important principle that was propounded was that if the persons or agents of the corporation who are in *de facto* control of the company reside in the enemy State or territory, then the company shall be deemed to be having enemy character. In this case the House of Lords observed, "............a company may, however, assume an enemy character............if its agents or the persons in *de facto* control of its affairs whether authorised or not, or resident in an enemy territory." In this case, the facts were as follows—

Continental Tyre & Rubber Co. Ltd., was a registered company and its registered office was situated in London. All the Directors of the Company were German nationals and resided in Germany. Most of the shareholders also resided in Germany. Daimler Co. Ltd., also a Company registered in England, owed £ 560510 to Continental Tyre & Rubber Co. Ltd., which filed a suit for recovery of the said money. Daimler Co. Ltd., opposed the said claim on the ground that the *Continental Tyre & Rubber Co. Ltd.,* and its officers belonged to the enemy country and therefore it was not liable to pay the said money.

In the First World War, Britain and Germany were enemies. Since the persons who were in *de facto* control of the company were residing in enemy State, the company was also considered to be an enemy company. Similarly, a company which is registered in England but is carrying on trade with an enemy State, will be deemed to be an enemy company.

The decision in *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. Ltd.,* has been criticized by several jurists. They have pointed out that the test of enemy character laid down in this case is very strict. For example, Starke has observed, "A company, incorporated in Britain, which acquires enemy character under the Daimler principle, is nonetheless not deemed to have its location in enemy territory; it is for all other purposes a British company subject to British legislation including regulations as to trading with the enemy." [3] Nevertheless, the principle laid down in *Daimler case,* was approved by the House of Lords in *Sovfracht case,*[4] and *The Glenroy.*[5]

(3) *Enemy character of Ships.**—The enemy character of ships is determined by their flags. This rule was adopted in Declaration of Geneva, 1909. By the flag of the ship is meant flag which the ship is legally authorised to use. For example, if a ship of France uses the American Flag, then it will be unauthorised. If the ship of an enemy State unauthorisedly uses the flag of a neutral State and is seized by the belligerent State then such a ship shall be deemed to be having enemy character. Consequently enemy character of ships, which use the flags of neutral States but are actually under the ownership of the enemy State, will be determined according to the following tests :—

(i) If the ship is in the service of enemy State or carries arms or takes part in the conflict.

(ii) If the ship resists the valid right of the belligerent State to visit and search, then such a ship may be seized and it may be deemed to be having enemy character. If such a ship is seized the onus of proving rests on the owners of the ship that the ship belongs to a neutral State. If it is not proved then the ship and its cargoes are deemed to be those of enemies.

(iii) If the vessel had no right to sail under the flag of neutral State, its real character will have to be determined in order to find out whether it has enemy character.

(iv) The neutral merchantmen acquire enemy character if they are engaged in a trade with enemy in time of war. This practice is prevalent in Britain, America and Japan.

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[2] (1916) 2 A.C. 307 : For details of the case see Appendix III.

[3] Starke, note 1, at p. 543 ; See also Kuenigal v. Donner Smarak, (1955) 1 Q. B. 515.

[4] (1943) A.C. 203.

[5] (1945) A.C. 124.

* P.C.S. (1977) Q. No. 7 (a).

(4) *Enemy character of goods**.—It is a well established customary rule that all goods found on board an enemy merchantman are presumed to be enemy goods unless the contrary is proved by the neutral owners.[6] Ordinarily, enemy character of the goods is determined by their ownership. If the owners of the goods are the residents of the enemy State, then the goods may be deemed to be having enemy character. On the other hand, if the owners of the goods live in neutral State, the goods will not be deemed to be having enemy character. Different countries have modified and amended this rule in accordance with their convenience and needs of time and circumstances. But the general rule which is evident from the general practice of the States is that the enemy character of the goods is determined by ownership of the goods.

(5) *Transfer of enemy Ships.*—Clear rules in this connection were formulated in the Declaration of London but it was not ratified by the States. Enemy ships can be transferred to and under the flag of neutral States under the following two situations :

- (a) *Before outbreak of war.*—It is necessary that such transfer should not have been made with an objective to evade the capture of the ship.[7]
- (b) *After the start of war.*—Transfer of ships after the start of war is generally considered illegal but it may be allowed if the owner of the ship establishes that it was not made with a view to evade the capture of the ship.[8]

(6) *Transfer of goods in sea.*—Nearly the same rules apply in this case as apply in case of transfer of ships. If the sale of the goods takes place before war or without its consideration, State law is applied to determine whether the transfer of ownership had been effected. If the change in ownership is attempted during war or in view of war, the goods are deemed to be of enemy character and such goods are not considered to be the property of neutral State and may be confiscated.

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* See also for P.C.S. (1965), Q. No. 6 (a); P.C.S. (1977), Q. No. (b).

[6] L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 281.

[7] Article 55 of the Unratified Declaration of London.

[8] Article 56, ibid.

CHAPTER 51

LAWS OF LAND WARFARE*

Introduction.—"The 'laws of war' consist of the limits set by International Law within which the force required to over-power the enemy may be used and the principles thereunder governing the treatment of individual in the course of war and armed conflict."[1] The objective of the rules of war is not to govern the war or regulate it as rules of games, such as, cricket, badminton, etc. On the contrary, the objective of the laws of war is to limit the sufferings and pain of the people involved in the war and to limit the area of war. That is why, the laws of war are often called the humanitarian laws of war.[2] In the absence of the laws of war, probably the cruelty and the atrocity during war would have no limits.

This history of the laws of war is very old but the development of the modern laws of war may be traced since the middle ages. The medieval concept of chivalry and Christianity greatly influenced the rules of war. In the modern times, in accordance with the rules of war, killing of civilians, bad treatment of prisoners of war, use of poisonous gases, sinking of ships without affording protection to the crew and its passengers have been prohibited. Before the nineteenth century, many multi-lateral treaties and conventions have been made which provide rules of war. More important of such treaties are : (1) Declaration of Paris, 1856; (2) Geneva Convention of 1864; (3) Declaration of Petersburg; (4) Hague Convention of 1899; (5) Hague Convention of 1907; (6) Geneva Gas and Bacteriological Warfare; Protocol, 1925; (7) The Submarine Rules Protocol, 1937; (8) The Four-Geneva Redcross Convention 1949; (9) Protocol I (*i.e.*, Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the protection of Victims of International Armed Conflicts) and Protocol II (*i.e.*, Protocol Additional to the Geneva Conventions of 12 August, 1949; and relating to the Protection of Victims of Non-International Armed Conflicts) adopted by Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law applicable in armed conflicts on June 8, 1977.

Convention on Prohibition or Restriction on the use of certain conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects :

This convention was signed on April 2, 1983. It entered into force on December 2, 1983. So far 125 countries have become parties of the Convention.

Five Protocols to this convention have been adopted. They are following :

(i) Protocol I

(ii) Protocol II—Mines, Booby Troops and other Devices.

As of January 2015, 102 parties amended it on May 3, 1996 to strengthen its provisions and extended the scope of its application to cover both international and internal conflicts.

(iii) Protocol III—Incendiary Weapons.

(iv) Protocol IV—Blinding Laser Weapons.

(v) Protocol V—Explosive Remanants of War.—This Protocol was adopted in 2003 and came in force since 2006.

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* See also for I.A.S. (1960), Q. No. 8.

[1] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 552, see also G. Schwarzenberger, A Manual of International Law, Fifth edition (1967), p. 196.

[2] For the proposed changes in the humanitarian laws of war ; see R. R. Baxter, "The Law of War" in the Present State of International Law and other Essays (1973), p. 107 at pp. 121-124.

Conference of State parties to the 1925 Geneva Protocol and other Interested States on the Prohibition of Chemical Weapons (1989).—A conference of State Parties to the 1925 Geneva Protocol and other Interested States on the Prohibition of Chemical Weapons was held at Paris from January 7 to 11th January, 1989. 149 States including India participated in the Conference. In the final Declaration of the Conference, adopted by consensus, the representatives of States participating in the conference expressed their determination to prevent any recourse to chemical weapons by completely eliminating them. They solemnly affirmed their commitment not to use Chemical Weapons. They stressed the necessity of concluding at an early date, a convention on the Prohibition of the development, production, stockpiling and use of Chemical Weapons, and on their Destruction.

Convention on the Prohibition, Production, Stockpiling and use of Chemical Weapons and on Their Destruction (1993) :

N.B.—This has been discussed in the Chapter on "Disarmament". Please, therefore, see the Chapter on "Disarmament" for a discussion of this Convention.

Laws of Land Warfare

The Hague Convention, 1907, is a landmark in respect of rules of land warfare. Hague Convention clarified the status of belligerent States and clarified the distinction between combatants and non-combatants. According to it, the persons in the regular army having specific regiment number, etc. are lawful combatants. Besides this the guerrillas, volunteers, corps, etc., may also be included in the category of combatants provided they fulfil the following three conditions :

(1) they serve under a definite and specific authority;

(2) they have specific emblem which may be recognised from distance; and

(3) they conduct war in accordance with the rules and customs of war.

The next landmark in respect of laws of land warfare was the adoption of the Four-Geneva Convention, 1949. Geneva Convention of Prisoners of War formulated important rules relating to land warfare. According to Article 4 of the Geneva Convention on Prisoners of War, 1949, the forces of National Resistance Movement may also be included in the category of lawful combatants provided that they also fulfil the conditions mentioned earlier. In regard to the treatment of the prisoners of war definite rules were formulated for the first time in the Hague Convention of 1907, and later on this was superseded by the Geneva Convention of 1929, on the treatment of prisoners of war which formulated many rules in this connection. In the present time, the rules relating to prisoners of war are contained in Geneva Convention of Prisoners of War, 1949, which has superseded the Convention of 1929 on the same subject. Besides the adoption of Convention on the Prisoners of War, a Convention was also adopted in Geneva in 1949 on wounded and sick members of the armed forces in the field. In this Convention, it was provided that it is the duty of the belligerent States to look after the sick and wounded in the war and provide them adequate medical facilities. Besides, a Convention was also adopted on wounded ship-wrecked members of the armed forces at sea. A brief reference may also be made here to the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts held in June 1977, and which adopted two Protocols to the Geneva Conventions (1949) on 8th June, 1977. Article 43 of Protocol I (*i.e.,* Protocol Additional to the Geneva Conventions of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflicts) provides that the armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognised by an adverse party. Such armed forces shall be subject to an internal disciplinary system which *inter alia,* shall enforce compliance with the rules of international law applicable in armed conflict Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Geneva Convention) are combatants, that is to stay, they have the right to participate directly in hostilities. Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify the other parties to the conflict.

Prohibited Means in Land Warfare.*—War is a contest between armed forces of two or more States wherein force can be used within certain limits laid down by the laws and customs of war. International customs, treaties, etc., have prohibited certain means in land warfare. According to Hague Convention, 1907, the use of poisonous weapons, projectiles which cause unnecessary sufferings and pain, etc., have been prohibited. Similarly the use of poisonous gas has been prohibited in land warfare. It has also been laid down that to pollute or otherwise poison water and other food materials to be used by enemy is also the violation of the laws and customs of war. During land war undefended cities and villages cannot be attacked or otherwise destroyed. Those cities and villages which are far away from military areas cannot be attacked. If on account of any special reasons it becomes necessary to attack such areas for the attainment of military ojectives, then it is the duty of the military commanders to give prior warning to the inhabitants of such areas. Killing of wounded and sick persons of the armed forces during war has also been prohibited. International law has always maintained the distinction between combatants and non-combatants. Under international law certain facilities have been provided to non-combatants. They can be made prisoners of war under special circumstances and can be prosecuted but they cannot be killed or otherwise grievously hurt during war. Thus we see that the objective of the rules of war is to minimise the sufferings and pain of the persons involved in war and also to limit the area of war.

Reference may also be made here to a new convention entitled *"Convention on Prohibitions or Restrictions on the use of certain Conventional weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects"* which was signed by the representatives of 34 States on 10th April, 1981. Belgium became the thirty-fifth signatory when it signed the convention later the same day. The convention is designed to prohibit or restrict the use of certain particularly inhumane conventional weapons, such as fragmentation, and incendiary weapons and mines and booby traps. Three Protocols are also annexed to the convention, which are not subject to signature. Protocol I deals with weapons designed to injure by fragments that escape X-Ray detection in the human body. Protocol II deals with mines, booby-traps and other devices. Protocol III deals with incendiary weapons. Expressions of consent to be bound by the three Protocols is optional for each State provided that at the time they deposit their instruments of ratification, accession or approval, they consent to be bound by any two or more of the Protocols. The convention and the Protocols were concluded in 1981 in Geneva, following work in 1979 and 1980 by a United Nations Conference and in 1978 and 1979 by a Preparatory Conference, as well as by efforts over the years by United Nations and other international bodies.

As of May 2015, 121 countries have become parties to this convention.

Its protocols have been discussed here briefly.

A brief reference may also be made here to Protocol I, *i.e.*, Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed conflicts adopted on June 8, 1977, by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed conflicts. Article 35 of Protocol I which lays down basic rules relating to Methods and Means of Warfare provides that in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited. Secondly it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. Thirdly, it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long term and severe damage to the natural environment.

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* See also for I.A.S. (1958), Q. No. 7 (b).

Ruses of War or Stratagem.*—Ruses of War or Stratagem are permitted during land warfare. By ruses of war or stratagem we mean that for the attainment of its military objectives, a belligerent State can misguide or mislead the enemy. According to the modern concept of war, war is not only the test of physical strength but also intelligence. That is why, in accordance with the rules of modern warfare ruses of war are permitted under Art. 24 of the Hague Convention. As pointed out by Fenwick, "Ruses of war or Stratagems are recognised by international law as legitimate means of deceiving the enemy. Their use, however, was restricted by the condition that they must not involve a violation of goodfaith."[3] According to Starke, "Ruses of war are permitted but according to general practice, not if tainted by treachery or perfidy or if any breach of some agreement between the belligerents". Thus, ruses of war are permitted under International Law provided that they do not amount to the contravention of any international agreements or contract.

Article 37, paragraph 1 of Protocol Additional to the Geneva Conventions of 12 August, 1946 and relating to the Protection of Victims of International Armed conflicts adopted on June 8, 1977 (hereinafter referred as Protocol I) provides that ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable to armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are the examples of such ruses : the use of camouflage, decoys, mock operations and misinformation.

Deceit.—As pointed out earlier, ruses of war are permitted under the International Law. But the position is different in regard to deceit which is different from Stratagem or Ruses of War. Deceit is contrary to International Law. For example, according to Hague Convention unauthorised use of the flag or emblem of the armed forces has been prohibited. This type of deceit is contrary to international law. Similarly, the flag of peace or emblem of red-cross cannot be used to deceive the enemy. This is also contrary to International Law.

Espionage.*—The position of espionage under International Law is very peculiar. On the one hand, International Law recognises espionage during land warfare; on the other hand, it also recognizes that the punishment can be awarded to those who are caught or apprehended while spying. According to International Law a belligerent State is entitled to send its spies in order to get information about the enemy. But the general practice of the States and the rules of international law are clear on the point that on their arrest the spies can be punished by the respective States. However, it is provided under the Hague Rules that before awarding punishment to the spies, they should first be tried and should be given sufficient opportunity to disprove the charges against them. It is also provided in the Hague Rules that if a spy escapes and is subsequently arrested, then he will be treated to be a prisoner of war. According to laws of land warfare as recognised in America, no discrimination should be made between men and women in regard to the punishment awarded to spies.

Article 46 of the Protocol I to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts provides that notwithstanding any other provision of the conventions or this Protocol any member of the armed forces of a party to the conflict who falls into the power of an adverse party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy. A member of the armed forces of a party to the conflict who, on behalf of that party and in the territory controlled by an adverse party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces. However a member of the armed forces of a party to the conflict who is a resident of territory occupied by an adverse party and, who, on behalf of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. More over such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage. Further a member of the armed forces, of a party to the conflict who is not a resident of territory occupied by an adverse party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as spy unless he is captured before he has rejoined the armed forces to which he belongs.

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* See also for I.A.S. (1967), Q. No. 8.

[3] Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 673.

* See also for I.A.S. (1977), Q. No. 8 (d); I.A.S. (1967), Q. No. 8.

Hague Regulation of 1907, has defined a "spy" as one who "clandestinely" or under "false pretences" obtains or endeavours to obtain information in the zone of operation of a belligerent with intention of communicating it to hostile party.[4] Thus "disguise" or "false pretences" is the essential element of espionage. A spy is one who acts in disguise or under false pretences but 'secrecy' is not an essential element.[5] One of the main reasons for the harsh treatment of spies is that since they are not agents of states for their diplomatic relations, they cannot take the plea of following the orders of their government.[6] It may also be noted here that espionage is illegal in peace time if it involves the presence of agents sent clandestinely by a foreign power into the territory of another state.[7] Last but not the least, "For acts of espionage, a 'true' spy, acting in disguise or under false pretences, is himself responsible : he is out in the cold by himself and the sending state will most likely disavow any knowledge of him. He will be impleaded in local courts and punished under the laws of the state where he carried out his acts".[8]

Provisions of the Geneva Convention relating to the Treatment of Prisoners of War, 1949.*

For the first time the Hague Convention of 1907 laid down certain rules relating to the treatment of prisoners of war. Later on, this Convention was superseded by the Geneva Convention of 1929 on the prisoners of war which laid down the rules relating to the treatment of prisoners of war. In the present time the rules of treatment of the prisoners of war are governed by the Geneva Convention relating to the treatment of Prisoners of War of 1949 which has superseded the Geneva Convention of 1929 on the same subject. The Geneva Convention of 1949 contains exhaustive provisions relating to the treatment of prisoners of war. Nearly 200 countries have ratified the convention.

The Geneva Convention, 1949, applies to all cases of declared war or of any other armed conflict which may arise between two or more of the parties to the Convention, even if the State of war is not recognized by one of them (Art. 2). The Convention will also apply in the case of armed conflict not of an international character occurring in the territory of one of the contracting parties. In such a situation it is provided that certain minimum provisions contained in Article 3 of the Convention should be applied and properly observed.

Article 4 of the Geneva Convention on Treatment of Prisoners of War, 1949 enumerates the categories of persons who, after they have fallen into the power or hands of the enemy must be treated as prisoners of war. The categories enumerated are as follows :

(1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;

(2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied,

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[4] See Article 29. Regulations respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 1907.

[5] Ingrid Delupis, "Foreign Warships and Immunity For Espionage", A.J.I.L., Vol. 78 (1978) p. 53 at pp. 62, 67.

[6] Ibid. at p. 67.

[7] Ibid p. 62.

[8] Ibid at p. 70.

* See also for I.A.S. (1977), Q. No. 8(b); P.C.S. (1983), Q. 10(d); P.C.S. (1987), Q. 8 (b).

provided that such militias or volunteer corps, including such organised resistance movements fulfil the following conditions :

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having fixed distinctive sign recognisable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war;

(3) Members of the armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;

(4) Persons who accompany the armed forces without actually being members thereof such as civil members of military, aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model;

(5) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the parties to the conflict who do not benefit by more favourable treatment under any other provisions of International Law; and

(6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Reference to the members of 'organised resistance movements' in category (2) noted above is very significant. As pointed out by Oppenheim, "There is in modern conditions no justification for the tendency, which was predominant in the nineteenth century and which found to some extent expression in the compromise reached at the Hague Conference in 1899 on the subject, to brand as illegal the activities of guerilla troops on the additional ground that the continuation of the struggle after the national territory has been totally occupied by the enemy without there remaining any hope of restoring the position is a senseless act of defiance which merits reprobation. For in modern-global warfare the complete occupation of a country may be but an episode in the campaign in which the legitimate government though compelled to withdraw from national territory continues to fulfil its responsibilities in conjunction with its allies.........Moreover, the right of the inhabitants to organise themselves spontaneously and to attack the enemy cannot be reasonably denied when the force of the lawful government re-enter the country in order to expel the invader and when, as the result, the authority of the occupant becomes precarious and is no longer uncontested. There is the further consideration that in modern conditions the distinction which the Hague Regulations established between the territory 'not under occupation' (as to which the inhabitants were permitted to take up arms spontaneously on the approach of the enemy subject to the conditions laid down by the Regulations) and territory under occupation is not as rigid as it was in the past; large areas may be nominally occupied by rapidly advancing motorised and armoured units, leaving full scope for legitimate resistance by scattered and spontaneously organised corps of the population". Thus as compared to the relevant provision of the Hague Regulations, the above provision of the Geneva Convention of 1949 marks a considerable advance for it applies to organised resistance movements operating in outside their own territory provided that they fulfil the four conditions (*i.e.*, a to d) mentioned in category (2) as noted above.

The Geneva Convention on Prisoners of War, 1949, contains the following important provisions relating to the treatment of prisoners of war :

(1) According to Article 13, prisoners of war must at all time be humanly treated.

(2) Any unlawful act or omission by the detaining power causing death or seriously endangering the health of the prisoners of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.[9]

(3) No prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

(4) Prisoners of war must at all times be protected, particularly against act of violation or intimidation against insults and public curiousity.

(5) Measures of reprisal against prisoners of war are prohibited.

(6) Prisoners of war are entitled in all circumstances to respect of their persons and their honour.[10]

(7) Prisoners of war shall retain the full civil capacity which they enjoy at the time of their capture. The detaining power may not restrict the exercise either within or without its territory of the rights which the convention confers except in so far as the captivity requires.[11]

(8) The power, detaining prisoners of war, shall be bound to provide free of charge for the maintenance, for the medical attention required by their state of health.[12]

(9) All prisoners of war shall be treated alike by the detaining power without any adverse distinction based on race, nationality, religious belief or political opinions or any other distinction founded on similar criteria subject, however, to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications.[13]

(10) No physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.[14]

(11) All effects and articles of personal use, except arms, horses, military equipment and military documents shall remain in their possession, likewise their metal helmets and gas-masks, like articles issued for personal protection.[15]

(12) Prisoners of war shall be evacuated as soon as possible after their capture to camps situated in an area far enough from connected zone for them to be out of danger.[16]

(13) At no time should prisoners of war be without identity documents. The detaining power shall supply such documents to prisoners of war who possess none. Badges of rank and nationality decorations and articles having above all personal or sentimental value may not be taken from the prisoners of war.

(14) The detaining power may subject prisoners of war (POW) to internment. It may impose upon them the obligation of not leaving beyond certain limits of the camp where they are interned or if the said camp is fenced in, of not going outside its perimetre. Subject to the provisions of the present convention

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[9] Ingrid Delupis, "Foreign Warships and Immunity For Espionage", A.J.I.L., Vol. 78 (1978) at p. 70.

[10] Article 14.

[11] Article 13.

[12] Article 15.

[13] Article 16.

[14] Article 17.

[15] Article 18.

[16] Article 19.

relating to penal and disciplinary sanctions. POW may not be held in close confinement except where necessary to safeguard their health, and then only during the continuation of the circumstances which make their confinement necessary (Article 21).

(15) Officers and prisoners of equivalent status shall be treated with due regard for their rank and age (Article 44). POW other than officers and prisoners of equivalent rank shall be treated with due regard due to their rank and age. (Article 45).

(16) The detaining power shall grant all POW of a monthly allowance of pay, the amount of which shall be fixed by conversion, into the currency of the said power. (Article 60)

(17) POW's shall be allowed to send and receive letters and cards. (Article 71).

It is clear from the above provisions that these rules have been made for ensuring good treatment towards the prisoners of war. It has become a general principle of international law that the prisoners of war should always be humanly treated. It is the duty of the prisoners of war that when they are asked questions relating to their name, date of birth and regiment etc., they should give reply properly. In case they do not give correct and appropriate replies in respect of the said questions they may not get the facilities which they might have been entitled to get.

Protocol I adopted on June 8, 1977 by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts also contains some provisions relating to prisoners of war. Article 44 of Protocol I provides that any combatant, as defined in Article 43,[17] who falls into the power of an adverse party shall be a prisoner of war. Article 45 provides that a person who takes part in hostilities and falls into the power of an adverse party shall be presumed a prisoner of war and therefore shall be protected by the Third Convention if he claims the status of prisoner of war, or if he appears to be entitled to such status or if the party on which he depends claims such status on his behalf by notification to the detaining power or to the protecting power. If a person who has fallen into the power of an adverse party is not held as a prisoner of war and is to be tried by that party for an offence arising out of hostilities, he will have to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and does not benefit from more favourable terms in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to the rights of communication under this convention.

Article 75 of the said Protocol I provides that in so far as they are affected by a situation referred to in Article 1[18] of the Protocol, persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the conventions or under this Protocol shall be treated humanly in all circumstances and shall enjoy, as a minimum the protection provided by this Article, without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion of social origin, wealth, birth, or other status, or any other similar criteria. Each party shall respect the person, honour, conviction and religious practices of all such persons.

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[17] The definition of combatant as contained in Article 43 has been noted earlier in Chapter on "War". Its Legal Character and Effects".

[18] Article 1 which deals with general principles and scope of application provides that in cases not covered by this Protocol or by other international agreements civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience. The Protocol also covers situations which include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against recist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the U. N. and the declaration of Principles of International Law concerning Friendly Relations and Co-operations among status in accordance with the Charter of the U. N.

Lastly, it may be noted that a mercenary shall not have the right to be a combatant or a prisoner of war.

Guerrillas*.—The Red Cross Conventions, 1949 have been revised recently to cover modern warfare techniques. Under the new clause recently added guerrillas have been conferred upon the rights and status of prisoners of war. The Red Cross Conventions have been ratified by an overwhelming majority of nations. The conference was held in the last week of April 1977 wherein the said decision was taken by 66 States out of 86 States attending the conference on humanitarian law in Geneva. In effect the revised conventions have legitimatised air piracy or guerrilla action on ground to a great extent. This is due to the widening of the definition of the term "Armed Forces". Article 43 of Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted on June 8, 1977, provides the following—

1. The armed forces of a party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates even if that party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict;
2. Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Article 44 further provides that any combatant, as defined in Article 43, who falls into the power of an adverse party shall be a prisoner of war.

It may also be noted here that paragraph 3 of Article I (which deals with general principles and scope of application) of Protocol I provides that this protocol, which supplements the Geneva Conventions of 12 August, 1949 for the protection of war victims shall apply in the situations referred to in Article 2 common to those conventions. Paragraph 4 of Article I further provides that the situations referred to in the preceding para include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the U. N. and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U. N.

The above provisions make it clear like crystal that the provisions contained in the Protocol shall apply also to guerilla war and resistance movements. The new clauses were criticized by countries such as Israel who pointed out that the said decision would encourage acts of terrorism. For example, a person committing air-piracy in a plane in a foreign country will get P. O. W. status, on other hand, Palestinian Liberation Organization (PLO) expressed its satisfaction and happiness with the decision.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August, 1949).

In regard to the treatment of injured members of the armed forces, some rules were formulated for the first time in Geneva Convention of 1864. These rules were reconsidered in the Hague Conference of 1907 which formulated certain rules relating to this subject. The problem of the dead and the injured members of the armed forces became very complex during the first world war. It, therefore, became necessary to make some definite rules in this connection by convening an international conference. Consequently a conference was convened at Geneva in 1929 wherein many rules were formulated relating to the treatment of the dead and injured members of the armed forces. The Second World

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* See also for I.A.S. (1977), Q. No. 8 (c); C.S.E. (1982), Q. 8 (a).

War witnessed the flagrant violation of these rules. In order to formulate more definite and liberal rules relating to the dead and injured members of the armed forces, a Conference was called at Geneva in 1949. In Geneva Conference, a Convention was signed which is known as *Geneva Convention relating to the treatment of the Dead and Injured Members of the Armed Forces, 1949*. Most of the signatory States later on ratified this convention. Thus at present the treatment of the dead and injured members of the armed forces is governed under the provisions of the said Geneva Convention of 1949. The Geneva Convention of 1949 contains the following important rules in this connection :

Articles 2 and 3 of the Convention which deal with the scope of the Convention are almost same as in Geneva Convention Relating to the Treatment of POW (1949) which have been referred above. This convention comprises of 64 Articles. Following are some of the main provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (1949) :

(1) For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation. (Article 5).

(2) The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick personnel and chaplains, and for their relief. (Article 9).

(3) Members of the armed forces and other persons mentioned in the Article 13, who are wounded or sick, shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.

(4) According to Article 13 of the Convention, the present Convention shall apply to the wounded and sick belonging to the following categories :

(i) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(ii) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions :

  (a) that of being commanded by a person responsible for his, subordinates;

  (b) that of having a fixed distinctive sign recognizable at a distance;

  (c) that of carrying arms openly;

  (d) that of conducting their operations in accordance with the laws and customs of war.

(iii) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.

(iv) Persons who accompany the armed forces without actually being members thereof, such as, civil members of military, aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.

(v) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law.

(vi) Inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units provided they carry arms openly and respect the laws and customs of war.

(5) The wounded and sick of a belligerent who fall into enemy hand shall be POW, and the provisions of international law concerning POW shall apply to them. This is, however, subject to the provisions of Article 12 (Article 14).

(6) At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. (Article 15).

(7) Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the parties to the conflict (Art. 19).

(8) Hospital ships entitled to the protection of the Geneva Convention for the amelioration of the condition of wounded, sick and ship-wrecked members of armed forces at sea of August 12, 1949, shall not be attacked from the land. (Art. 20).

(9) Members of the personnel designated in Article 25[18a] who have fallen into the hands of the enemy shall be POWs, but shall be employed on their medical duties in so far as the need arises. (Art. 29).

(10) Medical aircraft, *i.e.,* aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed between the belligerents concerned. (Art. 36).

(11) The Parties to the Convention undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in Art. 50. (Art. 49).

(12) Grave breaches referred to in Art. 49 shall be those involving any of the following acts, if committed against persons or property protected by the Convention : wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

(13) No High Contracting Party shall be allowed to absolve itself or other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in Art. 50 (Art. 51).

(14) Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination of the bodies, with a view to confirming death, establishing identity and enabling a report to be made one half of the double identity disc, or identity disc itself if it is single disc, should remain on the body.

Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead. (Art. 17).

(15) Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited (Art. 46).

[18a] Article 25 provides that members of the armed forces specially trained for employment, should be need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they came into contact with the enemy or fall into his hands.

(16) The present Convention replaces the Convention of August 22, 1864, July 6, 1906 and July 27, 1929, in relations between the High Contracting Parties (Art. 59).

It is clear from the above provisions of the Geneva Convention relating to the treatment of dead and injured members of the armed forces that certain facilities have been provided to the dead and injured members of the armed forces. It may however be noted that this Convention has certain weaknesses. As pointed out by Starke it is conspicuous by its silence in regard to financial matters. It also does not make any provision relating to the powers of the occupying belligerent authority in respect of the public finances. It will, therefore, be desirable and expedient to amend the said Convention in order to incorporate the above mentioned and certain other provisions which may be in accordance with the changing times and circumstances of the present warfare.

A brief reference may also be made here to Protocol I adopted on June 8, 1977 by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed conflicts. This protocol supplements the Geneva Conventions of 12 August, 1949. Article 10 of the Protocol provides that all the wounded, sick and shipwrecked, to whichever party they belong shall be respected and protected. In all circumstances they shall be treated humanely and shall receive to the fullest extent practicable and with the possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Red Cross Personnel and Red Cross Insignia*.—With a view to ensure that the wounded and sick members of the Armed Force may be given treatment, the Geneva Convention for the Amelioration of the condition of the wounded and sick in Armies in the Field provides that the belligerents have to respect and protect the mobile medical units and personnel of medical service. But this protection can be claimed by them so long as they are engaged in medical service. This protection ceases if they are involved in carrying on espionage, concealing arms and ammunition or sheltering combatants.[19] Under Article 24, the personnel engaged in the treatment of the sick and wounded must be respected and protected under all circumstances. According to Article 28 of the Geneva Convention of 1949, the medical personnel, chaplains and staff of National Red Cross Societies may be retained by the belligerent into whose hands they have fallen but only in so far as is necessary for the state of health, the spiritual needs and the number of prisoners. The persons thus detained are not to be considered prisoners although they may get the benefits of the provision of the Geneva Convention of 1949 on Prisoners of War. They should be allowed to continue on their duties for their armed forces. For example, they may visit prisoners of war in hospitals outside the camp or labour units. Such personnel should be returned to the belligerent to whom it belongs as soon as it is possible and military requirements permit. The Geneva Convention recognises the emblems of the Red Cross, the red crescent, or the red lion or red sun, on a white ground as a distinctive emblem in such countries as already use these emblems. Oppenheim[20] has summarised the rules concerning the use of this emblem in the following words :

(1) It must be shown, with the permission of the competent military authority (Article 39), on the flags, the armlets (brassards) and on all the equipment belonging to the medical service.

(2) Medical units and establishments hoist the distinctive flag, which may be accompanied by the national flag of the belligerent to which they belong (Article 22).

(3) All the medical personnel proper as well as that of the voluntary societies of belligerents and neutrals (Articles 24, 26 and 27 of the Convention), according

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* See also for I.A.S. (1977), Q. No. 8(a).

[19] Articles 21 and 22 of the Geneva Convention.

[20] International Law, Vol. II, Seventh Edition, p. 361.

to Article 40, wear on the left arm, a water-resistant armlet (brassard) with the distinctive sign, stamped by the competent military authority. Provision is made for the issue, in addition to identity discs, of uniform identity cards both for these categories as well as for the persons employed as auxiliary nurses or strecher-bearers. (Article 25).

(4) The Red Cross on white ground and the words 'Red Cross' or 'Geneva Cross' must not, according to Articles 44 and 53, be used, either in peace or war, except to indicate the protected medical units, establishments, personnel, and material.

It may also be noted that the abuse of the distinctive sign for the purpose of offensive military action is a violation both of the convention and the law of war in general.[21]

It is clear from the foregoing that Red Cross Personnel have been given certain protections under the Geneva Convention of 1949 so as to enable them to render their services for the treatment of sick and the wounded. Red Cross insignia is respected and is given certain immunities so long as it is genuinely and legitimately used. Its abuse is not permissible and constitutes violation of the Convention as well as law of war in general. A brief reference may also be made here to Protocol I adopted by Diplomatic conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted on June 8, 1977.

Red Cross, Red Crescent and other Recognized Emblems.—Article 38 of Protocol I provides that it is prohibited to make improper use of the distinctive emblems, of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the convention or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict, other internationally recognized protective emblems, signs or signals, including the flag of truce and the protective emblem of cultural property. Further, it is prohibited to make use of the distinctive emblem of the U. N., except as authorized by that organization.

As regards emblems of nationality, Article 39 provides that it is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not parties to the conflict. Further, it is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse parties while engaging in attacks or in order to shield, favour, protect or impede military operations. It is however provided that nothing in this Article shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

Perfidy.—Perfidy means breach of faith or treachery. Article 37 of Protocol I provides that it is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable to armed conflict and intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy :

(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;

(b) the feigning of an incapacitation by wounds or sickness;

(c) the feigning of civilian non-combatant status; and

(d) the feigning of protected status by the use of signs, emblems or uniform of the United Nations or of neutral or other States not parties to the conflict.

Geneva Convention Relative to the Treatment of Civilian Persons in Time of War (12 August, 1949).[22]—This convention deals with following main subjects :

(a) the treatment of alien enemies in belligerent territory;

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[21] International Law, Vol. II, Seventh Edition, at p. 362.

[22] See also provisions of this convention noted in the next Chapter (i.e., Chapter 54 entitled "Belligerent Occupation").

(b) the protection of sick and wounded civilians and establishment of safety zones for civilians;

(c) the treatment of internees both in belligerent and in occupied territory; and

(d) the treatment of civilian population in occupied territory.

As regards the last category mentioned above (*i.e.*, the treatment of civilian population in occupied territory), some of the provisions have been noted in next chapter on "Belligerent occupation", hence only those provisions will be referred which have not been referred in the said chapter.

The main provisions of the Geneva Convention Relating to Treatment of Civilian Persons in Times of War are following :

(1) The enemy aliens who want to leave the country before or during the war will be entitled to do so provided that their departure is not contrary to the interest of belligerent States. They should be permitted to take alongwith them money reasonably necessary for their travel and also their personal goods.

(2) Subject to the national security, enemy aliens should be treated in the same way as they are treated during war.

(3) They can be compelled to do only those works and to the same extent which can be taken from the nationals of the belligerent States and their working conditions and conditions to derive profits or gains must also be the same. They cannot be compelled to perform works which are directly relating to military activities.

(4) The internment of alien enemies or their placing in an assigned residence may be ordered only if security of the Detaining Power makes it absolutely necessary.

(5) According to Article 44 of the Convention, the Detaining Power shall not treat enemy aliens, exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not actually enjoy the protection of any government.

(6) Protected persons shall not be transferred to a power which is not a party to the convention. This provision, however, shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country or residence after the cessation of hostilities.

Protected persons may be transferred by the detaining power only to a power which is a party to the convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee power to apply the present Convention.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear prosecution for his or her political opinions or religious beliefs.

(7) Articles 27 to 33 of the Convention are applicable to persons both in the territory of the belligerent and in occupied territory. These articles lay down principles of general character. For example, it is provided that such persons are entitled to respect of their persons, their honour, their religious convictions and practices, and their family rights. No physical or moral coercion must be exercised against them, in particular for the purpose of obtaining information. The convention specifically prohibits measures of such a character as to cause physical suffering or extermination of the protected persons. Besides these, collective punishment and all measures of intimidation and terrorism are prohibited.

(8) According to the convention, the International Committee of the Red Cross and the National Red Cross Societies must be granted facilities for the fulfilment of their task. This is, however, subject to military considerations and national security.

(9) The convention contains a number of provisions relating to treatment of internees. For example, it provides that as far as possible, the internees shall be accommodated according to their nationality, language and custom. But the internees belonging to the same country shall not be separated merely because they speak different languages, and that as far as possible, families must not be separated.

(10) As regards the enforcement of the convention, the parties to the convention have undertaken to enact legislation necessary to provide effective penalties against persons or ordering to be committed any grave breach of the convention. It is the responsibility of every State Party to the convention to suppress all breaches of the convention which fall short of 'grave breaches'.

(11) As regards the protection of civilians in occupied territory, the main provisions are following :

(a) The convention prohibits individual or mass forcible transfers and deportations of civilians from occupied territory to the occupying power or to any other country, whether occupied or not. It is further provided that the occupying power must not deport or transfer parts of its own civilian population into the territory occupied by him. (Art. 49)

(b) The Occupying Power is prohibited from compelling the inhabitants of the occupied territory to serve in its armed forces. (Art. 51)

(c) The convention forbids the Occupying Power to compel the inhabitants of the occupied territory to work unless they are over eighteen years of age.

(d) The inhabitants of the occupied territory can be asked to do only that work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.

(e) The inhabitants of the occupied territory must not be forced to do any work which would involve them in taking part in military operations. (Art. 51)

(f) As far as possible, the inhabitants should be kept in their usual place of employment and they must be paid a wage which must be fair and proportional to their physical and intellectual capacities. (Art. 51)

(g) The Occupying Power must not alter the status of public officials and judges nor measures of coercion or discrimination be applied against them in case they abstain from fulfilling their functions for reasons of conscience. (Art. 54)

(h) The Occupying Power is prohibited from destroying the movable or immovable property of private persons, of the state, or of other public authorities, or of social or co-operative organisations except when military operations render such destruction absolutely necessary. (Art. 53)

(i) Unless repealed or suspended by the Occupying Power, the criminal laws of the country remain in force. (Art. 64)

(j) The Convention contains several safeguards against the imposition of death penalty on a civilian inhabitant. It can be imposed only in cases when the person concerned is guilty of espionage, of serious acts of sabotage against the military installations of the occupant, of intentionally causing death. Secondly, in the above cases, death penalty can be imposed if said offences were punishable by death under the law of the occupied territory prior to occupation. Thirdly, the attention of the court must have been drawn to the fact that the accused does not owe any duty of allegiance to the occupant. Fourthly, the accused must not be under 18 years of age at the time of the offence. (Art. 68)

(k) The Occupying Power is prohibited from arresting, prosecuting or convicting any person for acts committed before the occupation or during a temporary interruption thereof with the exception of breaches of laws and customs of war. (Art. 70)

(l) The convention contains a number of provisions for securing a regular trial such as notifying the Protecting Power and ensuring the attendance of its representatives at the trial, sending of information to it of any death sentences or imprisonment for two years or more, certain safeguards relating to evidence and counsel and granting of the right to appeal. No sentence shall be pronounced by the competent courts of the occupying power except after a regular trial. (Art. 71)

(m) The civilians who are accused of offences or convicted by the courts in occupied territory must be handed over to the authorities of the occupied territory at the end of the occupation. (Art. 77)

(n) If the occupying power considers it necessary, for imperative reasons of security, to take measures concerning protected persons it may, at the most, subject them to assigned residence or to internment. (Art. 78)

(o) Last but not the least, it is the duty of the occupying power to ensure the food and the medical supplies of the population to the fullest extent of the means available to it. Further, it shall, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. (Art. 55)

A brief reference may also be made here to Protocol I to the Geneva Conventions of 1949 adopted on June 8, 1977 by Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. This Protocol supplements the Geneva Conventions of 12 August, 1949. The Protocol contains a number of provisions relating to the treatment of civilian persons in time of war. Article 48 which contains a basic rule relating to civilian population provides that in order to ensure respect for and protection of the civilian population and civilian objects, the Parties shall at all times distinguish between a civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. The more important of other provisions are following :

(1) The civilian population and individual civilian shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances :—

  (a) The civilian population as such, as well as of individual civilians, shall not be the object of attack. Acts of threat or violence primary of which is to spread terror among the civilian population are prohibited.

  (b) Civilians shall enjoy the protection afforded by Protocol unless and for such time as they take a direct part in hostilities.

  (c) Indiscriminate attacks are prohibited. (Art. 51)

(2) As regards general protection of civilian objects, the Protocol provides that the civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military as defined hereinafter. Attacks shall be limited to military objectives. In so far as objects are concerned military objects are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make

an effective contribution to military action, it shall be presumed not to be so used. (Art. 52)

(3) Starvation of civilians as a method of warfare is prohibited. (Art. 54)

(4) In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. (Art. 57)

(5) As regards Civil defence, the Protocol provides that civilian, civil defence organizations and their personnel shall be respected and protected subject to the provisions of this Protocol. They shall be entitled to perform civil defence tasks except in case of imperative military necessity. (Art. 62)

(6) The protection to which the civilian, civil defence organizations, their personnel, buildings, shelters and materials are entitled shall not cease unless they commit or are used to commit, outside their power tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time limit, and after such warning has remained unheeded. (Art. 65)

(7) In addition to the duties specified in Article 55 of the Fourth Geneva Convention concerning food and medical supplies the Occupying Power shall, to the fullest extent of means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship. (Art. 69)

(8) Persons who, before the beginning of hostilities were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the state of the refuge or state of residence shall be protected persons within the meaning of Part I and III of the Fourth Convention, in all circumstances and without any adverse distinction. (Art. 73)

(9) Persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Geneva Conventions or under this Protocol shall be treated humanly in all circumstances and shall enjoy, as a minimum, the protection provided by this Article, (*i.e.*, Article 75) without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria. Each party shall respect the person, honour, convictions and religious practices of all such persons. The following acts are and shall remain prohibited at any time in any place whatsoever, whether committed by civilian or military agents :

  (a) violence to the life, health or physical or mental well being of persons, in particular : (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment and mutilation;

  (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and in any form of indecent assault;

  (c) the taking of hostages;

  (d) collective punishments; and

  (e) threats to commit any of the foregoing acts.

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court, respecting the generally recognised principles of regular judicial procedures. Women whose liberty has been restricted for reasons related to the armed conflict shall be held, in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units. It is further provided that persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by Article 75 and until their final release, repatriation or re-establishment, even after the end of the armed conflict. (Art. 75)

(10) Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. (Art. 76)

(11) Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason. (Art. 77)

(12) Journalists engaged in dangerous professional missions in areas of armed conflicts shall be considered as civilians and shall be protected as such under the conventions and this Protocol. Provided that there is no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in the Third Convention. (Art. 79)

(13) Last but not least, a party to the conflict which violates the provisions of the Conventions of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. (Art. 91)

CHAPTER 52

BELLIGERENT OCCUPATION

Belligerent Occupation*

When war takes place in between two or more than two States, it often happens that belligerent States occupy some territory of the enemy States. But this type of occupation may be deemed to be complete only when the occupying powers establish their administration over the occupying territory. Belligerent occupation, in fact, is the intermediate stage in between invasion and the transfer of complete sovereignty. Occupation is established after the attack but occupation of the belligerent State over a particular territory does not mean that the occupying power has established its complete sovereignty over that area. Occupation is established by firm possession over the territory. In accordance with the rules formulated in Hague Convention of 1907, belligerent occupation is established only when in fact the territory concerned comes under the occupation and authority of the belligerent State. According to Oppenheim, "occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation become apparent from the fact that an occupant sets up some kind of administration; whereas the mere invader does not."

In consequence of the establishment of occupation over a territory by the belligerent State, the nationality of the local citizens does not change nor their loyalty towards the old Government comes to an end. As a matter of fact, the position of the occupying power is that of an intermediate military occupation. In consequence of this occupation, the belligerent State acquires right to establish administration over the inhabitants or citizens of that territory. It can make rules and regulations, for maintaining peace and order in that territory and for the security of its forces there. Even after the end of the occupation of the belligerent State over such a territory, the legal and valid action performed by such a power as deemed to be valid even after the occupation has ended. But the same is not true in regard to illegal actions performed by it. As pointed out by Starke, "The rational basis of international law as to belligerent occupation is that until subjugation is complete and the issues are finally determined, the occupant power's authority is of provisional character only."[1] He further adds, "The Status of Germany after the second world war following on the unconditional surrender appears to have involved a stage intermediate between belligerent occupation and the complete transfer of sovereignty. The four Allied Powers, Great Britain, France, Russia and the United States exercised supreme authority over Germany, and in the opinions of some writers, this could not be regarded as a belligerent occupation because of the destruction of the former Government and the complete cessation of hostilities with the conquest of the country. Nor, since the Occupying Powers were acting in their own interests, were they trustees in any substantive sense for the German people. At the same time, it should be pointed out that the Allied Control system was expressly of a provisional character, not involving annexation, was predominantly military in form, and based on the continuance of the German State as such, and on the contrivance also of a technical State of war. However, the question is now somewhat of academic interest except as a precedent for the future, owing to the establishment of separate West and East German Governments."[2]

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* See also for P.C.S. (1976), Q. No. 10(a); I.A.S. (1973), Q. No. 7(d); I.A.S. (1970), Q. No. 9; I.A.S. (1962), Q. No. 7; I.A.S. (1960), Q. No. 9; I.A.S. (1955), Q. No. 5; I.A.S. (1956), Q. No. 9; P.C.S. (1984), Q. No. 10(f).

[1] J.G. Starke, Introduction to International Law, Tenth Edition, (1989) p. 565. In his view, "Belligerent occupation must be distinguished from two other stages in the conquest of enemy territory:—(a) invasion, a stage of military operations which may be extended until complete control is established; and (b) the complete transfer of sovereignty, either through subjugation followed by annexation, or by means of a treaty of cession," Ibid, at pp. 564-565.

[2] Ibid, at pp. 565-566. It may be noted here that recently there has been the unification of two Germanys.

The provisions of the Hague Convention relating to belligerent occupation depended on two main concepts—(a) the belligerent power occupying the territory is not equivalent to sovereign rules and (b) private property cannot be seized.[3] In the twentieth century, these concepts have been greatly affected due to several reasons. According to Julius Stone, following are the said reasons : (1) Expansion of the functions of the State Government; (2) Change in the rules of proper government administration; (3) Increase in the use of human and material resources in war by the belligerent States; and (4) Change in economic rules of war (for example, even if private property can be seized under certain circumstances, the acquiring power pays compensation for the same).[4]

Rights and Duties of occupying power*

The provisions relating to rights and duties of the occupying power find mention in following conventions :

(i) Hague Convention of 1907.
(ii) Geneva Convention of 1949 on Protection of Civilian Persons in Times of War.
(iii) Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

(I) Hague Convention of 1907

The rights and duties of occupying belligerent power depend upon the needs of maintaining peace and order on that territory, local needs of the inhabitants and the military needs of the occupying power. In short, following are the duties and rights of the occupying power :

(1) As provided under Article 43 of the Hague Regulations, the authority of the legitimate Power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

(2) The Occupying Power must respect family honour and rights, individual lives, private property and liberty;

(3) The occupant is entitled to collect ordinary taxes, dues and tolls imposed for the benefit of the State by the legitimate Government. As far as possible he must do so in accordance with the rules in existence and the assessments in force and must defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

(4) In regard to the property, the effects are the same as those of the effects of war which have been mentioned in detail in an earlier chapter. In short, private property may be taken over for a temporary period and can be used but it cannot be seized. Public movable property may be seized. Immovable property may be temporarily taken but cannot be permanently seized.

(5) Except for the needs of the forces of the occupying power, the valid professions of the local inhabitants should not be disturbed. They should be free to follow their religious customs and should have freedom to worship in their own ways. The occupying power is not entitled to transfer the inhabitants of the occupying territory to certain other places.

(6) The occupying power is entitled to get food material for the needs of their military forces. But this should be done keeping in view the needs and convenience of the inhabitants of the territory. The people of the territory occupied cannot be compelled to be engaged in military works against their own country. Contributions and donations cannot be extracted from the local

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[3] Julius Stone, Legal Control of International Conflicts (1954) pp. 727-28.

[4] Ibid, at pp. 728-729.

* See also for I.A.S. (1958), Q. No. 9; I.A.S. (1954), Q. No. 8; I.A.S. (1964), Q. No. 10; P.C.S. (1964), Q. No. 8(b); P.C.S. (1965), Q. No. 10(b); P.C.S. (1983), Q. No. 8(a).

people. This could be done only in exceptional circumstances when ordinary taxes are insufficient to meet the essential needs of the occupying power.*

(7) An occupant is prohibited from declaring extinguished, suspended or unenforceable in a court of law the rights and the rights of action of the inhabitants.

(8) An occupant may depose all Government officials who have not withdrawn with the retreating enemy. But he must not compel them by force to carry on their functions, if they refuse to do so except where military necessity arises.

(II) Geneva Convention of 1949 on Protection of Civilian Persons in Time of War :

Following are some of the main provisions of this Convention :

(1) Protected Persons *i.e.* civilian people who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the occupying power, nor by any annexation by the latter of the whole or part of the occupied territory.[5]

(2) Protected persons who are not the nationals of the power whose territory is occupied may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the occupying power shall establish in accordance with the said article. (Art. 48)

It may be noted here that Article 35 provides that all protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the state. The applications of such persons to leave shall be decided in accordance with the regularly established procedures and the decision shall be taken as early as possible those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use. If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate Court or administrative board designated by the Detaining Power for that purpose.

(3) Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the occupied power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the occupying power may undertake total or partial evacuation of a given area of the security of the population or imperative military reasons do demand.[6]

(4) The occupying power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.[7]

(5) The occupying power may not alter the status of public officials or judges in the occupied territories, or in any way, apply sanctions to or take measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.[8]

(6) To the fullest extent of the means available to it the occupying power has the

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* See also for P.C.S. (1988), Q. 9(b).

[5] Article 47.

[6] Article 49.

[7] Article 51.

[8] Article 54.

duty of ensuring the food and medical supplies of the population; it should, in particular bring the necessary food stuff, medical stores and other articles of the resources of the occupied territory are inadequate.[9]

(10) Similarly, to the fullest extent of the means available to it, the occupying power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.[10]

(11) The occupying power may requisition civilian hospitals only temporarily and only in case of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

The materials and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.[11]

(12) The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to the security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity of ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.[12]

(13) The penal provisions enacted by the occupying power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provision shall not be retroactive.[13]

(14) Protected persons shall not be arrested, prosecuted or convicted by the occupying power for acts committed for or opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.[14]

(15) No sentence shall be pronounced by the competent courts of the occupying power except after a regular trial.[15]

(16) A convicted person shall have the right of appeal provided for by the laws applied by the Court. He shall be fully informed of his right to appeal or petition and of the limit within which he may do so.[16]

(17) Protected persons accused of offences shall be detained in the occupied territory and if convicted they shall, serve their sentence therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in the prisons in the occupied territory.[17]

(18) Protected persons who have been accused of offences or convicted by the

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[9] Article 55.
[10] Article 56.
[11] Article 57.
[12] Article 64.
[13] Article 65.
[14] Article 70.
[15] Article 71.
[16] Article 73.
[17] Article 76.

Courts in occupied territory shall be handed over at the close of occupation with the relevant records to the authorities of the liberated territory.[18]

(19) Lastly, if the occupying power considers it necessary for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.[19]

Nearly 200 countries have ratified this convention.

Criticism.—The rules formulated in the Hague Convention and the Geneva Convention have been subjected to severe criticism. The most important criticism that has been levelled and, rightly too, is that these conventions are conspicuous for their silence in respect of several matters. For example, no clear rules have been formulated in regard to the economic and financial matters. It is also not clear as to what rights the occupying power possesses in regard to the bank, coinage, etc. of the territory occupied. In this connection, only one thing can be said with certainty that the occupying power should do its best not to take undue advantage from the inhabitants of the territory occupied in regard to economic and financial matters.

However, it may be noted that if the inhabitants of the territory occupied perform certain activities which are against the security and public order of the occupying power, then the occupying power is entitled to award due punishment to them. For example, if the local inhabitants resort to spying against the occupying power or interfere with any military activity of the occupying power then the occupying power can give them due punishment. However, it has been made clear in Articles 67 and 68 of Geneva Convention that the occupying power cannot claim the loyalty of the local inhabitants of the territory occupied. As pointed out earlier, in certain cases the occupying power or authority can establish control over the inhabitants of the territory occupied and can prohibit certain types of activities. It is, however, necessary that for the prohibition of these activities prior intimation should be given to the inhabitants of the territory occupied.[20]

(III) Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of victims of International Armed Conflicts (Protocol I)

In addition to the provisions of Hague Regulations and Geneva Convention of 1949 on Protection of Civilian Persons in Times of War, Protocol I adopted on June 8, 1977 by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed conflicts contains some provisions. The more important of the such provisions are following :

(i) The occupying power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied. The Occupying Powers shall not therefore requisition civilian medical units, their equipment, their material or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment subject to the general rule in the preceding sentence the Occupying Power may requisition, the said resources, subject to the following conditions :

(a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;

(b) that the requisition continues only while such necessity exist; and

(c) that the immediate arrangements are made to ensure that the medical needs of the civil population as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

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[18] Article 77.

[19] Article 78.

[20] For detailed study of this aspect see R.R. Baxter, "The Duty of obedience to the Belligerent occupant", B.Y.B.I.L., Vol. XXXVII (1950) p. 235.

(ii) The civilian population shall respect the wounded, sick and shipwrecked even if they belong to the adverse party, and shall commit no act of violence against them. The civilian population and aid societies, such as National Red Cross (Red Cresent, Red Lion and Sun) Societies shall be permitted even on their own initiative, to collect and care for the wounded, sick and shipwrecked even in invaded or occupied territories. No one shall be harmed, prosecuted, convicted or punished for the humanitarian acts.

(iii) The Occupying Power is also under obligation to protect the natural environment of the occupied territory.

(iv) In Addition to the duties specified in Article 55 of the Fourth Geneva Convention concerning food and medical supplies, the occupying power shall, to the fullest extent of means available to it and without any adverse distinction, also ensure the provision of clothing, beddings, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

Last but not the least reference may also be made here to the provision relating to responsibility in case of violation of the provisions of Geneva Convention and Protocol I. Article 91 of the Protocol provides that a party to the conflict which violates the provisions of the Convention or of their Protocol shall if the case demands be liable to pay compensation. It should be responsible for all acts committed by persons forming part of its armed forces.

Protocol additional I has so far been signed and ratified by 169 countries.

Protocol Additional Relating to Protection to victims of non-International Conflicts (Protocol II).—So far 165 countries have become parties to Protocol II.

Protocol Additional Relating to the adoption of distinctive Emblems (Protocol III).—As of 10 March, 2011, 54 countries have become parties to Protocol III.

CHAPTER 53

LAWS OF MARITIME WARFARE

Laws of Maritime Warfare*

Before the nineteenth century, laws of maritime warfare were mostly in the form of customs. In the nineteenth and the present century, a number of international treaties were entered into. As a result of these treaties, the laws of maritime warfare are mainly in the form of provisions of international treaties. Some of the more important of such treaties are Declaration of Paris, 1856, Hague Convention, 1907, Geneva Submarine Protocol, 1936 and Geneva Convention of 1949 on Wounded, Ship-Wrecked Members of the Armed Forces at Sea.

Following are the main laws of maritime warfare :—

(1) *Attack on public and private enemy ships.*—During naval war, the belligerent States are entitled to attack the enemy ships and destroy their property. This general rule admits the following exceptions :

- (a) *Hospital ships.*—According to Hague Convention, 1907, hospital ships cannot be attacked.
- (b) *Vessels employed in religious, scientific and philanthropic works.*—According to Hague Convention of 1907, vessels employed for religious, scientific and philanthropic missions, can neither be seized nor attacked. To attack or seize such ships has been declared illegal according to the said Convention.
- (c) *Cartel ships.*—Cartel ships or ships carrying prisoners of war cannot be attacked. Attack on such ships has been prohibited by the rules of maritime warfare.
- (d) *Fishing Smacks and Market Boats.*—In accordance with the provisions of the Hague Convention fishing smacks and market boats engaged in their local profession and which are unarmed cannot be seized or otherwise destroyed during naval war.
- (e) *Immunities of merchants.*—Hague Convention of 1907 provides the following immunities to merchants :
  - (i) After the beginning of the war, the merchants detained in the ports are given certain facilities.
  - (ii) Those merchants and persons who have reached the ports because of their lack of knowledge of war have also been provided certain facilities.
  - (iii) *Mail boats and mail bags.*—Maritime rules of International law provided certain immunities in regard to mail bags and mail boats. On the basis of the experience of the first world war, States have entered into treaties in this connection and have agreed to provide certain protections and immunities to mail boats and mail bags.

(2) *Merchant ships of enemy.*—Merchant ships of enemy can be destroyed during maritime warfare.

(3) *The crew of the ship.*—As pointed out earlier, enemy ships can be destroyed during naval warfare. However, it is provided that while sinking or destroying the ship, proper and necessary steps should be taken to protect the lives of the crew of the ship passengers and necessary papers, etc., on the board of the ship. Such crew and passengers of the ship cannot be attacked unless and until they resist the valid right of the belligerent State to visit and search the ship.

(4) Merchant ships are entitled to defend themselves against the attack of the enemy.

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* See also for P.C.S. (1969), Q. No. 5 (a).

(5) During maritime warfare, merchant ships cannot be converted into men of war (war-ships). According to British practice, the conversion of merchant ships into men of war can be made by belligerent State in its own port. It cannot be made in a neutral port.

(6) *Bombardment of the coastal cities.*—According to Hague Convention coastal cities can be bombarded or otherwise attacked during maritime warfare, but bombardment over undefended cities has been prohibited. This could be done only when the local inhabitants resist the supply of food materials and other essential supplies to the enemy.

(7) Ordinarily, only the places of military importance can be bombarded. Other places can be bombarded only when they are necessary for the achievement of military objectives.

(8) *Contact Mines.*—It is laid down in the Hague Convention that the laying of anchorless contact mines is contrary to International law. As regards the laying of floating mines under the sea it is provided that they should not be laid indiscriminately. It is the duty of the belligerent State laying such mine to give intimation of the area where such mines have been laid to neutral and other States. As rightly pointed out by Starke, "unfortunately the law as to mines is uncertain because of the weakness of the text of the Hague Convention VIII (Submarine Contact Mines) and because of the development of new types of mines and new kinds of minelaying techniques and mine-launching methods (*e.g.*, from submarines)."[1]

Interference with Submarine Telegraph Cables

As pointed out by Oppenheim, Article 15 of the Convention of 1884 relating to Submarine Telegraph Cables gives some rights to the belligerent States to take action in this connection; it is not certain as to what extent they are entitled to interfere with the Submarine Telegraph Cables.[2] According to Article 54 of the Second Hague Conference, Submarine Cables in the enemy territory which has been occupied and those cables which link or connect the neutral territory should not be destroyed and in case it is essential, then compensation should be paid when peace is established. But there are no definite rules in regard to other types of seizure or destruction. During the Second World War, the existing rules were indiscriminately violated. There is, therefore, an urgent need of an International Convention on this subject.

Geneva Convention of 1949 for the Amelioration of the condition of wounded, sick and ship-wrecked members of the armed forces at sea.

In Geneva Conference of 1949, a convention was also adopted on wounded, sick and ship-wrecked members of the armed forces at sea. A number of rules were formulated in this regard. These rules resemble the rules of land warfare. Article 4 of the Convention makes it clear that in case of hostilities between land and naval forces of parties to the conflict, the provisions of the present Convention shall apply to the forces on board ship. Forces put ashore shall immediately become subject to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

Article 5 of the Convention provides that neutral powers shall apply by analogy the provisions of the present Convention to the wounded, sick and ship wrecked and to the members of the medical personnel and to chaplains of the armed forces of the parties to the conflict received or interned in their territory, as well as to dead persons found.

Like the rules of land warfare, it is provided that the wounded shipwrecked members of the armed forces at sea should be looked after and humanitarian treatment should be made with them. If they are made prisoners of war they should be treated in the same way as the prisoners of land warfare are treated. It is clearly provided that hospital ships and the ships carrying prisoners of war cannot be attacked. During naval war, the ships of enemy can be sunk but before doing so it is the duty of the belligerent State to ensure the security and safety of the crew of the ship. If the ship of enemy has been sunk and the crew and the passengers of the ship try to save their lives through boats then ordering of firing at them is a flagrant violation of international law. A leading case on the point is the *Peleus Trial* in which it was clearly laid down that firing at the crew of the ship saving their lives through life boats is contrary to International Law. Other rules of maritime warfare are more or less the same as those of the rules of land warfare.

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[1] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 562.

[2] L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 514.

If wounded, sick or shipwrecked persons are taken on board a neutral ship or neutral military aircraft it shall be ensured where so required by international law, that they can take no further part in operations of war (Article 15). Wounded, sick or shipwrecked persons who are landed in neutral parts with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral and the belligerent powers, be so guarded by the neutral powers, where so required by international law, that the said persons cannot again take part in operations of war (Art. 17).

After each engagement, parties to the conflict shall without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled (Art. 18).

Military hospital ships, that is to say, ships built or equipped by the powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may, in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the parties to the conflict ten days before those ships are employed (Art. 22).

It is also provided that merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities (Art. 33). The protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duty, act harmful to the enemy. Protection may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded (Art. 34).

Reprisals against the wounded, sick and shipwrecked persons, the personnel the vessels of the equipment protected by the convention are prohibited (Art. 47).

Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted on June, 8, 1977 by the Diplomatic Conference on Re-affirmation and Development of International Humanitarian Law Applicable in Armed Conflicts also contains some provisions relating to wounded and ship-wrecked members of the armed forces at sea. Protocol I which supplements the said Geneva Convention of 1949 provides that all the wounded, sick and ship-wrecked to whichever party they belong shall be respected and protected. In all circumstances they shall be treated humanly and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their conditions. There should be no distinction among them founded on any grounds other than medical ones. Protocol I also provides for certain protections in respect of hospital ships and coastal rescue crafts.

*Laws of Submarine Warfare.**—Following are the main rules relating to the laws of submarine warfare :—

(1) It was laid down in the *Treaty of Washington of* 1922 that the use of submarine to destory merchant or commercial ships was against international law and hence it was prohibited.

(2) Next important treaty which laid down rules relating to submarines is the *London Naval Treaty* of 1930 signed by the U.S., U.K., France, Italy and Japan. Article 22 (Part IV) of the Treaty provided that rules of International

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* See also for I.A.S. (1958), Q. No. 10(a).

Law relating to surface vessels would also apply to submarines, particularly in respect of the attack on merchant ships. Thus a submarine should not sink a merchant vessel without ensuring the safety of the passengers crew and papers of the ships. As made clear in Article 23 of the Treaty the treaty shall remain in force for an indefinite period.

(3) Yet another landmark is the *London Submarine Protocol* of 1936 which was signed by the U.S., U.K., France, Italy and Japan in London. It incorporated the provisions of Part IV of the Naval Treaty of 1930 mentioned above. Germany and U.S.S.R. acceded to the Protocol in 1936 and 1937 respectively. But as pointed out by Prof. D. P. O. Connel, "In the case of submarine warfare the rules in London Protocol of 1936 are viable only in the ideal circumstances which are unlikely ever to occur in practice. Self-defence is then the only criterion of submarine warfare, and it becomes a matter of technological evaluation to ascertain the factors of proportionality and necessity which legitimate submarine warfare in times of limited hostilities."[3]

(4) Last but not the least instrument is the Nyon Agreement of September 1937 which deals with the suppression of attacks by submarines against merchant vessels. A remarkable thing about this agreement is that it provided that the provisions of the Treaty of 1930 and London Protocol of 1936 were "declaratory of International Law."

As with other rules of war, the above rules were also flagrantly violated during the second world war.

The Status of Foreign war ships

As regards the status of foreign war ships, present international law is as follows—

(i) Foreign war ships, their commander and crew are immune from the jurisdiction of coastal state.

(ii) So long as the foreign war ships are engaged in the official acts of state, their immunity is not lost.

(iii) The home state of the war ships is responsible for the acts of the war ships.

(iv) The foreign war ships will lose their immunity if their commander or crew intrude in a foreign state in disguise or false pretences since they are then guilty of aggravated trespass.[4]

As pointed earlier in chapter on "Laws of land warfare", "disguise" or "false pretences", is the essential element of espionage. Thereupon only in the last case (*i.e.,* No. IV referred above) a warship can be termed as a 'spy'. Since secrecy is not an essential element of espionage, the same rules will apply to submarines.[5]

Illustration.—A ship belonging to the Navy of state X was found by the authorities of state Y to have been engaged in acts of espionage within the territorial waters of Y and so was seized by Y's patrol ships. X contests the validity of the seizure under international law.*

It is well recognized principle of international law that the sovereignty of a state extends to its *territorial* waters. Therefore seizure of the ship of Navy of State X by Y's patrol ships is *valid. The* sovereignty of a coastal state over its territorial waters is subject only to the innocent passage being given to foreign ships. But it must be emphasized that the passage must be innocent. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state, such passage must take place in conformity with rules of international law. Article 19 (2) of the U. N. Convention on the Law of the Sea, 1982 provides that passage of a foreign ship shall be considered to be prejudicial of the peace, good order or the security of the state, if in the territorial sea it engages in the activities such as, *inter alia,* any act aimed at collecting information to the prejudice of the defence or security of the coastal state or any other activity not having a direct bearing on passage. Espionage is certainly such an activity and therefore in the instant case passage cannot be said to be innocent. State 'Y' is therefore justified in seizing the Navy ship of State X.

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[3] D. P. O. Connel "International Law and Contemporary Naval Operations", B. Y. B. I. L., Vol. XILV (1970) at p. 82.

[4] See Ingrid Delupis, "Foreign Warships and Immunity for Espionage", A.J.I.L., Vol. (1984) p. 53 at p. 71.

[5] Ibid pp. 71-72.

* C.S.F. (1985), Q. No. 7(c). See also P.C.S. (1991) Q. 8 (b).

The position will however be different, if the Navy ship of State Y is seized in the contiguous zone of State Y for the coastal state does not exercise sovereignty in the contiguous zone. It may only exercise control necessary to "prevent infringement of its customs, fiscal immigration or sanitary regulation within its territorial sea" and "punish infringement of the above regulations committed within its territorial sea."[6] Therefore seizure of the Navy ship of State X would not be lawful.

The seizure of the Navy ship of State X by State Y will also be valid if it has been seized on the high sea, after a chase from the territorial waters for its acts of espionage in the territorial waters. Such a seizure is justified under the doctrine of 'hot pursuit'. According to Article 111 of the 1982 Convention on the Law of the sea, the hot pursuit of a foreign ship may be undertaken when the competent authorities of a coastal state have good reason to believe that the ship has violated the laws and regulations of that state. Such pursuit must be commenced when the foreign ship or one of its boats is within the territorial waters, the archipelagic waters, the territorial sea or the contiguous Zone of the pursuing state, and may only be continued outside the territorial sea or the contiguous Zone if the pursuit has not been interrupted. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state. The right of hot pursuit may be exercised only by war ships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

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[6] Article 33 (1) of the 1982 Convention on the Law of the Sea.

CHAPTER 54

LAWS OF AERIAL WARFARE

*Laws of Aerial Warfare**.—In the modern times, the importance of aerial warfare has greatly increased. Aircrafts were used in large scale for the first time during the First World War. Since the First World War, the aircrafts have been used in all the major wars that have taken place so far. The increased use of aircrafts in war necessitated the formulation of definite rules of international law to regulate their use during war. Bombing by aircrafts cause excessive loss of public and private property. In order to regulate the use of aerial warfare, many conferences have been called for from time to time and many rules have been formulated. It has been rightly remarked by Baxter, "The law pertaining to the use of aircraft in war notably that concerning aerial bombardment in the most primitive of these three bodies of law (i.e., Land, Naval and Air). There is no general multilateral agreement relating specifically to aerial warfare, and it is possible to do no more than lay down certain general principles analogy to outdated rules governing bombardment by land and naval forces." For the sake of our convenience, we will study them under the following headings :

(1) *Brussels Conference of 1874.*—Brussels Conference laid down the following rules :

(a) Bombardment of undefended cities, villages and towns was prohibited.

(b) Bombing of buildings and works relating to art, science, religion and culture and philanthropic works was prohibited.

(c) It was also laid down that the buildings of public utility should not be destroyed during aerial warfare.

(d) Bombing of hospitals etc., was completely prohibited.

(2) *Hague Convention, 1899.*—The Hague Convention, 1899, approved the rules formulated in Brussels Conference, 1874 and also laid down the following additional rules :

(a) Bombing of civilian people and their property without just and appropriate cause was prohibited.

(b) Bombardment for the realisation of money or things was declared illegal.

(c) It was laid down that bombardment should be made only for the achievement of military objectives.

(d) Bombardment of those cities and villages which are away from the war area was also prohibited.

(e) Yet another significant principle that was pronounced was that during aerial warfare the damage or loss caused should not be more than that caused by naval war. The obvious reason fo this rule was that hitherto navy occupied an important place in war and it was thought necessary that the damage or loss caused by aerial warfare should not exceed that of naval warfare.

(3) *First World War* (1914-18).—The above-mentioned rules were flagrantly violated during the First World War. It appeared for the time being as if there were no rules of war and the First World War turned into a total war in disregard of all rules and regulations of war. It was, therefore, felt that definite rules of aerial warfare should be formulated and for this a conference was called in Washington in 1922.

(4) *Washington Conference, 1922.*—The use of the aircraft during the First World War had made it clear that the rules of aerial warfare formulated so far were not in conformity with the changing facts and circumstances. In order to amend these rules and

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* See also for I.A.S. (1960), Q. No. 8 ; I.A.S. (1958), Q. No. 10 (b) ; P.C.S. (1970), Q. No. 4 ; P.C.S. (1965), Q. No. 11.

to frame certain rules, a conference was called in Washington in 1922 which is popularly known as *Washington Conference*. This conference was attended by America, Great Britain, Italy, Japan and some other nations. This Conference laid down the following rules :

(a) Arming of private aircraft with weapons for self-defence was prohibited.

(b) Bombardment for the realisation of money and things was declared illegal.

(c) It was also laid down that bombardment to frighten civilian population was illegal.

(d) It was also laid down that only factories of military importance could be destroyed through aerial bombardment.

(e) Those villages and towns, and buildings which are unconnected with or are away from the war area should not be destroyed.

(f) Ordinarily civilian areas cannot be bombarded. Such areas can be bombarded only when they are very essential for the achievement of military objectives. But this can be done only after giving prior warning in this connection.

(g) Buildings connected with religion, culture or the philanthropic works cannot be destroyed.

(h) Hospitals and other places where the patients are treated cannot be destroyed by aerial bombardment.

(i) Yet another important rule that was laid-down was that during aerial warfare the rules of land warfare should also be enforced. That is to say laws of neutrality and land warfare were also made applicable during aerial warfare.

(j) Last but not the least, it was laid down that if a belligerent State violated the above-mentioned rules, it will be liable to pay compensation for the same.

(5) *The Hague Rules of Air Warfare* (1923)*.—The states which participated at the Washington Conference of 1922 agreed to appoint a Commission of Jurists to prepare a Code of Air Warfare Rules. The Commission prepared the Code of Air Warfare Rules and presented the proposed rules in 1923. It may be noted that the proposed rules have not been ratified. However, "they are of importance as authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war and they will doubtless prove a convenient starting point for any future steps in this direction. On occasions governments have announced that they would act in accordance with the provisions of the Hague Air Warfare Rules."[1] Further, the main object of the Hague Air Warfare Rules was to propose a legal regulation of the special problems raised by air warfare."[2]

Among the rules proposed by the Commission following deserve special mentions :—

(*i*) *The use of incendiary or explosive bullets.*—Article 18 of the Air Warfare Rules of 1923 provided that the use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.

(*ii*) *Aerial bombardment.*—Regarding aerial bombardment following main rules were proposed :

  (a) Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited.

  (b) Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

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* See also for I.A.S. (1963), Q. No. 11 ; I.A.S. (1976), Q. No. 10 (ii).

[1] L. Oppenheim International Law, Vol. II, Seventh Edition, Edited by H. Lauterpacht, p. 519.

[2] Ibid.

(c) Aerial bombardment is legitimate only when directed at a military objective, that is to say an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(iii) *Treatment of and operations against enemy non-military aircraft.*—According to Article 33, belligerent non-military aircraft can be fired upon unless they make the nearest available landing on the approach of enemy military aircraft. Article 34 further provides that such aircraft can be fired upon if they fly within the jurisdiction of the enemy, in the immediate vicinity thereof and outside the jurisdiction of their own State or in the immediate vicinity of the military operations of the enemy by land or sea.

Besides the above-mentioned rules, rules were also proposed in respect of treatment of crews of enemy military aircraft; the duties of the belligerents towards neutral states and of neutral states towards belligerents; the external marks and belligerent qualification of aircraft, etc. The rules proposed were not intended to be exhaustive. This is clear from Article 62 which provides that aircraft personnel engaged in hostilities come under the laws of war and neutrality applicable to land troops.

(6) *Geneva Protocol,* 1925.—In Geneva Protocol, 1925 the gas and poisonous substance were prohibited during the aerial warfare.[3]

(7) *Disarmament Conference.*—Disarmament Conference was convened under the auspices of the League of Nations in 1932. Its main objective was to achieve disarmament and thereby to reduce the devastating effects of war. In this Conference, some rules relating to war were also laid down, the most important of them that aerial bombardment over the civilian people of cities and villages were completely prohibited.

(8) *Second World War,* 1939-45.—In the Second World War, all the above rules formulated in different Conferences were violated. During the war the German bombers ruthlessly destroyed cities and villages and caused uncalculable and unprecedented loss and damages to the people at large. In reaction to this America, Britain, Russia, etc., also resorted to same tactics. The most unfortunate incident of the Second World War, however, was the dropping of atom-bomb over the two cities of Japan—Hiroshima and Nagasaki—which resulted in the death and excessive suffering of the millions of people. America gave two reasons for its action of dropping atom-bombs on Nagasaki and Hiroshima. In the first place she contended that it was done to end the war immediately. Secondly, America contended that the dropping of atom-bombs was resorted to as a reprisal. But as rightly pointed out by Starke, neither of these grounds is satisfactory and justified. The unprecedented devastation and destruction caused in the Second World War further made it clear that it was necessary to amend the rules relating to aerial warfare.

(9) *International Convention for Protection of Cultural Property,* 1954.—In this convention emphasis was laid that during aerial warfare cultural property and the building connected with it could not be destroyed.

(10) *Convention Concerning the Protection of World Cultural and Natural Heritage, 1972.*—This convention was signed on 16 November, 1972 and entered into force on 17 December, 1975. So far 191 countries have become parties to this convention. As of 2013, 983 sites listed : 759 cultural, 193 natural and 29 mixed properties in 160 states properties.

(11) *Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),* 1977.—This Protocol was adopted by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts on June 8, 1977. Article 42 of Protocol I provides that no person parachuting from an aircraft in distress shall be made the object of attack during his descent. Upon reaching the ground

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[3] For detailed study see R. R. Baxter and Thomas Buergenthal, "Legal Aspects of the Geneva Protocol of 1925", A.J.I.L., Vol. 64 (1970) p. 853. See also Chapter on "Laws of Land Warfare".

in territory controlled by an adversary party, a person who has parachuted from an aircraft in distress shall be given an opportunity before being made the object of attack, unless it is apparent that he is engaging in hostile act. Airborne troops are however, not protected by this Article.

Modern science and technology have helped the notions to perfect devastating and very potential weapons of destruction. Atomic-bombs and nuclear weapons have brought about revolutionary changes in the whole aspect of war. The devastating effects of these weapons have made it clear that a future war will be much more devastating and one cannot even foresee as to what will happen if the nuclear war takes place. The scientists have warned that the whole human race may be erased from the face of the earth. The use of atomic and nuclear weapons have made it clear that the civilian areas cannot also escape from the effects of war. These revolutionary changes have also made it clear that the above-mentioned rules of warfare are not in keeping with the facts and circumstances of the present time. It is, therefore, necessary to bring about revolutionary changes in this connection. Some efforts are being made in this connection which will be mentioned later on in this chapter. But it is sufficient to note here that despite these efforts, the progress achieved so far is far from satisfactory.

Legality of Atomic or Nuclear Warfare—Legality of the use of Atomic Bombs dropped on Hiroshima and Nagasaki during the Second World War.*

On the basis of the rules which have been formulated so far in the conferences and conventions mentioned above, there can be no two views that the dropping of atom-bombs by America on Nagasaki and Hiroshima was a flagrant violation of the rules of aerial warfare. The reason given by America can convince no right thinking man. America contended that this action was taken to end the war immediately, and it was also used as a reprisal, but both of these reasons are not justified. In fact, the use of atom-bombs during the Second World War was a violation of international law relating to aerial warfare and cannot be justified on any reason. Reference may be made here of a Japanese case, *Shimoda and others* v. *State,* decided by Tokyo District Court in 1963. In this case for the first time, the legality of the atomic warfare was considered. In this case, five citizens of Hiroshima and Nagasaki filed a case against the State to claim compensation for the damage caused to them by atom-bombs. The Tokyo District Court did not grant relief to them on procedural grounds but it gave its verdict on the validity of dropping of atom-bombs. The Court observed, "The dropping of atomic-bombs was a hostile act taken by the United States of America, which was then in a state of war with Japan and was illegal act of hostility contrary to the positive International Law of that day (treaty and customary-law)".

In the modern time some treaties have been concluded in order to check the spread of nuclear wars and to prohibit it in certain areas. The more important of them are (1) Nuclear Test Ban Treaty, 1963; (2) Treaty on Non-proliferation of Nuclear Weapons, 1968; (3) Treaty on Prohibition of Emplacement of Nuclear Weapons, in Sea-bed and Ocean floor, 1971 or properly called Sea-bed Treaty (1971).

Although significant efforts have been made through these treaties to regulate the use of nuclear weapons, it cannot but be conceded that they are far from satisfactory. So long as five great powers possess nuclear weapons and they do not destroy them, the world will always be afraid from these devastating weapons. Present world may be said to be siting on a crater which may erupt at any time and cause unprecedented damage, destruction and devastation. There is not even the least doubt in the contention that if the nuclear war takes place, the rules of aerial warfare formulated so far will be flagrantly violated. It is unfortunate that the desired progress has not been achieved so far in this connection.

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* See also for I.A.S. (1962), Q. No. 9 ; I.A.S. (1957), Q. No. 11 ; P.C.S. (1964). Q. No. 10(a) ; P.C.S. (1987), Q. 8 (c) ; C.S.E. (1992) Q. 8 (a) ; IAS (2003) Q. 7(b) ; IAS (2006) Q. 8(b) ; UPPCS (2008) Q. 7(b).

In 1993, the World Health Organisation (WHO) requested the International Court of Justice to give its advisory opinion on the following question :

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under International law including the WHO's Constitution?"

The World Court declined to give its advisory opinion on the ground that the above question is not within the scope of proper activities of WHO.

Subsequently, the General Assembly vide Resolution 49/75, dated 15 December, 1994 requested the International Court of Justice to give its advisory opinion on the following question :

"Is the threat or use of nuclear weapons in any circumstance permitted under International law ?" Giving it advisory opinion, the World Court held that there is no specific authorization for the threat or use of nuclear weapons under customary or conventional law. Moreover, a threat or use of force by means of nuclear weapons is unlawful if it is contrary to Article 2(4) of the U.N. Charter and not vindicated by the requirements of Article 51 of U.N. Charter. Further, a threat or use of nuclear weapons ought to be compatible with the requirements of the international law applicable in armed conflict, especially international humanitarian law including specific obligations under treaties expressly dealing with nuclear weapons. Lastly, there is an obligation of the members of the United Nations to pursue in good faith and conclude negotiations leading to nuclear disarmament under effective International Control.

But as regards the threat or use of nuclear weapons 'in any circumstance' the World Court did not give any definite opinion and observed that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance. This hesitancy on the part of the majority opinion of the World Court is deplorable since there is no authorization for the threat or use of nuclear weapons under customary or conventional law and a threat or use of nuclear weapons is unlawful. If it is in violation of Article 2(4) and not vindicated by Article 51 of the Charter, and has to be compatible with the requirements of International humanitarian law, the World Court should have unhesitatingly held that the threat or use of nuclear weapons 'in any circumstance' is not permitted under international law, one of the reasons of World Court's hesitancy to reach the conclusion was the fundamental right of every State to survival, and thus its right to resort to self defence, in accordance with Article 51 of the Charter, when its survival is at stake. But it may be submitted when (*i.e.* by the use of nuclear weapons) the survival of the entire human race is at stake, the right of individual State cannot prevail over it. Thus the threat or use of nuclear weapons must be declared to be unlawful in any circumstance. This view finds support from separate opinions of several judges of the World Court.

Legality of the Conducting of Nuclear Tests.*

Despite the agreement among certain nuclear powers not to conduct nuclear tests, some countries, such as, France and China have been conducting nuclear tests, and have been constantly refusing to accept any international control over such matters. Nuclear tests emanate radio-active substances which are very harmful for the health and well-being not only of the present generation but of the generations to come. The question may however, arise whether the nuclear tests conducted by China and France are legal and valid according to international law. Australia and New Zealand lodged complaints in May 1973 in the International Court of Justice about France's plan to conduct nuclear tests. Thus the World Court got an opportunity to give its verdict on the validity of the nuclear tests. The World Court decided on June 22, 1973 by 8 votes to 6 votes to accede to the New Zealand request to restrain France from continuing her nuclear tests in the South Pacific pending a full scale hearing on the dispute. In a ruling on Australian complaint about the planned tests the Court asked France to avoid nuclear tests causing the deposit of radio-active fall out on Australian territory. The court observed, "The governments of Australia and France each of them should ensure that no action of any kind is taken which may aggravate or extend the disputes submitted to the Court or projects the right of either party in respect of the carrying out of whatever decisions the court may render in this case, and in particular the French Government should avoid nuclear tests causing the deposit of radio-active fallout on Australian territory." Thus the International Court of Justice accepted the Australian request and granted injunction restraining France to conduct the planned nuclear tests.

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* See also for C.S.E. (1989), Q. 5 (d).

It was, however, very disheartening to note that the French Government declared that it would not abide by the decision of the Court. It may be noted that since the complaint had been lodged by Australia and later joined by New Zealand, the French Government had been repeatedly declaring that it would ignore the verdict of the Court. The reason of French rejection explained by Foreign Minister was that the court cannot rule on matters arising from France's national defence. The contention conflicted with Australian and New Zealand claim that the tests would be harmful by injuring health. The dispute therefore, raised an important point of international law whether one country in its defence interests can harm another. The World Court answered in negative and gave its verdict in favour of New Zealand and Australia. The transigence of the French Government in refusing to abide by the decision of the International Court of Justice was unfortunate. Nevertheless, so far as the legal position is concerned, it appears quite obvious that the use of atomic-bombs in aerial warfare as well as conducting nuclear tests are flagrant violations of the rules of international law if they affect adversely other sovereign States.

It may be noted that later on the President of France informed the Court that in future France would not conduct atmospheric nuclear tests and confine underground test only. In view of this, the World Court did not decide the case on merits and the case was dropped.[4]

Legality of nuclear tests conducted by India : Pokharan Explosion.[5*]

India successfully carried out her maiden underground nuclear explosion at Pokharan in the Thar desert of Rajasthan on May 18, 1974. It was claimed that the nuclear test was designed to harness the energy of the atom for peaceful purposes. While it was hailed by some countries as a significant achievement, some countries, such as, Canada, Japan and Pakistan reacted adversely to it. Indian Prime Minister and other Indian Government spokesmen repeatedly assured the world that the explosion was not designed to manufacture nuclear weapons but to harness the energy of the atom for peaceful purposes.

Every country is free to do anything it likes within its territory, provided that its acts do not affect other sovereign States. Hitherto it was believed that the nuclear explosions are necessarily followed by the spread of radio-active dust in a wide area adversely affecting the health and well-being of the people of that area. The most puzzling thing about India's nuclear test was the absence of any radio-active fall-out following the explosion. Indian scientists were both elated and pazzled about this significant achievement. Dr. H. N. Sethana, Chairman of the Atomic Energy Commission said that an aerial survey, minutes after the explosion at the heights as low as 30 metres above the explosion area showed no increase in the level of radio-activity. The fact that there was no increase in the level of radio-activity, was not seriously and successfully contested by any country of the world. Thus India's nuclear explosion was not contrary to international law because its effects were contained within the territory of India and no other sovereign State was affected by it.[6]

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[4] See Nuclear Test case (*Australia* v. *France*) Judgment Dec. 20, 1974, [(1974) I.C.J. Rep. 253)]. Nuclear Test case (*New Zealand* v. *France*) Judgment of Dec. 20, 1974, (1974) I.C.J. Rep. 457.

[5] See also S. K. Kapoor, "The Legality of Nuclear Testing : the Pokhran Explosion" I.J.I.L., Vol. 14 (1974) p. 425; Pierre M. Gallois, "India's Nuclear Explosion and India's Security". Foreign Affairs Reports Vol XXIV (1975), p. 91.

* See also for C.S.E. (1989), Q. 5 (d).

Let us now examine whether India's nuclear test constitutes a violation of India's treaty obligations assumed by her under any international treaty. In this connection, it will be relevant to refer to Nuclear Test Ban Treaty, 1963 and Treaty on Non-Proliferation of Nuclear Weapons, 1968. As regards the Nuclear Test Ban Treaty, 1963, India is a party to it (India signed this treaty on March 3, 1967). But India's nuclear explosion does not constitute a violation of this treaty. In the first place, this treaty prohibits nuclear test explosion only in the atmosphere, outer space or under water including territorial waters. It does not prohibit underground nuclear explosion. Secondly a nuclear explosion in any other environment to constitute a violation of the treaty must be such as "causes radio-active debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted ...." [Art. 1 (b)]. Thus India's nuclear explosion is in no way contrary to the provisions of the Nuclear Test Ban Treaty, 1963.

The question of the violation of the Treaty on Non-Proliferation of Nuclear Weapons, 1968, does not at all arise because India is not a party to this. India did not sign this treaty on the ground that instead of aiming at disarmament of nuclear weapons, this Treaty will perpetuate the monopoly of the nuclear nations.[7] Besides being highly discriminatory, this treaty places totally unjustified restrictions on the peaceful uses of atomic energy.

Therefore, it is clear that India's nuclear explosion does not constitute a violation of her treaty obligation assumed under an International Treaty. Thus, India's nuclear explosion of May 18, 1974, is not contrary to International Law. India was within her rights to conduct the nuclear test and any attempt to criticize and malign her is motivated by political considerations. In view of the above discussion, it may be concluded that the legality of the India's nuclear test cannot be successfully challenged.

Conclusion.—Although the use of atomic weapons is contrary to International law, it does not necessarily follow that their manufacture and possession will also be contrary to the norms and principles of international law. In fact in the absence of any treaty obligations, the existing norms and principles of International law do not prohibit the manufacture and possession of nuclear weapons by a Sovereign State within its territory provided that such manufacture and possession do not affect other Sovereign States. India was, therefore, within her rights to explode her maiden nuclear device on May 18, 1974.

Star War and International Law.

N. B.—For this please see Chapter on "Disarmament".

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[6] See George Schwarzenbeger, The Legality of Nuclear War (London Stevens and Sons Ltd., (1958) p. 49; Myres S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea" A.J.I.L., Vol. 49 (1955), p. 356; Myres S. McDougal and Nobert A. Schlei. The Yale Law Journal. Vol. 64 (1955), p. 618; For contra, see Emanuel Margolis, "The Hydrogen Bomb Experiment and International Law." The Yale Law Journal, Vol. 64 (1955) p. 629; Ellery C. Stowell, "The Laws of War and the Atom Bomb", A.J.I.L. Vol. 39 (1945), p. 781.

[7] See also T. T. Poulose, "The Third World Response to Anti-Nuclear Proliferation Strategy, India Quarterly, Vol. XXXIV, No. 2 (1978), p. 145 at p. 156.

CHAPTER 55

WAR CRIMES*

NEUREMBERG, TOKYO, PELEUS, EICHMANN AND OTHER WAR CRIME TRIALS

Sanctions of the Laws of War

International law is often criticized on the ground that it lacks sanctions. It is true that as compared to State law, there are very few sanctions behind the International law. It would, however, be wrong to contend that there are no sanctions at all behind international law. A glaring example of this is the sanctions of the laws of war. It is true that the laws of war are frequently violated but would be wrong to say that international law does not possess any means to enforce these laws upon the States. In fact there are the following three sanctions of the laws of war :

(*1*) *Reprisal.*—It is one of the oldest rules of international law that reprisal is a means to compel the enemy States to observe the rules of war. In the modern times reprisal is often instrumental in making the belligerent State observe the rules of war.

(*2*) *Punishment of War Criminals.*—Yet another sanction of the laws of war is the punishment awarded to war criminals. The persons who are guilty of war crimes can be arrested and prosecuted. After the Second World War, a number of war criminals have been held and the persons found guilty of war crimes have been punished. Among such war crime trials, *Neuremberg Trial, Tokyo Trial and EichmanTrial* deserve special mention.

(*3*) *Compensation.*—Yet another sanction of the laws of war is that a belligerent State which violates the laws and customs of war may be compelled to pay compensation for such violation. Article 3 of Hague Convention of 1907 provides that a State violating the law of war can be compelled to pay compensation for such violation.

Definition of 'War Crimes'[1]**

Probably the widest definition of the international crimes, as given by Prof. Schwarzenberger, is that they are acts which "strike at the very roots of international society." Genocide, war crimes, piracy, etc., are thus clearly and without the shade of doubt international crimes. Professor Kelsen and other older writers defined war crimes as the violation of the laws and customs of war. According to Prof. Higgins war crimes include the violation of the recognized rules of warfare by members of the armed forces, illegitimate hostilities in arms committed by individuals who are not members of the armed forces, espionage, and war treason and marauding. According to some other writers, war crimes also include illegitimate hostilities in arms committed by individuals who are not members of the armed forces espionage, war treason and marauding. This definition is now considered obsolete and inadequate. As pointed out by Prof. Quincy Wright, "Acts committed in violation of laws of war constitute war crimes in a narrow sense." Further, "the term war crimes has been used in military circles as synonymous with violation of the laws of war but in current official and juristic discussion it has acquired a wider connotation."[2] Acts of sabotage, espionage or seduction committed by enemy soldiers, or civilians, etc., are war crimes in its narrow sense. To quote Prof. Quincy Wright again,

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* See also for I.A.S (1966), Q. No. 9 ; P.C.S. (1985), Q. 10 (c).

[1] See also S. K. Kapoor, "War Crimes : Problem of the Pakistani Prisoners of War" Lawyer, Vol. 5, No. 6 (June 1973), p. 109.

** See also for P.C.S. (1978), Q. 7(a) ; C.S.E. (1980), Q. 10(b).

[2] Quincy Wright, "War Criminals", A.J.I.L. Vol. 39 (1945), p. 257 at p. 274.

"Very different are the acts of cruelty, perfidy or vandalism forbidden by the rules of war. Among these war crimes are use of forbidden-weapons, maltreatment of sick, wounded and professions ; abuse of red-cross flags of truce; breach of parole or armistices : execution of hostages; massacre of non-civilians or of enemy soldiers who have surrendered spillage; destruction of maritime ships without putting the passenger and crew in a place of safety; bombardment of undefended places, or protection to buildings of non-military objectives. War crimes in this class should be punished at any time the guilty individuals are captured, even after the war. As pointed out by Prof. Schwarzenberger, pirates, war criminals are reckoned as *hostis humani generis* the enemy of mankind and each State may capture, try and punish them.[3]

Professor Oppenheim has given a wide definition of war crimes in the following words : "War crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders."[4] Now it is generally recognised that there is personal responsibility for commission of war crimes. This is evident from *Ex-parte Quirin, Yamista, Neuremberg, Tokyo* and *Eichmann Trials.*"[5]

The principles of International law enunciated in the *Neuremberg Trial* have brought about a revolutionary change in the laws of war in general and war crimes in particular. The principles of international law enunciated in the Neuremberg judgment have been summarised in the Report of the International Law Commission in its second session in 1950. The Neuremberg Trial classified the crimes punishable under international law into the three categories : (1) Crimes against peace ; (2) War crimes; and (3) Crimes against humanity.

(1) Crimes Against Peace.—Article 6 of the Charter of Neuremberg enumerated following crimes as crimes against Peace : Planning, preparation, initiation, or waging of a war aggression, or a war violation of International treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(2) War Crimes.—An exhaustive definition of war crimes has been given in Principle IV of the said report. According to it, war crimes are the violations of the laws and customs of war which include but are not limited to murder, ill-treatment or depradation to forced labour or for any other purpose of civilian population or in the occupied territory murder or ill-treatment of the prisoners of war or persons on the seas, killing of hostages, plunder of public property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

Reference may also be made here to Resolution 3074 (XXVIII) passed by the General Assembly of the U. N. declaring Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity. The General Assembly passed the said resolution on December 3, 1973. The General Assembly declared that the United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and maintenance of International peace and security, proclaimed the following principles :

1. War crimes and crimes against humanity, whenever or wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty to punishment.
2. Every State has the right to try its own nationals for war crimes or crimes against humanity.
3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

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[3] G. Schwarzenberger, The Frontiers of International Law, p. 187.

[4] L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 566.

[5] See "The Proposed Trial of Pakistani War Criminals", I.J.I.L. (October 1971), p. 645 at p. 647.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty in punishing them.
5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.
6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the person indicated in paragraph 5 above and shall exchange such information.
7. In accordance with Article 1 of the Declaration on Territorial Asylum of 14 December, 1967, States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.
8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detention, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.
9. In co-operating with a view to detection, arrest, and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and if found guilty, their punishment, States shall act in conformity with the provisions of the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

(3) Crimes Against Humanity.—The Nuremberg Charter described crimes against Humanity as the crimes such as murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, investigators, and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

The U. N. War Crimes Commission

The states would now enjoy broader access to the archives of the United Nations War Commission. Thus for the first time access would be given to individual researchers on the initiative of U. N. Secretary-General, Javier Perez de Cuellar, the original 17 members of the U. N. War Crimes Commission on the issue in September and October 1987, and agreed that some of the secrecy surrounding the archives for 40 years should be dispelled. As a result, Governments can now conduct general research, and the files may be opened to "*bona fide* research by individuals into history and work of the United Nations War Crimes Commission and into war crimes."[6]

Convention on Applicability of Statutory Limitation to War Crimes, a crime Against Humanity (1968).—A brief reference may be made here to the convention on Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity. This Convention was concluded on 26 November, 1968 and entered into force on 11 November, 1970. This Convention has been ratified by 48 States. India ratified this Convention on 12 January, 1971.

IMPORTANT WAR CRIME TRIALS

The Scuttled U-Boats case, [(1940) 1 Law Reports of Trials of Criminals 55].

This case relates to war crimes and the punishment of war criminals. The North-Western Command of the German Armed Forces surrendered on May 4, 1945 before the allied nations. The surrender included all the sea vessels in that area. The surrender took place in consequence of an armistice agreement. After the signing of the instrument of surrender but before it came into effect the German Officers ordered their subordinate officers to scuttle the U-Boats. Subsequently this order was countermanded. But the accused who was an instructor of the U-Boats ordered the scuttling of U-Boats and consequently the U-Boats were scuttled. The accused was arrested and was prosecuted for violating the laws of war. In his defence, the accused put forward the following two arguments, (1) He did not know the terms of the instrument of surrender because they were not intimated to him, and (2) that he did not know or receive the information of countermanding of the original order regarding scuttling of U-Boats. The accused was held guilty and was sentenced for five years' imprisonment.

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[6] U. N. Chronicle, Vol. XXV, No. 1 (March, 1988), p. 91.

While delivering the judgment, the Court observed that by 5th May, it had become clear that the U-Boats had become the property of the allied nations and could not, therefore, be destroyed. In defence also it was admitted that after the armistice agreement and surrender if any German Officer knowingly, scuttled the U-Boats, then it would be the violation of the rules of war. The Court observed that even if it is admitted that the first order (*i.e.*, regarding scuttling of U-Boats) was binding, then in between 5th and 6th May, the incidents that took place could have led any reasonable man to understand that under these circumstances the scuttling of U-Boats would be violation of the laws of war. In the opinion of the Court, the accused knew that the U-Boats could not be scuttled yet he committed this crime. Thus the Court propounded the following principles :

(1) If the armed forces of a State surrender after an armistice agreement, then this agreement shall be binding on both the States (*i.e.*, the surrendering State and the State to whom surrender is made). If after the surrender, the soldiers do not observe and follow this agreement, they will be guilty of the violation of the laws of war.

(2) If person scuttles the Boats or otherwise causes harm to them after the armistice agreement and surrender, he will be guilty of war crimes because after the surrender war-boats become the property of the conquering State.

Neuremberg Trial[7]*

Jurisdiction of Neuremberg Tribunal.—The Neuremberg Tribunal was established after the Second World War to try the war criminals of Germany. In order to confer jurisdiction upon the tribunal, the victorious nations entered into an agreement in 1945 and conferred jurisdiction upon the tribunal through a Charter. The Neuremberg Tribunal was authorised to try and punish the persons who were guilty of war crimes during the Second World War. Besides this, the Charter also conferred jurisdiction upon the Court in respect of crimes against peace and crimes against humanity. The trial of main accused started on November 20, 1945. The tribunal delivered its judgment on September 30, 1946, whereby it acquitted three accused, sentenced to death 10 accused; awarded punishment of transportation for life to 3 accused and awarded imprisonment for a long period to 4 accused.

Facts.—As pointed out earlier, the Neuremberg Tribunal was established to try and punish the war criminals of Germany. The main charges against these accused were that they had committed war crimes, crimes against peace and crime against humanity during the Second World War. Under the leadership of Hitler these accused had committed inhuman atrocities upon the Jews. These accused were also charged for having violated the Treaty of Varsailes, 1919 and the Pact of Paris, 1928. Great emphasis was laid on the Pact of Paris 1928, because through it the parties had renounced war as an instrument of national policy for the settlement of international disputes.

Judgment and Principles laid down.—While delivering the judgment, the Neuremberg Tribunal laid down the following principles :

(1) The crimes against International Law are committed by men not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

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[7] The International Military Tribunal, Neuremberg, (1946) Cmd 1964, AJ.I.L., Vol. 41 (1947), p. 172.

* See also for I.A.S. (1974) Q. No. 10 (c); I.A.S. (1960), Q. No. 10; I.A.S. (1966), Q. No. 9; I.A.S. (1956), Q. No. 10; P.C.S. (1976), Q. No. 7; P.C.S. (1965), Q. No. 2; P.C.S. (1987), Q. 8 (d).

(2) In the words of the Report of the International Law Commission, 1950, the Court also laid down the following :

"The fact that a person who committed an act which constitutes a crime under International law acted as the head of the State or responsible government official does not relieve him from responsibility under international law."

(3) As expressed in principle IV of the Report of the International Law Commission the Court also laid down the fact that a person acted pursuant to orders of his Government or his superior does not relieve him from responsibility under International law, provided a moral choice was in fact possible to him.

(4) The accused had raised the objection that unless there was a pre-existing law, an act cannot be declared as crime nor can it be punished. The Neuremberg Tribunal rejected this argument.

(5) In the view of the Court the conduct of aggressive war was highest international crime. According to this Court, Germany was responsible for starting aggressive wars against other countries which was against the Pact of Paris, 1928. Hence persons responsible for organising and conducting this war were declared guilty. The Tribunal held : "Planning and preparation are essential to the making of war. In the opinion of the Tribunal, aggressive war is a crime under international law."

(6) The Court also held the accused guilty for making bad treatment towards the prisoners of war. The accused argued that since Russia had not signed the Geneva Convention relating to the treatment of the prisoners of war, they could not be punished for the bad treatment towards the Russian prisoners of war, but the Court rejected even this argument and held them guilty.

(7) "............from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against Humanity; and in so far as the inhumane acts charged in the indictment and committed after the beginning of war did not constitute war crimes, they were all committed in execution of, or in connection with the aggressive war, and therefore constituted crimes against Humanity.

Justification and criticism of Neuremberg Tribunal.—Judgment of Neuremberg Tribunal occupies a significant place in the laws of war in general and war crimes in particular. It was, therefore, quite natural that the jurists of the world should have taken keen interest in it. The verdict of the Neuremberg Tribunal has been justified by a number of jurists. They have contended that war crimes, genocide and crimes against humanity are all international crimes and the offenders of such crimes should be given deterrent punishment and in this respect the Neuremberg Tribunal performed commendable work. Such jurists have laid great emphasis upon the Pact of Paris, 1928.

On the other hand, there are a number of jurists who have severely criticized the judgment of Nuremberg Tribunal. The main points of their criticisms are given below :

(1) According to them, it was not proper to lay so much emphasis upon the Pact of Paris. In their view, the intention of the Pact of Paris was not to make war an international crime. They have also pointed out that the charge of starting war and organising or conducting aggressive war was not justifiably levelled.

(2) As pointed out by Chief Justice Marshall of America, the Neuremberg Charter declared those crimes punishable which were not punishable at the time when the crimes were committed. This was contrary to the principles of criminal law.

(3) According to Prof. Schick, some of the principles incorporated in the Neuremberg Charter were contrary to the law of nations. In his view, the plea of superior orders was rejected without any sound or concrete ground.

(4) The circumstances in which the tribunal was established, impartial justice was not possible.

(5) Grave doubts have been expressed in regard to the principles propounded by the Neuremberg Judgment.

(6) Neuremberg Military Tribunal cannot be called an international tribunal in real sense of the term because most of its judges belonged to the victorious nations.

Legal significance of Neuremberg Trial.—Despite the above criticism, it cannot but be admitted that the principles propounded in the Neuremberg Trial have greatly influenced International law, particularly the laws of war relating to war crimes. The Neuremberg Tribunal made it clear that the laws of war are not only for States but they are also applicable upon individuals, it is only by punishing them the provisions of the international law can be enforced. Besides this, the office or status of the accused is not relevant in respect of the punishment to be awarded to him for violating the laws of war and for committing war crimes. The fact that a person who is accused is the head of a State or high military official will be no excuse in the view of the Tribunal.

Robert K. Woetzel has rightly written, "In conclusion it should be stated that in no area more than in that of war crimes is the responsibility of the individual under International law as undisputable and recognised. The I. M. T. (*i.e.*, International Military Tribunal) was also justified under international law in judging crimes against humanity, as has been shown. Most of these acts constituted heinous crimes judged by any standard of justice. It was clearly in accordance with international law that the defendants at Neuremberg were held responsible for them."[8] The principles enunciated in the Neuremberg Tribunal also encouraged the tendency of codification of international law. The principles enunciated in the Neuremberg judgment have been summarised by the International Law Commission in its Report of the second session of 1950. But it must be admitted that the Neuremberg Military Tribunal was not an international court in real sense. Its main defect was that most of the judges belonged to the victorious States. Consequently its impartiality has been doubted. Nevertheless, Neuremberg Trial occupies an important place in the history or development of war in general and war crimes in particular. Often it is said that States do not hold war crimes trial of the members of their armed forces. In this connection Prof. L. C. Green has replied that ordinarily it is unnecessary because generally war crimes are also contrary to the national military laws.[9] For example, in *U. S.* v. *Griffin,*[10] the plea of superior order was rejected in a case arising from the murder of a member of Vietcong.

Tokyo Trial*

As Neuremberg Tribunal was established to try war criminals of Germany, the Tokyo Tribunal was established to try the war criminals of Japan. The Tokyo Tribunal was established by the victorious States by making an agreement and subsequently by issuing a Charter conferring jurisdiction upon the Court. The Tokyo Trial started hearing on June 4, 1946, and was presided by Sir William. A special feature of this trial was that its judges were not only from the victorious States, but some of the judges belonged to other States also. For example, the eminent Indian Jurist, Dr. Radha Vinodpal was one of the judges of the Tokyo Tribunal. Besides this, there were some judges from Philippine and other countries of the Commonwealth of the Nations. During the trial the accused objected that they could not get justice from this trial because most of the judges belonged to the nations which defeated Japan, but this objection was rejected by the Court. The Tokyo Tribunal awarded death sentences to those persons who were guilty of conducting and organising war and awarded imprisonment for different terms to other persons accused of war crimes.

Dissenting judgment.—Dr. Radha Vinodpal who was one of the judges of the Tokyo Tribunal, delivered his dissenting judgment. According to him war is beyond the scope of International law although its conduct is within the scope of the rules of international law. Besides, he expressed the view that neither the Pact of Paris comes under the category of law nor has it brought about any change in the status of war. According to him, International law has not developed so much so as to make war a crime. Similarly he expressed the view that conspiracy was not an independent crime under international law.

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[8] Robert K. Woetzel, The Neuremberg Trials Under International Law (1960), p. 189.

[9] L. C. Green, International Law Through Cases, Third Edition, (1970) p. 726.

[10] (1968) C.M. 41, 6805.

* See also for I.A.S. (1974), Q. No. 10 (c); I.A.S. (1966), Q. No. 9; I.A.S. (1956), Q. No. 10; P.C.S. (1976), Q. No. 7.

Consequently, he ruled that the accused should be declared not guilty as there was no evidence on the record to prove their guilt.

Peleus Trial

Peleus was a Greek ship which was sunk by the German U-Boat. After sinking the ship the commanders of the U-Boat ordered firing upon the members of the crew of the ship who were trying to save their lives through life-boats. Thus out of 35 people, 22 members of the crew lost their lives in consequence of firing. After some weeks when on account of attacks the U-Boats were compelled to come to the coast, officers on board of the boats were arrested and were prosecuted for war crimes.

The Court ruled that it is the fundamental usage of war that firing on unarmed enemies is prohibited. The Court referred to an old case, namely, *Liandovery Castle* (1921),[11] wherein it was laid down, "In war of land the killing of unarmed enemies is not allowed............Similarly in war at sea the killing of ship-wrecked people who have taken refuge in life boats is forbidden."

During the trial the accused contended that they were not guilty because they fired on the orders of the superior officers, but the Court rejected the plea of superior orders and held that they were bound to obey only lawful orders of their officers. There is no duty to observe orders which are not lawful. Consequently the accused were held guilty and were duly punished.

Eichmann Case (1962)[12*]

Under Hitler, Eichmann had committed many Nazi atrocities upon the Jews. The charge against him was that he was responsible for the murders of lacs of Jews and for inhuman treatment towards them. The spies of Israel were after him for a long time, but he was running from one country to another and escaping arrest and trial. Ultimately the Israeli Spies caught him in Argentina. But on account of the fear that the Government of Argentina might not extradite him for prosecuting him for having committed war crimes, the Israeli spies abducted him from Argentina to Israel in an irregular way. In Israel, Eichmann was prosecuted for crimes and was sentenced to death. An appeal was filed by him in the Supreme Court of Israel. It was contended on behalf of Eichmann that the courts of Israel did not possess the jurisdiction to try him because when the crimes were committed by him, Israel as a State did not exist. That is to say, war crimes were committed during the Second Wold War and Israel came into existence afterwards. But the Supreme Court of Israel rejected this argument and propounded the principle of universal jurisdiction in respect of war crimes and genocide.[13]

Following arguments were put forward on behalf of Eichmann (i) That he was abducted in an irregular way; (ii) That he had to obey superior orders; and (iii) That acts done by him were acts of State. The Court rejected all the arguments and laid down the following principles :—

(1) ....the principle *nullum crimen sine lege nulla poena sine lege,* in so far as it negates penal legislation with retrospective effect has not yet become rule of customary International Law............it is a universal character of crime, in question, which vests in every State the power to try those who participated in the preparation of such crimes and to punish them therefor...........'

(2) As regards the contention that Eichmann was abducted from Argentina through an irregular way, the Court recorded the following conclusions :

(a) The court will not investigate the circumstances in which the 'fugitive offender' was detained and brought to the area of jurisdiction.

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[11] Annual Digest of Public International Law (1923-1924), case No. 235.

[12] *Adolf Eichmann* v. *Attorney-General of the Government of Israel, Supreme Court of Israel,* (1962) 136 I.L.R. 277.

[*] I.A.S. (1973), Q. No. 11 (a); I.A.S. (1962), Q. No. 12 (b); I.A.S. (1963) Q. No. 7. For more details see also the case of Eichmann discussed under the heading "Principle of Universal Jurisdiction" in Chapter on "Piracy" and "State Jurisdiction".

[13] See also J.F.S. Fawcett, "The Eichmann Case", B. Y. B. I. L., Vol. XXXVII (1962), pp. 181-215.

(b) This also applies if the offender's contention be that the abduction was carried out by the agents of the State prosecuting him, since in such a case the right violated is not that of the offender, but the sovereign rights of the State aggrieved. The issue must, therefore, find its solution on the international level and is not justiciable before the Court into whose area of jurisdiction the offender has been brought.

(c) From the point of view of International Law, the aggrieved State may condone violations of its sovereignty and waive its claim, including the claim for the return of the offender to its territory, and such waiver may be explicit or by acquiescence.

(d) Only in one case eventually has a fugitive offender a right of immunity when he has been extradited by the country of asylum to the country requesting his extradition for a specific offence, which is not the offence for which he is tried.

(e) The right of asylum and immunity belong to the country of asylum and not to the offender.

The Supreme Court of Israel rejected the plea of superior orders ard observed that in this case the principle propounded by the Inernational Military Tribunal, Neuremberg will apply.

(4) The court also rejected the argument regarding the act of State.

Mai Lai Trial

Mai Lai is a village in Vietnam, whole population of which was killed by American military personnel. It was clearly a war crime and consequently there was a great reaction in the international community and America was charged with for having encouraged perpetration of war crimes in Vietnam. American nationals also expressed their resentment against such atrocities and war crimes. Due to the reaction of the international community as a whole and the pressure of the American nationals at home, the Government of America was compelled to hold a trial of the Officer responsible—Lt. Caley. The Court held the accused guilty and awarded punishment to him. Mai Lai trial is a landmark event in respect of the punishment awarded to criminals for the violation of the war crimes. Hitherto war trials were such wherein the victorious States had conducted the war crime trials against the war criminals of the vanquished nations, but Mai Lai trial marked the beginning of a new trend which shows that there may be circumstances wherein because of the reaction or public opinion of the international community and the pressure of its own national State may be compelled to hold war criminal trials against its own officers. It is undoubtedly an auspicious beginning and augurs well for the observance of laws of war in future.

Chernigov Trial.—For two weeks in Chernigov war crimes trial was held against Grigory Shurub of Ukrain. On 27th December, 1986, he was sentenced to death. He was charged of siding with Germany in 1943 and of having participated in slaughter of 100 Ukrainians in Yatsevasky Camp. Out of these 100, he himself killed 10 Ukrainians. At that time, nearby Yatsevo village was destroyed and Bobrovitsa was partially destroyed. 625 villagers were either killed or burned alive because they had helped the prisoners to escape. Grigory Shurub was also charged of having participated in the destruction of other three villages of the Ukrainian district of Koryukovka. About 7,500 inhabitants of these villages were killed.

U. N. War Crimes Commission to investigate war crimes committed in former Yugoslavia.—On 6th October, 1992, the Security Council passed a resolution[14] unanimously authorising Secretary-General Boutros Boutros Ghali to establish U. N. War Crimes Commission to investigate war crimes committed in former Yugoslavia. Though the scope of this Commission is very limited, it is very significant landmark in the history of the United Nations. It is not a permanent Commission yet is significant because it will definitely establish an important precedent.

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[14] See Resolution 780 (1992).

The Security Council, on 6th October, 1992, asked States, relevant U. N. bodies and other organizations to provide within 30 days any substantial information concerning violations of humanitarian law. It may be noted here that two months before, on 13th August, 1992, in resolution 771, the Council had asked States and international organizations for such information on the former Yugoslavia.

On 6th October, 1992, the Council took the decision for the establishment of War Crimes Commission as it had been alarmed by reports of mass killings and ethnic cleansing" in former Yugoslavia.[15] The Commission reported that it had several thousand pages of documentation, as well as video information on allegations of grave breaches of the 1949 Geneva Conventions and violations of international humanitarian law and was preparing a database on all reported crimes.

Establishment of an International Tribunal for Prosecution of Violators of International Humanitarian Law in former Yugoslavia.—Investigation of war crimes by U. N. War Crimes Commission would have been futile if the persons guilty of war crimes and violation of humanitarian law were not prosecuted and punished. Consequently as the natural next step, the Security Council, on 22 February, 1993, decided[16] that an international tribunal "shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." It will be reckoned as a great landmark in the history of the U. N. because it is for the first time that U. N. has established an International Criminal Court with jurisdiction to prosecute crimes committed during armed conflict. The above-mentioned resolution was unanimously passed by the Security Council. The Council asked the U. N. Secretary-General Boutros Boutros Ghali to make specific proposals within 60 days for the organization and operation of such tribunal.[17]

On 3rd May, 1993, the Secretary-General reported[18] that the tribunal would operate as a subsidiary organ of the Security Council performing its functions, independently of political considerations and would "not be subject to authority and control" of the Council with regard to the performance of its judicial functions. Its life span would be "linked to the restoration and maintenance of international peace and security" in the former Yugoslavia.

The tribunal would consist of two Trial Chambers, an Appeals Chamber, the Prosecutor and a Registry, servicing both Chambers and the Prosecutor. With regard to competence the Tribunal will apply those rules of international humanitarian law which are "beyond any doubt part of customary law", such as international conventions relating to the protection of war victims, respective laws and customs of war on land and prevention of the crime of genocide. The tribunal will also deal with "crimes against humanity—first recognized in the Charter and judgment of the Neuremberg Tribunal—which include "inhuman acts of a very serious nature" committed as part of a "widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." In the case of the former Yugoslavia, such inhuman acts took the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[19]

On 25th May, 1993, the Security Council decided to establish an International Tribunal for the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[20] The Council unanimously endorsed a 34-article draft statute of the tribunal annexed to the Secretary-General's report (S/25704). Under its statute, the Tribunal is to deal with "crimes against humanity", such as murder, extermination, enslavement, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhuman acts. Also acting upon an order of a Government or a superior would not relieve the perpetrator of criminal responsibility and should not be a defence. Obedience to superior orders could, however, be considered a mitigating factor should the Tribunal determine that justice so requires.

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[15] See U. N. Chronicle, Vol. XXX, No. 1 (March, 1993) p. 7.

[16] See Resolution 808 (1993).

[17] See U. N. Chronicle, Vol. XXX, No. 2 (June, 1993) p. 5.

[18] Vide document (S/25704).

[19] See U. N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 13.

[20] See Resolution 827 (1993).

The Secretary-General was asked to make practical arrangements for effective functioning of the Tribunal, which would be located at the Hague.

It may also be noted here that on 28th May, 1993, two items on the tribunal's financing and on election of its judges were added to the agenda of the General Assembly's forty-seventh session.[21]

On 17th November, 1993, the 11-member International Tribunal for crimes in the former Yugoslavia was inaugurated at the Peace Palace in the Hague, Netherlands. The two week session of the Tribunal was held from 17th to 30th November, 1993. Judge Antonio Cassere of Italy was elected President of the Tribunal. During its two-week session, the Tribunal also considered proposed rules of procedure and evidence. Earlier Roman Escvar Salern of Venezuela was appointed Tribunal Prosecutor by Security Council.[22]

The first extraditions of suspected war criminals from former Yugoslavia were made on 12th February, 1995. A Bosnian Serb General and a Colonel spent their first day in Dutch jail on 13th February, 1995, after NATO, acting on the request of U.N. War Crimes Tribunal for former Yugoslavia, flew them out of Sargeevo on 12th February, 1995.

Milosevic War Crimes Trial

Slobodan Milosevic, former Yugoslavian President, was required to appear before the International Criminal Tribunal on 3rd July 2001 to hear charges of crimes against humanity committed during his tenure as they so-called "Butcher of the Balkans". After charges were read, he would have 30 days to enter a plea. Aged 59, Milosevic is accused by the International Criminal Tribunal for former Yugoslavia (ICTY) of responsibility for murders, deportations, persecutions and violations of the 1949 Geneva Conventions for his rule in the 1988-89 Serb crackdown on ethnic Albanians in Kosovo.

It took hardly 12 minutes for Slobodan Milosevic to deny the charges : "Thus contemptuously he alleged : "This trial's aim is to produce false justification for war crimes committed by NATO in Yugoslavia," Terming the Tribunal as illegal he even refused to appoint his counsel. The actual trial started on Tuesday, 12th February, 2002. On that day U.N. war crimes prosecutor Carla Del Pente alleged that Milosevic was "responsible for the worst crimes known to mankind" by orchestrating crimes against humanity and genocide in the 1990 wars of Bosnia, Crotia and Kosovo.

Establishment and statute of International Tribunal for Rwanda

Expressing its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda and determined to put an end to such crimes and take effective measures to bring to justice the persons who are responsible for them, the Security Council, on 8 November, 1994, decided to adopt the statute of the International Criminal Tribunal for Rwanda. Prior to this the Security Council had received the request of the Government of Rwanda to establish the said Tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of International humanitarian law committed in the territory of Rwanda and Rwanda citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1st January, 1994 and 31 December, 1994. The Security Council has established the Statute acting under Chapter VII of the U.N. Charter.

Articles 2 and 3 of the statute define the terms Genocide and Crime Against Humanity respectively. Article 1, which deals with the competence of the Tribunal, provides that the Tribunal shall have the power to prosecute persons, responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1st January and 31st December, 1994, in accordance with the provisions of the present statute. According to Article 4 of the International Tribunal for Rwanda shall have power to prosecute persons committing or ordering to be committed serious crimes of Article 3 common to the Geneva Conventions of 12th August, 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8th June, 1977.

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[21] See note 19, p. 13.

[22] See Resolution 877 (1993) of 21st October, 1993.

Article 10 of the statute provides that the International Tribunal for Rwanda shall consist of the following organs :

(a) The chambers, comprising two Trial chambers and an Appeals chamber,
(b) The Prosecutor, and
(c) A Registry.

As regards the composition of the chambers Article 11 provides that the chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State who shall serve as follows :

(a) Three judges shall serve in each of the trial chambers.
(b) Five judges shall serve, in the Appeals chamber.

The Trial chambers shall pronounce judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law. (Art. 22). The penalty imposed by the Trial chamber shall be limited to imprisonment (Art. 23). An appeal against the convictions may be made to the Appeals chamber on the following grounds : (a) An error on a question of law invalidating the decision and (b) an error of fact which has occasioned a miscarriage of justice.

The Appeals chamber may affirm, reverse or revise the decisions taken by the Trial chamber (Article 24).

After the establishment of an International Tribunal for Prosecution of violators of International Humanitarian Law in former Yugoslavia it is the second tribunal of its kind and will not only contribute to the process of national reconciliation and to the restoration and maintenance of peace but will also ensure that such violations are halted and effectively redressed.

The Tribunal delivered its first judgement in September, 1998. It found Jean—Paul Akayesu, the former Mayor of Taba, guilty of genocide and crimes against humanity. The Tribunal also found Jean Kambananada, former Prime Minister of Rwanda, guilty of genocide and crimes against humanity and sentenced him to life imprisonment.

In the last week of August, 2003, U.N. Secretary-General appointed Hassan Jallow, fifty-two year former Gambian Supreme Court Judge and Solicitor -General as the new prosecutor of the Rwandan Genocide Tribunal on a four-year term in place of Carla Del Ponte, who had become involved in a controversy with that country's government. However Del Ponte had been retained as Chief Prosecutor of the Yugoslav Tribunal trying cases of war crimes against humanity committed as the country was breaking up. Her term which was to expire on September 14, 2003 was extended for another four years.

Del Ponte got into controversy when she decided to investigate Tutris, who now ruled the country, in connection with the killings of some 30,000 Hutus. In her view it was necessary to investigate both sides to ensure credibility of the tribunal. The U.S. and U.K. also backed her removal fearing that her investigation into ruling Tutsi top brass could destabilize the country and the region. On the other hand, human rights groups had been supporting Del Ponte as they feared that her replacement would mean the Tutsi culprits go scot free.

The Security Council resolution also set a time table under which both courts were to complete investigations by the end of next year and most of the work by 2008. They were to be wound up by the year 2010. It may be remembered that the Rwanda Tribunal is trying cases of genocide and crimes against humanity arising out of 1994 massacre of more than a million Tutsis and moderate Hutu extremists.

CHAPTER 56

GENOCIDE

Meaning and definition of 'Genocide'

The genocide committed during the Second World War shocked the whole mankind so much so that the General Assembly in its first meeting affirmed the principles enunciated in the Neuremberg Judgment. Besides this, in its resolution 96 (I), dated 11 December, 1946 the General Assembly declared that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world".[1] The main cause of such keen interest taken by the General Assembly in its first session was the Nazi atrocities committed by the Germans during the Second World War. The General Assembly did not rest contended and went ahead to adopt unanimously on 9 December, 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred as 'Genocide Convention'). The Genocide Convention entered into force on 12 January, 1951. This Convention has been ratified by India who signed it on 29 November, 1949 and ratified it on 27 August, 1959. The convention on the Prevention and Punishment on the crime of Genocide has been ratified by 146 countries as of January, 2014. Article II of the Genocide Convention defines 'genocide' in the following words : "In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

(a) killing members of the group;
(b) causing serious bodily harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group."

'Genocide' a crime under International Law

The term 'genocide' was coined by Lemkin a private individual whose efforts played a large part in promoting the United Nations work on genocide. The convention probably reflects customary international law.[2] In *Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*[3]; speaking about the obligations of a State when it admits into its territory foreign investments or foreign nationals, the International Court of Justice observed[4] : "Such obligations derive, for example, in contemporary international law, from the out-lawing of acts of aggression *and of genocide* as also from the principles and rules concerning the basic rights of human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protections have entered into the body of general international law;[5] others are conferred by international instruments of a universal or quasi-universal character".

Article I of the Genocide Convention, 1948, therefore, provides that the contracting parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish. Under Article III of the Convention following acts are punishable : (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; and (e) Complicity in genocide.

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[1] See also Raphael Lemkin, "Genocide as a crime under International Law", A.J.I.L., Vol. 41 (1947) p. 145 at p. 150.

[2] D. J. Harri's, Cases and Materials on International Law (London, Sweet and Maxwell, 1973), p. 549.

[3] I.C.J. Reports, 1970, p. 3.

[4] Ibid., para 34.

[5] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports, 1951, p. 23.

Article IV of convention provides that persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.

Other Main Provisions of the Genocide Convention :

(i) The contracting parties of the convention have undertaken to enact in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.[6]

(ii) Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.[7] It is unfortunate that the provision relating to "international penal tribunal" to try persons for genocide, and for that matter any other international crime, has yet not been implemented although 36 years have passed since the adoption of the Genocide Convention.

(iii) Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.[8]

(iv) Disputes between the contracting parties relating to the interpretation, application of fulfilment of the present convention, including those relating to the responsibility of a State for genocide or any other acts enumerated in Article III, shall be submitted tc the International Court of Justice at the request of any of the parties to the dispute.[9]

As of May, 2019, 152 countries have become parties to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

The International Court of Justice has recognized the principles underlying the convention are principles which are recognized by civilized nations binding on states even without any conventional obligation.

Example of Genocide in Bangladesh

The military regime of Pakistan under General Tikka Khan committed uncalculable and unprecedented genocide in Bangladesh. As pointed out by M. K. Nawaz, "The Bengali people have a language and culture different from the people of West Pakistan, can accordingly be considered as ethnical group within the meaning of Article II of Genocide Convention."[10] Justice V. R. Krishna Iyer, former Member of the Indian Law Commission and retired Judge of the Supreme Court, has also pointed out, "the Bengali population of East Pakistan probably falls under the national and ethnical group—not merely territorial or linguistic."[11] Anthony Mascaren has also written........."The Nazi style programmes were intended, in the context of the ambitions of the West Pakistan Regime, as military answer to what was essentially a political problem of its own making.........the obliteration of Bengali language and culture is the continuing purpose of the regime."[12]

Thus the genocide committed by Pakistani military personnel in Bangladesh was clearly and without a shade of doubt an international crime. As aptly remarked by Justice V. R. Krishna Iyer : "The scenes of blood and bestiality ensuing from the military crack down under General Tikka Khan's deadly direction was such the like of which no eye had seen and no tongue could adequately tell. Bangladesh is fortunately free today but its 'sweetest songs' of freedom are those that tell of 'saddest thought' of the millions dead. The appealing human annihilation perpetrated by military personnel of Pakistan in Bangladesh, its dimensions and dastardliness *prima facie* constitutes an international crime".[13]

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[6] Article V of the Genocide Convention.

[7] Article VI.

[8] Article VII.

[9] Article IX.

[10] M. K. Nawaz, "Bangladesh and International Law", I.J.I.L., Vol. 11 (1971), p. 251 at p. 261.

[11] "Law's Tryst with the Dead in Bangladesh vis-a-vis punishment of Humanicidists", National Herald, February 4, 1972.

[12] Anthony, Mascaren, The Rape of Bangladesh (1971), p. 120.

Provisional Measures by World Court against Federal Republic of Yugoslavia for Prevention of Genocide.—On 8th April, 1993, the International Court of Justice issued an order calling upon the Federal Republic of Yugoslavia (Serbia and Montenegro) to "immediately.........take all measures within its power to prevent commission of the crime of genocide".

This order was made unanimously by the court in *Case Concerning Application of the Convention on Prevention and Punishment of Crime of Genocide* [*Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)*].[14]

The World Court unanimously also directed that the Government of Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of Republic of Bosnia and Herzegovina "should not take action and should ensure that no action is taken which may aggravates or extend the existing dispute over the prevention and punishment of the crime of genocide or render it more difficult of solution". Moreover, by 13 votes to 1, the Court directed that the Government of Former Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as organizations and persons which may be subject to its control, direction, influence, do not commit any acts of genocide, or of complicity in genocide whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.

On further requests for the indication of provisional measures, the International Court of Justice, on 13 September, 1993 reaffirmed the provisional measures indicated on 8th April, 1993 and directed that the same be "immediately and effectively implemented".[15]

Establishment of International Tribunal for Rwanda for violations of International Humanitarian Law and Genocide committed in the territory of Rwanda and neighbouring States between 1st January, 1994 and 31 December, 1994.

N.B.—For this please see the Chapter on "War Crimes".

Conclusion.—The adoption of the convention on the Prevention and Punishment of the Crime of Genocide, 1948 was a great achievement at the time when the memories of atrocities committed during the Second Wrold War still loomed large in the minds of the people. It is however doubtful whether the convention covers cultural genocide. Moreover, the concept of 'complicity in genocide' is very vague. Last but not the least, failure of the contracting parties to establish, an international penal tribunal to try persons for genocide remains a formidable obstacle in the proper implementation of the convention. Nevertheless the convention has rendered a signal service by making the crime of genocide punishable in time of peace or in time of war. By September 1983, 93 States have expressed their consent to be bound by the convention.

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[13] V. R. Krishna Iyer, J., note 11.

[14] I.C.J. Reports, (1993), p. 3.

[15] Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [*Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)*, (13 September, 1993), ICJ Reports (1993) p. 325.

CHAPTER 57

TERMINATION OF WAR AND POSTILIMINIUM

Modes of Termination of War.*—Generally following are the modes of termination of War :

(1) *Simple cessation of hostilities without any definite understanding being reached.*—Sometimes during the war, the belligerent States cease hostilities without any definite understanding being reached between them. The examples of such types of cessation of war are between France and Spain (1720), war between Russia and Prussia (1801), war between Spain and Chile (1878), etc. Termination of war through this mode is not in accordance with the present circumstances because in this mode of termination of war, no agreement or understanding is reached and it is not determined as to what will be the fate of the prisoners of war, how shall the boundaries be fixed or determined and what shall be the fate of the property under the occupation of the belligerent State or other type of property. Consequently this mode of termination of war presents many difficulties.

(2) *Conquest followed by annexation.*—Sometimes it so happens that a belligerent State conquers another State and annexes it into its territory. According to International law, the annexed territory or State cease to have any independent importance under international law. This mode of termination of war may present difficulties when the belligerent State concerned has annexed the territory in violation of the rules of International law. There is no clear rule of international law in this connection. However, it is definite that the war comes to end after one belligerent State conquers the other belligerent State and annexes the territory of that State into its own territory.

(3) *By a Peace Treaty.*—War may also be terminated by the conclusion of a peace treaty. The advantage of the mode of termination of war is that some understanding is reached in regard to the treatment of prisoners of war, property and other relevant matters connected with war. As pointed out by Starke, "On all points concerning property on which the treaty is silent the principle *uti possidetis* (as you possess, you shall continue to possess) applies, namely, that each State is entitled to retain such property as was actually in its possession or control at the date of cessation of hostilities."[1] The principle of *uti possidetis* has been explained by Oppenheim in the following words : "Unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the conclusion of peace. Thus, all movable State property, such as munitions, provisions, arms, money, horses, means of transport, and the like seized by an invading belligerent, remains his property, as likewise do the fruits of immovable property seized by him. Thus further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who may annex it. But it is now-a-days usual, although not at all legally necessary, for a conqueror desirous of retaining conquered territory to secure its cession in the treaty of peace."[2] The principle of Postiliminium also comes into force when war come to an end through this mode. According to this principle in the absence of any express provision the persons and things come to their original position after release from the occupation of the enemy. This principle has been discussed in detail later in this Chapter. This principle does not apply to property.[3]

(4) *By Armistice Agreement.*—Sometimes wars are terminated by the conclusion of Armistice Agreement. Under this mode of termination of war, the hostilities cease for

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* See also for I.A.S. (1973), Q. No. 7(e) ; I.A.S. (1956), Q. No. 7; P.C.S. (1967), Q. No. 10 ; P.C.S. (1981), Q. No. 2 ; P.C.S. (1988), Q. 8.

[1] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 572.

[2] L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 611.

[3] In the words of Starke, "There also applies the postiliminium principle, in the absence of express provision, to the rights of the parties other than to property : that is to say, that any prior condition and prior status are to be restored, hence legal disabilities of former alien enemies are removed, diplomatic relations reconstituted, etc." note 1, p. 573.

temporary period but since the state of war continues between States, war may erupt at any time.

(5) *By Unilateral Declaration of one or more of the victorious powers.*—Sometimes war may come to an end by the unilateral declaration of one or more of the victorious powers. For example Indo-Pak War of 1971, came to an end in consequence of the unilateral declaration of India to end the war. The war came to an end because Pakistan also respected this declaration and ceased hostilities. It is not essential that the date of the termination of war should also be the date of conclusion of peace treaty, or the date when the hostilities actually ceased. It is a matter to be determined by State law. There is no rule of international law which may bind States to treat the conclusion of war on the date of the conclusion of peace treaty.

Doctrine of Postiliminium*

The doctrine of *postiliminium* was incorporated into International Law from Roman law. According to it, persons and things released from the occupation of the enemy come to their original position or they are restored to their original position after the end of war. According to Roman Law this principle is applied on persons and things. According to International law, this principle is applied in the context of war. If any State remains under the occupation of another State for a temporary period and then subsequently becomes independent then after its independence the persons and things come to their original position in accordance with the principles of *postiliminium.* This principle cannot, however, be applied in matters of neutral States.

Private movable property can be seized for a temporary period and be used by the occupying power and, therefore, the principle of *postiliminium* does not apply on such properties. However, public movable property can be seized by the belligerent States only when and in so far as it is essential for the objectives of war. If after withdrawal of the enemy the property remains, then it comes or is restored to its original position. The principle of *postiliminium* also applies on immovable property. Similarly after the end of the occupation of the belligerent State, the administration of the valid government of territory concerned is restored on the principle of *postiliminium.* It may, however, be noted that the valid and lawful acts performed by the occupying enemy State remain valid even when the occupation ceases. In fact, the principle of *postiliminium* applies only when the occupying power has exceeded its powers or has acted beyond its rights. Thus the legal and valid acts performed by the occupying power are beyond the scope of the principle of *postiliminium.*

Limitations of the doctrine of Postiliminium.—Following are the limitations of the doctrine of *Postiliminium* :—

(1) It does not apply upon the valid and lawful acts performed by the occupying power. They remain valid even when such occupation ends.
(2) This principle also does not apply in cases of the realisation of taxes etc. made by the occupying power.
(3) The principle of *postiliminium* does not apply in respect of the neutral States.
(4) It does not apply when one State incorporates another State into its State by conquest because conquest followed by annexation, changes the status of things and persons.
(5) Yet another limitation of the doctrine of *postiliminium* is that it does not apply when an enemy State has finally incorporated the territory concerned as a part of its territory.

Case of Elector of Hesse Cassel.

This case is related to the principle of *postiliminium.* Hesse Cassel was a neutral State which was conquerred and annexed by France in 1806. Consequently Elector of Hesse Cassel fled away from its territory. In 1893, in accordance with a treaty, Elector regained his lost territory. After the death of the former Elector, his son claimed to realise past debts on the basis of the principle of *postiliminium.* But he could not succeed. In this case, it was held that after the conquest, the conquering State is fully entitled to realise taxes etc. Napoleon was, therefore, within his right to realise debts, etc. Since it was a valid act performed by the occupying power and it was within the right of Napoleon, the principle of *postiliminium* could not be applied in this case.

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* See also for I.A.S. (1962) Q. No. 12 (a); I.A.S. (1959), Q. No. 6 (g); I.A.S. (1957), Q. No. 6 (f); I.A.S. (1965), Q. No. 12 (a); P.C.S. (1967), Q. No. 10; P.C.S. (1988) Q. 8.

CHAPTER 58

NON-INTERNATIONAL ARMED CONFLICTS

The laws of war discussed in earlier chapters generally deal with armed conflicts of an international character. A pertinent question therefore arises as to what will be the position of a non-international armed conflict and what rules will apply in case of a non-international armed conflicts. It is also necessary to know whether civil wars can be called wars in the technical meaning of the term. As pointed out by Oppenheim, "In the proper sense of the term a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large portion of the population of a State rises in arms against the legitimate Government. As war is an armed contention between *States* such a civil war need not be war from the beginning, nor become war at all, in the technical sense of the term. But it may become war through the recognition of the contending parties or of the insurgents, as a belligerent power. Through such recognition a body of individuals receives an international position in so far it is for some purpose treated as though it were a subject of International Law." Further, "As observance of the generally recognized rules of warfare is one of the conditions of recognition of belligerency, recognition by other States provides evidence of the ability and the willingness of the insurgents to observe these rules. In view of this, such recognition by other States entails upon the legitimate Government even it refuses recognition a compelling moral obligation, closely approximating to a legal duty to treat insurgents in accordance with the rules of warfare of a humanitarian character." Thus it may be said that recognition of one of the contending parties or of the insurgents, internationalises the civil war and the rules of international law become applicable. But if none of the contending parties is recognised as a belligerent power, the civil war remains a non-international armed conflict.

As regards non-international armed conflicts the four Geneva Conventions of 1949 marked a great advance by providing uniformly that in such conflicts which occur in the territory of one of the parties to the convention, each party to the conflict shall be bound to apply, as a minimum certain humanitarian provisions of a fundamental character. For example, the Geneva Convention of 1949 on Treatment of Prisoners of War provides that in case of non-international armed conflicts, occurring in the territory of the contracting parties, each party to the conflict shall be bound to apply a minimum standard conduct. The conventions provide that persons who take no part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat,* as the result of sickness, wounds, detention or any other cause must in all circumstances be treated humanly without any adverse distinction based on considerations of race, colour, religion or faith, sex, birth or wealth, or any other similar reasons. The convention prohibits the following acts in respect of these persons : (a) violence to life and person; in particular, murder of all kinds, mutilation, cruel treatment and torture, (b) taking of hostages; (c) outrages upon personal dignity; in particular, humiliating and degrading treatment ; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

These provisions relating to non-international armed conflicts continue to apply in cases of civil wars until one of the contending parties is recognised as a belligerent power.

It may be noted here that the provisions noted above are contained in Article 3 which forms part of Chapter I dealing with the General provisions and which is common to each of the four Geneva Conventions of 1949. The convention however, provides that these provisions shall not affect the legal status of the parties to the conflict. That is to say, the observance of these provisions shall not amount to recognition of the belligerency of the insurgents on the part of the legitimate government.

As regards guerilla warfare, Oppenheim has aptly expressed the view that "So long as these persons, though operating in occupied territory, fulfil the conditions which the Hague Regulations prescribe generally as qualifying irregular forces for the privileges and treatment enjoyed by the armed forces of the belligerents they are entitled to the same treatment and privileges. Undoubtedly the fact that such forces operate in small units and are in the position to disclose their uniform, or the distinctive sign by which they can be recognised at a distance creates special difficulties for the occupying power. However, provided that they comply with the terms of the Hague Regulation and observe the rules of war they must not be treated as war criminals.

The right to be treated in accordance with these Regulations applies, in particular, to cases in which the resistance movement against the enemy, while backing military cohesion, is authorised by and acts in accordance with the orders of the lawful government."

As noted earlier the four Geneva Conventions of 1949 mark a great advance by containing some provisions relating to non-international armed conflicts. However, it cannot but be admitted that they are far from satisfactory. In view of the marked increase in the number of non-international armed conflicts in last three decades in particular the need for providing more provisions and elaboration of the existing ones was fact for a considerable period of the time. Consequently the Diplomatic conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted on June 8, 1977 Protocol Additional to the Geneva Conventions of 12 August, 1949 and Relating to the protection of victims of Non-international Armed conflicts (Protocol II). The preamble of this Protocol emphasizes the need to ensure a better protection for the victims of the armed conflicts not of international character. Article 1 of the Protocol which deals with the material field of application provides that this Protocol which develops and supplements Article 3 common to the Geneva Conventions of 12 August, 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of this Protocol Additional to the Geneva Conventions of 12 August, 1949 and relating to the Protection of victims of International Armed Conflicts (*i.e.,* Protocol I) and which take place in the territory of a High contracting party between its armed forces and dissident armed forces or other armed groups which, under responsible command, exercise such control over a party of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. This provision now makes it clear like crystal that the provisions contained in the Protocol shall apply also to guerilla war and resistance movements provided that conditions mentioned above are fulfilled. Article 1 however adds that this Protocol shall not apply to situations of internal disturbances and tensions such as, riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts. As regards personal field of application Article 2 of Protocol II provides that this Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion national or social origin, wealth, birth or other status or any other similar criteria (hereinafter referred to as "adverse distinction") to all persons affected by an armed conflicts as defined in Article 1 (which has been noted above).

Humane Treatment

Part II of Protocol comprising of Articles 4 to 6 lays great emphasis on humane treatment of persons affected by non-international armed conflicts. Article 4 contains certain Fundamental Guarantees. It provides that all persons who do not take a direct part in hostilities whether or not their liberty has been restricted, are entitled to respect for their person, honour and conventions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. It is further provided that without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever : (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; and (h) threats to commit any of the foregoing acts.

It is also provided that children shall be provided with the care and aid they require.

As regards persons whose liberty has been restricted, Article 5 provides the following :

1. In addition to the provisions of Article 5 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained : (a) the wounded and the sick shall be treated in accordance with Article 7 (Article 7 deals with protection and care of the wounded, sick and ship-wrecked and lays emphasis on humane treatment with them in all circumstances); (b) the persons referred to in this paragraph shall in the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict; (c) they shall be allowed to receive individual or collective relief; (d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons such as chaplains, performing religious function; and (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.
2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1, shall also, within the limits of their capabilities, respect the following provisions relating to such persons : (a) except where men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women; (b) they shall be allowed to send and receive letters and cards, the number of which may be limited by the competent authority if it deems necessary; (c) places of internment and detention shall not be located close to the combat zone ; (d) they shall have the benefit of medical examinations; and (e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission.
3. Persons who are not covered by Para 1 but whose liberty has been restricted in any way whatsoever for reasons related to armed conflicts shall be treated humanely in accordance with Article 4 and with paras 1 (a), (b), (c) and (d), and 2 (b) of this Article.
4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

As regards prosecution and punishment of criminal offences related to armed conflict, Article 6 provides that no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. Further, a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised. The death penalty shall not be pronounced on persons who are under the age of 18 years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. At the end of the hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Civilian Population

Part IV of Protocol II deals with the civilian population. As regards protection of civilian population, Article 13 provides that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed : (i) The civilian population, as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited, and (ii) Civilians shall enjoy the protection afforded by this Part, unless and for such times as they take a direct part in hostilities.

Protocol II also provides protection of object indispensible to the survival of the civilian population.[1] It also contains provisions relating to protection of works and installations containing dangerous forces.[2] Protection of cultural objects and places of worship[3] and prohibition of forced movements of civilians.[4] It is also provided that relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and ship-wrecked. If the civilian population is suffering undue hardship owing to lack of the supplies essential for its survival, such as food stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Conclusion.—In view of the foregoing discussion, the contention that the laws of war of International Law deal only with international armed conflicts and that they have nothing to do with non-international armed conflicts is no more tenable. The provisions noted above apply to the non-international armed conflicts. It need not be overemphasized that they apply also to guerillas and persons taking part in organised resistance movement provided that they satisfy the requirements provided in the Geneva Conventions and Protocol II. The Geneva Conventions of 1949 as well as Protocol II which supplements, them, lay great emphasis upon human treatment of persons taking part in non-international armed conflicts and civilian and individuals affected by such conflicts. That is why, they are often called humanitarian laws of war.

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[1] See Article 14.

[2] Article 15.

[3] Article 16.

[4] Article 17.

Part VI

THE LAW OF NEUTRALITY

CHAPTER 59

NEUTRALITY

Meaning and definition of the term "Neutrality"*.—As pointed out by Oppenheim, neutrality is "the attitude of impartiality adopted by third States towards the belligerents and recognized by belligerent, such attitude creating rights and duties between the impartial States and belligerents."[1] According to Lawrence, neutrality is the "condition of those States which in times of war take no part in the contest but continue pacific intercourse with the belligerents."[2] In his definition, Lawrence has laid emphasis on the point that neutrality is a condition wherein a State does not take part in war and continues intercourse with the belligerent States. This definition is neither complete nor adequate because it does not mention anything about the attitude of impartiality adopted by the neutral States. Moreover, it is also not made clear in this definition that recognition of neutrality by the belligerent States gives rise to certain duties and rights. As compared to this definition, the definition given by Oppenheim as quoted earlier is more appropriate. Judge Philip C. Jessup has defined the term "neutrality" in the following words : "Neutrality is a legal status arising from the abstention of a State from all participation in a war between other States, the maintenance by it of an attitude of impartiality in its dealings with the belligerent States and the recognition of the latter of this abstention." According to Starke, "In its popular sense neutrality denotes the attitude of a State which is not at war with belligerents and does not participate in the hostilities. In its technical sense, however, it is more than an attitude, and denotes a legal status of a special nature, involving a complex of rights, duties and privileges at international law, which must be respected by belligerents and neutrals alike."[3]

On the basis of the above definitions we may conclude that there are following essential elements in neutrality :—

(1) *Attitude of Impartiality.*—Neutral State is a State which does not take part in war and remains impartial. This impartiality is one of the essential elements of neutrality.

(2) *Recognition of Impartiality by Belligerent States.*—Not only the neutral State should remain impartial, it is also necessary that this impartiality should be recognised by the belligerent States.

(3) *Creation of rights and duties.*—The recognition of attitude of impartiality of the neutral State gives rise to certain rights and duties. It gives certain rights to neutral States and also imposes certain duties upon them. Similarly, the neutral State also acquires certain rights because of the attitude of impartiality and neutrality adopted during the war between the two belligerent States. These rights and duties are recognized under international law and should be observed by the belligerent States as well as the Neutral States.

Development of the Law of Neutrality**

The term 'Neutrality, has been derived from the Latin word 'Neuter' which means impartiality. In wider sense, by neutrality we mean an attitude of impartiality adopted by the States who do not take part in the war. Ordinarily, by neutral States we mean those ~~States which try to keep themselves~~ aloof from the war of their neighbours. The law of neutrality was known in India in ancient period. In the Mauryan period nearly four centuries B.C., the law of neutrality was known in India. As pointed out by Prof. K. R. R. Shastry, three different conditions of international law were recognized in India. They were (1) War; (2) Peace; and (3) Neutrality.[4] Although, it is true that the law of neutrality was known in ancient India yet it must be conceded that there was no clear provision of the status of belligerency. So far as the modern International law is concerned, the law of neutrality started in the middle ages. As pointed out by Prof. Schwarzenberger, "neutrality as descriptive of the political and legal status of the country not at war with either of the two belligerents made its appearance in European diplomatic correspondence in the middle ages."

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* See also for C.S.E. (1987), Q. 7 (a).

[1] L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 653.

[2] T. J. Lawrence, The Principles of International Law, Seventh Edition, p. 582.

[3] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 577.

** See also for I.A.S. (1954), Q. No. 10; P.C.S. (1976), Q. No. 6 (a).

In fact, the word "neutrality" began to be used since seventeenth century. But its systematic development could not be achieved until eighteenth century. In eighteenth century, the two famous jurists Bynker-Shoek and Vattel contributed much to the development of the law of neutrality. In the eighteenth century it was agreed that the States which do not take part in war are entitled to remain impartial and this impartiality may confer upon them certain rights. The development of the law of neutrality received a great impetus in the nineteenth century. Much of the credit for this goes to the United States of America because in the Nepoleonic wars of Europe America remained a neutral country. During the wars of Nepoleon Lord Stowwell who presided the British Prize Court contributed much to the systematic development of the law of neutrality and clarified the rights and obligations of the neutral States arising out of neutrality. The systematic development of the law of neutrality also owes much to the civil war of America. A leading case of this period relating to neutrality is *Alabama Claims Arbitration,* 1872. In the civil war of America, Britain was neutral. But Britain provided the facilities to the Southern States for the fitting and construction etc., of Albama and other destroyer in its territory. America claimed that it was a clear violation of the neutrality adopted by Britain. America contended that it was the duty of Britain to prevent such types of acts in its territory. America, therefore, claimed compensation for the violation of law of neutrality by Britain. Britain and America agreed to entrust this matter to the Court of Arbitration. The Court of Arbitration gave its award in favour of America and ruled that Britain should pay 1,55,00,000 dollars in gold to America as compensation.

The permanent neutralisation of Belgium and Switzerland in nineteenth century was also a landmark event so far as the development of the law of neutrality was concerned. This encouraged the development of the law of neutrality. Some rules relating to the law of neutrality were also framed in the Declaration of Paris, 1856 and Hague Convention of 1907. But the first world war turned into a "total war" and laws of neutrality were openly and flagrantly violated during the war. So was also the case with the second world war. America remained neutral in the first world war up to the year 1917, but later on it was compelled to take part in war. It was claimed by America that it had to participate in war because its neutrality was violated.

The establishment of the League of Nations and then of the United Nations greatly affected the law of neutrality in the twenteith century. Some jurists have gone to the extent of saying that the law of neutrality has become impossible in the presence of the provisions of the Charter. We will take up the detailed discussion of the position of the neutrality under the Covenant of the League of Nations and under the United Nations Charter, later on in this Chapter. It is sufficient to note at this stage that the Covenant and the United Nations Charter have greatly affected the old law of neutrality.

Rational basis of neutrality*.—Neutrality is often justified because of the following reasons : (1) It helps to localise the area of war. (2) It discourages the war. (3) In consequence of neutrality, some States are able to keep themselves away from war. (4) It regularises international relations.

Ordinarily above-mentioned reasons are said to be rational basis of the law of neutrality. But the second world war has clearly established that the first and second reasons are not the true basis of neutrality. During the second world war, Norway, Denmark, Ireland and Belgium were neutral countries. But the belligerent States in general and Germany in particular did not respect their neutrality and conquered them. So far as the above-mentioned third basis is concerned the experience of the first world war has shown that it is not a concrete basis because America wanted to keep itself away from the first world war but had to enter the first world war in 1917. As regards the last basis, it may be noted that the establishment of the League of Nations greatly affected the old law of neutrality. At present, the provisions of the United Nations Charter have also greatly affected the law of neutrality. It is because of these reasons that it is contended that the observance of the law of neutrality is not possible in the presence of the provisions of the Charter. We will take up this discussion later on in this Chapter. Presently, it will suffice to note that although the Covenant of the League of Nations and United Nations Charter have greatly affected the old law of neutrality, they have not completely abolished it and the observance of the rules of neutrality is still possible under certain circumstances.

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[4] See "The Concept of Neutrality in International Law", S.C.J. (1959), p. 113.

* See also for I.A.S. (1973), Q. No. 8.

Position of the Law of Neutrality under the Covenant of the League of Nations*

Many jurists have expressed the view that the Covenant of the League of Nations has put an end to the old law of neutrality. Before saying anything for or against this view it will be desirable to discuss the relevant provisions of the covenant of the League of Nations. There could be two types of war under the League of Nations—(1) War not in disregard of the provisions of the Covenant; and (2) War in disregard of the provisions of the Covenant of League of Nations. As regards the first type of war, Covenant provided that the members of the League of Nations were under the obligation to settle their international disputes first through arbitration, judicial decision or inquiry by Council. Even after the States failed to settle their disputes by these means, they could not go to war until a period of three months lapsed after the award of the arbitration or judicial decision or inquiry by Council. That is to say the Covenant had not completely prohibited war. It has simply imposed certain restrictions upon the member States in respect of their right to resort to war. As pointed out earlier, if the problem could not be resolved through the above-mentioned means, the member States could resort to war only after a lapse of three months. If the member-States resorted to war after exhausting the means provided under the Covenant for the settlement of their disputes other member-States of the League of Nations could remain neutral and the Covenant did not impose any obligation upon them. Thus in this type of war States were free to maintain their neutrality. The position was entirely different in regard to the second type of war. The second type of war greatly affected the law of neutrality under the Covenant. This is to say, if a State went to war in total disregard of the provisions of the Covenant of the League of Nations, then such a State could be deemed to be the enemy of the whole of the League of Nations. Article 16 of the Covenant of the League of Nations provided that if any State resorted to war in violation of the Articles 12, 13 and 15, then it was considered to be war against the whole League. In such type of war other members of the League of Nations were under obligation to assist the League of Nations. In short, we may say that in this type of war, other States of the League of Nations could not remain neutral. According to Fenwick, Covenant of the League of Nations put an end to the old law of neutrality.[5] Professor Kelsen has also expressed the view that the provisions of the Covenant of the League of Nations are inconsistent with the old law of neutrality. But as pointed out by Prof. Oppenheim although the Covenant of the League of Nations greatly affected the old law of neutrality it did not completely abolish it.[6] The view of Prof. Oppenheim seems to be better one because under certain circumstances the States could remain neutral under the Covenant. For example, if a State resorted to war not in disregard of the provisions of the Covenant, then in that situation the State members were under no obligation to assist the League of Nations and could remain neutral.

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* See also for P.C.S. (1976), Q. No. 6 (b); P.C.S. (1978), Q. No. 8. For answer See also Chapter on "War, Its Legal Character and Effects"; P.C.S. (1984), Q. 9.

[5] Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 719.

[6] Oppenheim, note 1, at pp. 634-635.

*Neutrality under the Pact of Paris (1928) or Kellogg Briand Pact** : As remarked by Oppenheim, "The General Treaty for the renunciation of war (*i.e.*, Paris Pact), although it did not effect an express alteration in the law of neutrality, brought about a fundamental change in the status of war in International Law—a development which it was thought, must in the long run influence the institution of neutrality."[7] Fenwick has also expressed the same view. He writes : "............the Pact made no provisions for measures of enforcement in case of the violation of its pledges; it set up no machinery to determine whether a particular act should constitute a violation; and its broad 'outlawry of war' was limited and qualified by a covering letter of Secretary Kellogg in which the right of self-defence was reserved in such general terms as to permit escape from the obligations of the Pact even more easily than the terms of Article 15 permitted escape from the obligations of covenant. *Nevertheless its provisions were regarded by a large number of Jurists as definitely restricting the status of neutrality which might otherwise be claimed by States not members of the League of Nations*"[8]

Modern concept of Neutrality or Position of Neutrality under the United Nations Charter**

Some jurists are of the view that the United Nations Charter has put an end to the old law of neutrality. Professor Kelsen has also remarked that the rule of impartiality upon neutral States is superseded by the Charter. Professor Quincy Wright, Fenwick, Professor Smith, Jackson and Mis. V. M. Chricton also subscribe to this view. In the view of these jurists, when a State resorts to war there can be only two conditions. He can either be an aggressor or a defender. If he is an aggressor then preventive or enforcement action can be taken against him under the Charter. If he is a defender then he should be assisted by the United Nations. Thus the Member States of the United Nations cannot remain neutral. Before we criticize the views of these jurists, it will be desirable and necessary to refer the relevant provisions in the United Nations Charter which have affected the old law of Neutrality. Such provisions are as follows :

(*1*) *Article* 2 (5).—Art. 2 (5) provides that all members shall give the United Nations every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

(*2*) *Article* 25.—Art. 25 provides that members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. That is to say, if the Security Council decides to take any action, the member-States have no option but carry out this decision. Under such circumstances they cannot remain neutral.

(*3*) *Articles* 41, 42 and 43.—Arts. 41, 42 and 43 are relating to the right of enforcement action conferred upon the Security Council in respect of maintenance of peace and security. Under these Articles the Security Council has been empowered to ask other States to assist it. These provisions are in fact detrimental for the observance of the rules of the old law of neutrality.

(*4*) *Article* 49.—Art. 49 provides that the members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council. It has also affected the old law of neutrality.

(*5*) *Article* 51.—Article 51 of the Charter confers upon the member-States of the United Nations the right of individual or collective self-defence if an armed attack occurs against a member of the United Nations.

It is clear from the above provisions that the United Nations Charter has greatly affected the old law of neutrality. It is on the basis of these provisions that many jurists have expressed the view that the Charter of the United Nations has put an end to the old law of neutrality. But as against this view some jurists have expressed the view that although the provisions of the Charter have greatly affected the old law of neutrality, they have not completely abolished it. That is to say, neutrality can still be practised under certain circumstances. P. B. Potter has aptly remarked, "It is hardly too much to assert that neutrality in the formal juridical sense of that concept and that term, as known prior to 1945, was abolished for all signatory States within the limits of the Charter for issues and conflicts not covered by that instrument neutrality could still exist or be practised."[9] Fenwick has also expressed the view that if in respect of certain matters relating to peace and security, the Security Council is not able to take any decision, then in such a situation other member States of the United Nations can remain, neutral."[10] Professor Oppenheim has also expressed the view that Charter has greatly affected the old law of neutrality, but has not completely abolished the law of neutrality. He adds, in principle no member-State of United Nations can remain neutral in case the Security Council has declared a member-State aggressor or has decided that the breach of peace has taken place. However, there are still certain situations wherein the member-States of the United Nations can remain neutral."[11] For example, if the Security Council decides that a State has committed a breach of peace or has made an aggression but because of the exercise of veto by permanent member, it is not able to take any decision then other member-States of the United Nations do not have any legal obligation and may remain neutral. Starke has also expressed the same view. He has pointed out, "Neutrality, is not, however, completely abolished. Even where preventive or enforcement action is being taken by the United Nations Security Council, certain member-States may not be called upon to apply the measures decided upon by the Council or may receive special exemption (Articles 48 and 50). In this event their status is one of *'qualified' neutrality* inasmuch as they are bound not to assist the belligerent States against which the enforcement measures are directed and must also assist the member-States directly taking the measures (Article 49)."[12] Further, "It seems also that where the 'veto' is exercised by a permanent member of the Security Council so that no preventive or enforcement action is decided upon with reference to a war, in such cases member-States may remain absolutely neutral towards the belligerents.[13]

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* See also for P.C.S. (1976), Q. No. 6 (c); P.C.S. (1978), Q. No. 8.

[7] Oppenheim, note 1, at p. 635.

[8] Fenwick, note 5, at p. 720.

** See also for P.C.S. (1976), Q. No. 6 (d); I.A.S. (1962), Q. No. 8; I.A.S. (1957); Q. No. 12; I.A.S. (1955), Q. No. 10; I.A.S. (1970), Q. No. 10 (a); I.A.S. (1969), Q. No. 9; I.A.S. (1972), Q. No. 8 (a); P.C.S. (1978) Q. No. 8; P.C.S. (1979), Q. No. 11 (c), P.C.S. (1981), Q. No. 10 (d); P.C.S. (1983), Q. No. 5(a); P.C.S. (1984), Q. No. 9; C.S.E. (1984), Q. No. 8; P.C.S. (1987) Q. No. 9 (b).

Thus we see, as pointed out by Starke, the old law of neutrality has not been completely abolished and can be practised by the member-States of the United Nations in certain special circumstances, although in principle the member-States of the United Nations cannot claim to remain neutral. The present status of the neutrality has been very aptly summed up by J. P. Lalive in the following words : "In realm of thinking in International law and particularly as regards neutrality ours is a period of transition in the sense that the grouping by the advocates of international organisation and collective security for a new concept and principle to replace the traditional concept of neutrality is by no means successful and that this despite all reasonings, to impair the status of neutrality which had no doubt become rail in the face of belligerent necessity during the two world wars, neutrality survives by force of logic and by reason of the facts of international politics."

RIGHTS AND DUTIES OF NEUTRAL STATES AND RIGHTS AND DUTIES OF BELLIGERENT STATES*

Duties of Neutral States.—Ordinarily following are the duties of the neutral States :

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[9] "Neutrality", 1955, A.J.I.L. (1956), p. 101 at p. 102.

[10] See Charles G. Fenwick, "Legal Aspects of Neutralism", A.J.I.L., Vol. 51 (1957).

[11] Oppenheim, note 1, at pp. 647-50.

[12] Starke, note 3, at pp. 581-582.

[13] Ibid, at p. 582.

* See also for I.A.S. (1974), Q. No. 8; I.A.S. (1957), Q. No. 12; I.A.S. 1955, Q. No. 10; I.A.S. (1967), Q. No. 10 (a) : P.C.S. (1982), Q. No. 10 (d); P.C.S. (1985), Q. 9; C.S.E. (1987), Q. 7 (a).

(1) *Abstention.*—It is the duty of the neutral State to abstain from rendering direct or indirect help to the belligerent States. For example, the neutral State cannot assist either belligerent through war forces or cannot guarantee the loans to be given to them.

(2) *Prevention.*—It is also the duty of the neutral States to prevent certain things within their territory. For example, it is their duty to ensure that persons are not recruited for the war forces of belligerent States within their territory. They should also prevent the preparation of war in favour of either of the belligerent States.

(3) *Acquiescence.*—It is also the duty of the neutral States to give their acquiescence in respect of certain matters. For example, they should give their acquiescence when a ship using the flag of their States is seized for carrying contraband. If they oppose such seizure it will be deemed to be the violation of the law of neutrality on their part.

In addition to the above-mentioned duties the neutral States have certain other duties although the following duties are in consequence or connected with the above mentioned three duties. Such duties are as follows :

(1) *Restoration.*—It is the duty of the neutral States not to allow any act connected with the war within their territory and in case if any such act takes place it is their duty to restore it. This is to say, if either of the belligerent seizes enemy ship within the territory of the neutral State then it becomes the duty of the neutral State to get such ship restored to the other belligerent State.

(2) *Reparation.*—If a neutral State contravenes the above-mentioned duties, it may be held liable to pay compensation for the same. A leading case on the point is *Albama Claims Arbitration,* 1872. In this case Britain had to pay America 1,55,00,000 dollars in gold in the form of compensation for the violation of the laws of neutrality. This case was related to the civil war of America in which Britain was neutral but had allowed certain facilities of fittings etc., to Alabama and other destroyers within its territory. Since it was violation of laws of neutrality, Britain was made to pay compensation for the same. Rights and duties of the neutral States have been mentioned in Hague Convention of 1907.

The case of Altmark.—The *Altmark,* a German auxiliary vessel, carried over 300 British officers and sailors taken prisoners from several British merchant vessels sunk by a German armoured warship, the *Admiral Graf Spee.* In February, 1940, the *Altmark* entered Norwegian territorial waters on her way to Germany. The Norwegian authorities ascertained that she was an auxiliary vessel and so granted her permission to navigate through the vast stretch of the Norwegian territorial waters. Soon after the Commander of the British Naval forces asked for a search of the *Altmark* in order to release the British prisoners, but the Norwegian officers refused the request. Thereupon the *Cosseck,* a British destroyer was ordered to enter the Norwegian territorial waters where *the Altmark,* had taken refuge. Without taking or sinking the *Altmark,* the British soldiers were released and brought to England. Norway strongly protested on the ground that the British action constituted a violation of her neutrality. The British Government alleged that Norway was partial, and showed special consideration to the *Altmark,* permitting a far too deep entrance into her territorial waters to hide prisoners, thus compelling the British officer to resort to self-help on humanitarian grounds.¨ Great Britain also justified her action on the ground that the British prisoners on board exempted the case from the rule of free passage through territorial waters.

Reference may be made here to Article 5 of Hague Convention No. XIII which provides that belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries. Further, Article 12 *limits to twenty-four hours period* within which belligerent men-of-war may remain within the territorial waters. But as pointed out by Oppenheim "Probably acquiescence in such passage as causes the men-of-war to remain within territorial waters for more than twenty-four hours is not inconsistent with neutrality so long as it does not result in transforming the territorial waters into a base of war-like operations for offensive or for defensive purposes.

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* Asked in I.A.S. (1967), Q. No. 10(a) and also in P.C.S. (1969), Q. No. 7; see also for P.C.S. (1965), Q. No. 10(a).

The passage must be innocent in the primary meaning that it is a normal incident of international navigation and does not amount to an abuse of the right or of the permission of passage by being a device for gaining immunity by circuitous resort to the shelter of neutral waters in manner involving a conspicuous prolongation of the voyage."[14] As regards the case of *Altmark* he rightly observes, "While according to customary International Law and to Hague Convention No. XIII, the neutral State is entitled to permit the passage of belligerent men-of-war through its territorial waters, the nature and the duration of such passage are governed by the overriding principle that neutral territorial waters must not be further permitted to become a basis for warlike activities of either belligerent. The prolonged use of neutral territorial waters by belligerent men-of-war or their auxiliaries for passage not dictated by normal requirements of navigation and intend *inter alia,* as a means of escaping capture by superior enemy forces must, therefore, be deemed to constitute an illicit use of neutral territory which the neutral State is by International Law bound to prevent by the means at his disposal or which in exceptional cases, the other belligerent is entitled to resist or remedy by way of self-help."[15]

In view of the foregoing, if a belligerent ship which is being pursued stops at a neutral port for more than thirty hours,* it will be violative of the law of neutrality.

Duties of the Belligerent States.—Following are the duties of the belligerent States :

(1) *Abstention.*—It is the duty of the belligerents to abstain from committing any act of war within the territory of the neutral States. For example, if the bomber planes of a belligerent fly over the territory of Switzerland and drop bombs on another belligerent, the belligerent State will be guilty of the violation of its duty under the law of neutrality.**

(2) *Prevention.*—It is their duty to prevent bad treatment towards the ambassadors, citizens, etc., of the neutral States.

(3) *Acquiescence.*—Like the neutral States, belligerent States are under duty to give their acquiescence in respect of certain matters. For example, if the neutral State gives asylum or refuge to some members of its forces or allows temporary asylum or refuge to the enemy within its port, or allows the enemy State to get its ships repaired in its port then it is the duty of the other belligerent State not to oppose it and to give its acquiescence in this respect.

Rights of neutral States and the duties of Belligerents towards the neutral States.***—According to Lawrence, following are the rights of neutral States :

(1) The first right of neutral States is that no war-like act should be committed in their territory.

(2) Secondly, their cable lines in seas, etc., should not be damaged as far as possible.

(3) The belligerent States should not use their territory for making preparation for war.

(4) They are also entitled to get certain rules formulated for the protection of their territory and to make the belligerent States observe them.

(5) Neutral States also possess the right that if their neutrality is violated then they may get compensation for the same. It may however, be noted that there is a lack of definite principles in this respect. But at least this is definite that they should get adequate compensation for the violation of the law of neutrality and the compensation should be proportionate to the loss or damage suffered by them.

Commencement of Neutrality.—Immediately after the start of war, neutral States should declare their neutrality. For example, during the Second World War neutral

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[14] Oppenheim, Supra note 1, at p. 694, note 1.

[15] Ibid, at pp. 694-695.

* P.C.S. (1988), Q. 9 (a).

** P.C.S. (1988), Q. 9 (d).

*** P.C.S. (1982), Q. No. 10(d) ; P.C.S. (1985), Q. 9.

States declared their neutrality immediately after the start of war. It is only after the start of war, States can determine as to whether they will remain neutral or not. Hence, knowledge of the start of war is necessary for the declaration of neutrality. No neutral State can be held responsible for its own acts as well as the acts of its citizens done before the start of war. That is why, Article 2 of Hague Convention III provides that the belligerent States should intimate the neutral States about the start of war. The rights and duties of neutral States begin only after such intimation.

End of Neutrality.—Neutrality comes to an end in one of the following ways :—(a) at the end of war ; (b) when the neutral State starts war with one of the belligerent States; or (c) when any belligerent State starts war with the neutral States. The rights and duties of neutrality continue till a State remains neutral, they end as soon as the neutral State ends its neutrality. However, neutrality does not end simply by a violation of the neutrality.

Kinds of Neutrality and Distinction between them*.—Neutrality may be of following kinds :

(1) *Perpetual or Permanent Neutrality.*—When a State is neutralised through a special international treaty, then such a neutrality is called perpetual or permanent neutrality.

(2) *General and Partial Neutrality.*—When only a part of the State is neutralised, it is called partial neutrality. On the other hand, the whole State adopts the attitude and policy of neutrality, it is called general neutrality.

(3) *Voluntary Neutrality and Neutrality based on some Treaty.*—A voluntary neutrality is a neutrality which is declared by a State voluntarily without being bound by a treaty. On the other hand, a State may become neutral being bound by any general or special treaty.

(4) *Armed Neutrality.*—When a State uses armed force for the defence of its neutrality, it is called armed neutrality.

(5) *Benevolent Neutrality.*—When a State, while remaining neutral, favours a belligerent State or otherwise helps it, it is called benevolent neutrality.

(6) *Perfect and Qualified Neutrality.*—When a State remains completely impartial and does not, directly or indirectly, assist either of the belligerents, then it is called perfect neutrality. But if a State remains neutral generally but as a result of some provisions of treaties entered into before start of war, directly or indirectly, assist any belligerent State, then it is called qualified neutrality.

DEFINITION OF 'NEUTRALITY', 'NEUTRALISATION' AND 'NEUTRALISM' AND DISTINCTION AMONG THEM**

Meaning of the term 'Neutrality' and its distinction with 'Neutralisation' and 'Neutralism'.—The meaning of 'Neutrality' has already been clarified earlier. It is an attitude of impartiality as well as legal status of those States which do not take part in war. When the belligerent States accept or recognize this attitude of impartiality then it gives rise to certain rights and duties. Neutrality is a temporary status and is essentially related to war between two or more States. The neutral State may end the status of neutrality at its will. For example, America remained neutral State during the first world war up to 1917. In 1917 it ended its neutrality and took active part in war.

As compared to this neutralisation is a permanent status of neutrality of a State which is guaranteed by an agreement or treaty. A State may declare its permanent neutrality and if such neutrality is guaranteed by other States through the medium of international agreement or treaty then it is called neutralisation. For example, Switzerland is a neutralised State.

In 1985, referendum was held to decide as to whether Switzerland should join the U. N. The result of referendum was not in favour of joining the U. N. Thus Switzerland continues to be an ideal neutralized State.

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* See also for P.C.S. (1970), Q. No. 10.

** See also for I.A.S. (1965), Q. No. 11; P.C.S. (1974), Q. No. 2 (b); P.C.S. (1973), Q. No. 10 (c); P.C.S. (1985), Q. 9.

As compared to neutrality and neutralisation, neutralism is only a political attitude or status of a State. Under the policy of neutralism any State may keep itself away from the cold war going on between different military blocks of groups.

Meaning and definition of the term 'Neutralisation' and its distinction with 'Neutrality' and 'Neutralism'.—As pointed out earlier, neutralisation is the permanent status of neutrality of a State. Often it is guaranteed by the international agreement or treaty. Such a State cannot participate in war without violating its neutrality. Switzerland is an ideal example of neutralised State. Prof. Schwarzenberger has made the distinction between neutrality and neutralisation in the following words : "Whereas under international customary law a neutral power remain free to exchange its status of neutrality for that of war, a neutralised State which is a party to a treaty prescribing its permanent neutrality may not do so. It cannot resort to war without a breach of its treaty obligation or release from these by the other parties to the treaty. Switzerland represents this type of State."

Thus we see that Switzerland is an ideal neutralised State to the extent that in order to adhere to its neutrality it has not even joined the membership of the United Nations. Austria is also a neutralised State and its neutrality has also been guaranteed under an international treaty. But Austria has become the member of the United Nations. As pointed out by Starke, a neutralised State may become a member of the United Nations because despite the provisions contained in Art. 2 (5), the Security Council under Art. 48 may exempt such a neutral State from the performance of its obligation. Probably on this ground Austria became the member of the United Nations in 1955. In the words of Starke, following is the distinction between Neutralisation and Neutrality : "Neutralisation differs fundamentally from neutrality, which is a voluntary policy assumed temporarily in regard to a state of war affecting other powers and terminable at any time by the State declaring its neutrality. Neutralisation on the other hand, is a permanent status conferred by an agreement with the interested powers, without whose consent it cannot be relinquished."[16]

As compared to neutrality and neutralisation, neutralism denotes the policy of keeping aloof from the conflicts of the military blocks. In the words of Starke, "It is thus also essentially different from 'neutralism' a newly coined word denoting the policy of a State not to involve itself in any conflicts or defensive alliances."[17]

Meaning and definition of the term 'Neutralism' and its distinction with 'Neutrality', and 'Neutralisation'*—As pointed out by Prof. Schwarzenbenger, "neutralism is still newcomer to the vocabulary of international relations." According to Schwarzenberger, neutralism is a political and ideal concept, the meaning of which may change in different contexts, and circumstances. In his book entitled 'Neutraiism', Dr. Peter Lyon has aptly pointed out, "Since the end of the second world war, the political neologism 'neutralism' has been used so often and by so many people in such different circumstances and with such different intentions that its meaning seems to change, Chameleon like, depending on the contest in which it appears." Like neutralism, non-alignment is also a political concept. It means not aligning with either of the two blocks—Capitalistic Block led by the U. S. and the Socialistic Block led by the U.S.S.R. Non-aligned Movement has now gathered great momentum. It commands great respect in international relations and is a force to reckon with. Its membership is now about 120. But the term non-alignment is not at all a legal term and has nothing to do with the traditional law of neutrality. Non-Aligned Movement (NAM) believes in the policy of non-alignment *i.e.*, not aligning itself with either of the two military blocks but at the same time considers itself free to take independent decisions of specific issues. While neutrality is necessarily connected with war, non-alignment is related to cold war and peace.

There is a great difference between 'neutrality' and 'neutralism'. Neutrality is an attitude of impartiality as well as legal status. As compared to it neutralism is only used to denote the political attitude of a State. As pointed out by Dr. Peter Lyon, "By neutrality is

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16. Starke note 3, at p. 122.
17. Ibid.

* See also for P.C.S. (1982), Q. No. 7(e) ; P.C.S. (1987), Q. 9(a); C.S.E. (1987), Q. 7(a).

meant non-involvement in war while by neutralism is meant non-involvement in cold war." Professor Schwarzenberger has also remarked, "in contrast to neutrality which presupposes state of war between at least two other States, neutralism is understood as a policy of non-aliiance or non-involvement is available as a patern of policy in times of both peace and war." P. B. Potter has observed "obviously there are no legal bonds upon such an attitude as long as neither party to the 'cold war' commits any illegal action *vis-a-vis* other parties."[18]

In the end, it may be concluded that while on the one hand neutralisation and neutrality are legal status under the international law, on the other hand, neutralism is only a political attitude. It has no significance in law and does not give rise to any rights and duties under international law. It is a policy through which the neutral States may keep itself aloof from the cold war going on between different blocks. For example, India follows the policy of neutralism and keeps herself away from the military pacts of America and Russia.

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[18] "Neutrality, 1955", A.J.I.L., Vol. 50 (1956) p. 101 at p. 102.

CHAPTER 60

RIGHT OF ANGARY*

As regards the original right of Angary, Oppenheim has written, "under the term *jus angariae,* belligerents who had not sufficient vessels often claimed and practised in former times the right to lay an embargo on, and seize, neutral merchantmen in their harbours, and to compel them *and their crews* to transport troops, munitions, and provisions to certain places on payment of freight in advance. This practice arose in the Middle Ages, and was much resorted to by Louis XIV. "Thus the original right of angary not only empowered a belligerent to requisition neutral ships for military purposes, but also to compel the neutral crews to render services by which they acquired enemy character." Further, "In contradistinction to this original right of angary, the modern right of angary is a right of belligerents to destroy, or use, in case of necessity for the purpose of offence and defence, neutral property on their territory, or on enemy territory, or on the open sea. This modern right of angary does not as did the original right, empower a belligerent to compel neutral individuals to render services, but extends to neutral property.........The object of the right of angary is therefore, either such property of subjects of neutral States as retains its neutral character from its temporary position on belligerent territory and which therefore is not vested with enemy character, or such neutral property on the open sea as has not acquired enemy character. All sorts of neutral property, whether it consists of vessels or other means of transport, or arms, ammunition, provisions, or other personal property, may be the object of the right of angary, provided it is serviceable to military ends and wants. The conditions under which private enemy property may be utilized or destroyed ; but in every case the neutral owner must be fully indemnified."

It may also be noted, as pointed out by Oppenheim, "whatever the extent of the right of angary may be, it does not derive from the law of neutrality. The correlative duty of a belligerent to indemnify the neutral owner of property appropriated or destroyed in the exercise of the right of angary does indeed derive from the law of neutrality. But the right of angary itself is rather a right deriving from the law of war. As a rule the law of war only gives the right to a belligerent, under certain circumstances and conditions, to seize, make use of, or destroy the private property of the inhabitants of occupied enemy territory; but under other circumstances and conditions, and very exceptionally, it likewise gives a belligerent the right to seize, use or destroy neutral property temporarily on occupied enemy territory, on his own territory, or on the open sea."

As pointed out by Starke, privilege of Angary means "requisitioning any neutral ships or goods physically within their jurisdiction, but not brought voluntarily subject to the property being useful in war and being urgently required by them and subject to the payment of full compensation."[1]

On the basis of the above definition, it appears that the right or privilege of Angary has following essential elements :—

(1) it is the privilege of the belligerent State to requisition any ship or goods within its territory and it may use it;
(2) it is necessary that such ships or goods should not be brought voluntarily in that area;
(3) such ships or goods should be useful for purposes of war;
(4) such ships or goods should be urgently required; and
(5) it is necessary for the belligerent States to give full compensation in return of taking or using of such goods or ships.

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* See also for I.A.S. (1974), Q. No. 10(a) ; I.A.S. (1970), Q. No. 10 (f) ; I.A.S. (1965), Q. No. 12(b) ; I.A.S. (1959), Q. No. 6(f) ; I.A.S. (1957), Q. No. 6(e) ; P.C.S. (1976), Q. No. 10(b); P.C.S. (1968), Q. No. 10(c) ; P.C.S. (1965), Q. No. 8 ; I.A.S. (1961), Q. No. 12 (b).

[1] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 584.

The practice of the first and second world wars shows that belligerent States possess the right to declare war area in the open sea and may notify the ways or routes through which neutral States may send their ships, etc. According to Bullock, following are the essential elements of privilege of Angary :—

(1) Belligerent States are entitled to requisition the ships or goods of the neutral State within their territory.
(2) This can be done only when it is urgently required for transportation and other purposes.
(3) Such goods can be taken only when they are within the territory of the belligerent States.
(4) Such requisition should be necessary due to some urgency.
(5) Full compensation should be given for taking or using of such ships or goods.
(6) After the seizure of ships its crew or servants cannot be compelled to render their services to the belligerent State.

According to Rollin and Bullock, the right or privilege of Angary cannot be exercised for requisition or taking over property within the territory of a neutral State, or in the open sea. A leading case connected with the privilege of Angary is the *Zamora,*[2] wherein Privy Council ruled that in accordance with the rules of international law the ships or goods which are pending for decision of the Prize Court can be taken but there are limitations for the exercise of this right. The Court pointed out the following limitations:—

(i) This should be necessary for the conduct of war and security of the belligerent State concerned.
(ii) There should be a real question for adjudication by the court otherwise seizure or requisition would be unlawful.
(iii) The implementation of such an order should be through the court which will decide whether or not the right has been validly exercised keeping in view all the circumstances.[3]

In short, it will suffice to say that the belligerent States can requisition the neutral ships or goods which are within their territory but the exercise of this right is subject to certain limitations.[4]

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[2] (1916) 2 A.C. 77.

[3] Ibid., at p. 16; For facts of the case see Chapter on "Blockade."

[4] Oppenheim, International Law, Vol. II, Seventh Edition, p. 167.

CHAPTER 61

CONTRABAND AND DOCTRINE OF CONTINUOUS VOYAGE

Contraband*

Meaning and Definition of the term Contraband.—As pointed out by Starke, "contraband is the designation for such goods as belligerents consider objectionable because they may assist the enemy in the conduct of war."[1] Oppenheim has defined contraband in the following words : Contraband of war is the designation of such things as are forbidden by either belligerent to be carried to the enemy on the ground that enable him to carry on the war with greater vigour."[2]

Some rules were formulated in regard to contraband in the Declaration of Paris, 1856. These rules have now become part of international law. According to international law belligerent States are entitled to seize contraband goods during war. They may seize contraband goods during war, no matter whether they are ships of the enemy States or the ships of neutral States. International law has conferred this right upon the belligerent States because during war it is in the interest of self-defence. They are entitled to seize and take into their custody not only the contraband goods but also the ships carrying such contraband goods. They are entitled, according to international law to seize the contraband goods so that it may not assist the enemy in the conduct of war.

Kinds of contraband**

Contraband may be of two Kinds.—*Absolute contraband*; and (2) *Conditional contraband.* Absolute contraband are those goods which are of military character and render help directly in the conduct of war. For example, arms and ammunitions, clothes of armed forces, explosive substances, etc., are absolute contraband. On the other hand, conditional contraband are those goods which may be used in peace as well as war. For example, food materials, fuel, etc., are conditional contraband.

In addition to the above mentioned two kinds of contraband, there is also a third category called free articles. These goods are such as cannot be seized as contraband. For example, Chinaware, glass, soap, medicines, etc., are free articles and cannot be seized as contraband even during war. However it may be noted that there is no general agreement among the States in regard to the different categories of contrabands. A serious endeavour was made in this connection in the Declaration of London, 1909, but it could not succeed. In the Declaration of London lists were prepared for the three types of contrabands but this declaration could never come into force. No recognition was accorded to these lists during the first and second world wars nor the States accorded their general consent in regard to the lists prepared in the Declaration of London, 1909. Consequently it depends upon the States whether to put a particular, contraband goods into the category of absolute contraband or conditional contraband or to treat it free articles. The general principle of international law in this connection is that those goods which directly or indirectly assist the enemy in the conduct of war may be seized as contraband.

Consequences of carriage or contraband of war.—As indicated earlier, during war the belligerents are entitled to seize the contraband. In addition to this, under certain circumstances they are also entitled to seize the ship in which such contraband goods are carried. It may, however, be noted, simply by seizure of the goods or taking the goods into custody such belligerent State does not acquire ownership over such goods. It is clear from the practice followed in Britain, America and certain other countries that such goods or ships are produced before the Prize Courts. Only when the Prize Courts declare the seized goods or ship as a lawful prize, the belligerent State concerned acquires ownership over such goods or ships. In this connection, it may also be noted that, as pointed out by Starke, seizure by a belligerent State is admissible only in the open sea or in the belligerent's own territorial waters : seizure in neutral territorial waters would be the violation of neutrality.

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* See also I.A.S. (1974), Q. No. 10(d) ; P.C.S. (1969), Q. No. 3(b) ; P.C.S. (1966), Q. No. 10(c) ; P.C.S. (1964), Q. No. 1 (b) ; P.C.S. (1983), Q. 5(b) ; P.C.S. (1984), Q. 8.

[1] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 589.

[2] L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 799.

** See also for P.C.S. (1984), Q. 8; C.S.E. (1981), Q. 7 (a).

Economic warfare and the doctrine of contraband : Impact of the Second World War*.—The experience of second world war have made a significant impact on the traditional doctrine of contraband. During the Second World War, far-reaching theories of economic warfare were adopted by the U. K. and the U. S. As pointed out by Starke, "Under the new concept of economic warfare, economic pressure was not to be limited primarily to the traditional expedients of contraband interception and blockade, but was to be conducted by multifarious other methods and operations, in order, effectively to weaken the enemy's economic and financial sinews, and therefore his ability to continue the struggle............An almost unlimited range of techniques and expedients, not restricted to contraband and to blockade controls, was adopted in the waging of this economic warfare;........."[3] Further, "The new concept of economic warfare, as thus put into practice, with its wide permissible limits, has by reflex action necessarily had the result, too, of removing a number of the qualifications upon the doctrines of contraband and blockade, which originated in the period when economic pressure in time of war was conceived in the narrowest terms. It is perhaps not today seriously disputed that the modifications to these two doctrines, made in the course of two world wars, will endure.

Accordingly, contraband and blockade as separate doctrines, of the laws of war and neutrality, must now be treated as special topics within the larger field of economic warfare. It should not, however, be overlooked that in a special case, an operation of blockade may involve primarily naval or military aspects rather than those of an economic character."[4]

Doctrine of Continuous Voyage**

As pointed out earlier, during war the belligerent States can seize the contraband goods. Connected with the doctrine of Contraband is the doctrine of Continuous Voyage. According to Starke, the doctrine of Continuous Voyage consists "in treating an adventure which involves the carriage of goods in the first instance to a neutral port and then to some ulterior and hostile destination as being for certain purposes one transportation only to an enemy destination, with all the consequences that would attach were the neutral port not interposed."[5]

According to the principle of contraband, objectively things which may assist the enemy in the conduct of war may be seized by the belligerent States. In order to escape the enforcement of this principle or rule, sometimes it so happens that the States instead of sending the contraband directly to the enemy State, send to a neutral State from where it is subsequently transferred to the enemy State. This is done with the objective that the goods may not be seized as contraband by the belligerent States. In order to prevent the violation of the rule of contraband the doctrine of Continuous Voyage was propounded. According to this doctrine, if the ultimate destination of the goods is the enemy State or territory then such contraband goods may be seized, no matter whether they are first sent to a neutral State and are subsequently to be transferred to an enemy State. In the eyes of law it is considered that it was a Continuous Voyage, that is to say, it is deemed in the eyes of law as if the neutral State never interposed. Consequences of the seizure of contraband goods in accordance with the doctrine of Continuous Voyage will be same as that of the seizure of contraband goods. This has already been discussed earlier. The doctrine of Continuous Voyage was expounded in very clear terms by Lord Stowell in the famous case of *"The Maria"*.[6] Besides this, during the civil war of America, Supreme Court of America also contributed much to the development of Continuous Voyage.

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* See also for C.S.E. (1985), Q. 8—For answer see also Chapter on "Blockade," especially 'Strategic and Commercial Blockade' and 'Long Distance Blockade'.

[3] Starke, note 1, at p. 588.

[4] Ibid, at p. 589.

** See also for I.A.S. (1975), Q. No. 10(a) ; I.A.S. (1962), Q. No. 10 ; I.A.S. (1958), Q. No. 11 ; P.C.S. (1964), Q. No. 9(a) ; P.C.S. (1984), Q. 8 ; P.C.S. (1985), Q. 10(e).

[5] Starke, note 1 at p. 591.

It may be noted here that many British and foreign writers condemned the application of the doctrine of continuous voyage. But Great Britain departed from the said view in the case of *Bundesrath* (1900) and defended her action on the ground of the doctrine of Continuous Voyage. In this case, in 1900, three German Vessels—the *Bundesrath, Herzog, and General,* were sailing from German neutral ports to the Portuguese neutral ports. They were seized by British cruisers under the suspicion that they were carrying contraband. Germany contended that since the vessels were sailing from neutral ports to neutral ports, there was no carriage of contraband. Germany demanded the release of the said vessels. But Great Britain did not accept this contention of Germany and defended her action on the ground that the ultimate destination of the goods was an enemy country, hence they were contraband and could be seized. The change in the British view was in consequence of the changed conditions of international transport.

According to the unratified Declaration of London, 1909, in accordance with the doctrine of Continuous Voyage, only absolute contraband goods can be seized and conditional contraband goods cannot be seized. The practice of the States, however, runs to the contrary. The practice of the States reveals that in accordance with the doctrine of Continuous Voyage not only absolute contraband but conditional contraband can also be seized and taken. A leading case on the point is *The Kim.*[7] In this case the court made it clear that the doctrine of Continuous Voyage is applicable on the contraband goods carried on lands as well as sea and that it has become a part and parcel of international law. A brief discussion of this case will be desirable here.

The Kim[8].—Kim and three Norwegian ships and one Swedish ship were carrying some goods from New York to Copenhagen (Denmark). The ship named Kim was going to Copenhagen and was loaded with rubber and hides. This ship was stopped and seized by the British ships in November, 1914 in the High Seas on the ground that the ultimate destination of the ship and its cargoes was not Copenhagen (Denmark) but Germany. Germany and Britain were enemies of each other during the first world war. Consequently, Germany was an enemy State. The ultimate destination of the Kim and the cargoes loaded on it was Germany. Since the ultimate destination was Germany, the British ships seized rubber and hides loaded on the Kim. Ruber was absolute contraband whereas hides were conditional contraband. Subsequently this matter relating to the seizure of the ship as well as the contraband goods was submitted to the Prize Court for its decision. The Prize Court held, the Cargoes "were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise, that Copenhagen was not the real *bona fide* place of delivery ; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination."

Thus the Prize Court declared that the goods were seized as lawful prize and consequently the Government of Britain acquired ownership over the seized contraband goods. It is also clear from the decision of the Prize Court that not only absolute contraband goods but conditional contraband goods can also be seized in accordance with the doctrine of Continuous Voyage.

It may also be noted here that in Britain the doctrine of Continuous Voyage has been applied in a very wider sense. The following two principles laid down by British courts will make this statement self-evident :—

(1) Goods being carried to a neutral State may be seized if their ultimate destination is an enemy State or territory. The British courts have applied this

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[6] (1805) 5 Ch. Rob. 365.

[7] (1915) p. 215.

[8] (1915) p. 215.

principle in respect of the raw-materials which are sent to a neutral State and after their manufacture or conversion of the raw material into finished goods they are subsequently sent to enemy State.

(2) The British courts have also applied this doctrine in the situation wherein the owner of the ship might be quite innocent in regard to the ultimate destination of the contraband goods. That is to say, even if the intention of the owner of the ship might not be to send the goods concerned to an enemy State yet if they are actually being sent to an enemy State or being sent for the purpose of being transferred to an enemy State, they may be seized in accordance with doctrine of Continuous Voyage.[9]

It is clear from the above-mentioned principles that the British courts have broadened the scope of the doctrine of Continuous Voyage. The main objective behind this doctrine is that during war the belligerent States may prevent the carriage of contraband goods to enemy State in the interest of their self-defence and self-preservation. Prof. Julius Stone has rightly remarked that the development of the doctrine of continuous voyage has taken place with a view to adopt the legal concepts to the political and economic changes.[10]

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[9] Starke, note 1, at p. 592.

[10] Julius Stone, Legal Control of International Conflict (1955), pp. 484-85.

CHAPTER 62

BLOCKADE*

Meaning and Definition of 'Blockade'.—As pointed out by Starke "A blockade occurs when a belligerent bars access to the enemy coast or part of it for the purposes of preventing ingress or egress of vessels or air-crafts of all nations."[1] According to Oppenheim : "It is blocking of men of war of the approach to the enemy coast or a part of it for the purpose of preventing ingress and egress of vessels or aircrafts of all nations."[2]

Pacific blockade has already been discussed earlier. There is a difference between Pacific Blockade and this type of blockade. Pacific blockade is a peaceful means of settlement of international dispute. It is used during peace time. On the contrary, blockade with which we are concerned in this Chapter is an act of war. This is a common thing during war that the belligerent States blockade the coast of each other so as to check the ingress and egress of the ship. Thus we see, that the blockade with which we are presently concerned is an act of war and is enforced in accordance with the rules of war. "The law as to blockade represents a further restriction on the freedom of neutral States as to trade with belligerents."[3]

Essential elements of blockade**

(1) It should be done by men of war.
(2) Through it whole of coast or a part of the coast of the enemy can be blockaded.
(3) The ingress and egress of the ships should be prevented through blockade.
(4) Blockade is an act of war.
(5) Blockade should be such that no discrimination is made between the ships of different countries.

In addition to the above elements of blockade, following conditions also deserve special mention :

(i) *Effectiveness.*—Blockade to be binding must be effective. It was laid down in the Declaration of Paris, 1856, that a blockade to be binding must be effective. It is also necessary for blockade that as much force should be used as necessary for preventing the ingress of the ships of enemy States. In the famous case named, *The Franciska,*[4] it was laid down that the concerned are a "............must be watched by a force sufficient to render the egress or ingress dangerous, the force must be sufficient to render the capture of vessels attempting to come in or come out most probable."[5] Although International Law provides that sufficient force should be used for blockade, there is no provision of international law to ascertain as to how much force should be used. According to Lord Cockburn, "In the eye of law, a blockade is effective if the enemy's ships are in such numbers and position as to render breaking the blockade a matter of danger, although some vessels may succeed in getting through."[6] During the Cremean War of 1854, only one

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* See also for I.A.S. (1974), Q. No. 10 (b) ; I.A.S. (1964), Q. No. 9 ; P.C.S. (1969), Q. No. 3(a) ; I.A.S. (1958), Q. No. 8.

[1] J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 594.

[2] L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 768 ; See also Julius Stone, Legal Control of International Conflict (1954), p. 492.

[3] Starke, note 1, at p. 594.

** See also for P.C.S. (1976), Q. No. 8 ; P.C.S. (1985), Q. 8.

[4] (1855) 2 E.C.C. and Ad., 113.

[5] Ibid, at p. 120.

[6] *Geipel* v. *Smith,* (1872) L.R. 7

British ship was able to blockade successfully the Russian port of Riga which was 120 miles away. One of the essential elements of the blockade, therefore, is that it should be enforced by sufficient force, but it is not clear as to how much force should be used and there is nothing to indicate the number of ships to be used for the enforcement of an effective and binding blockade.

(ii) *Continuous Maintenance.*—There should be continuous maintenance of blockade. If the ships enforcing blockade go away then it will be deemed as if blockade has been ended. It is therefore necessary that the warship should remain present to enforce the blockade.

(iii) *Proper establishment.*—The blockade should be properly established.

(iv) *Impartiality.*—It is also provided that the country enforcing the blockade should not discriminate in between the ships of different countries. All the ships of different countries should be stopped without any discrimination.

(v) *Declaration and notification.*—As pointed out by Starke, it is an established rule of international law that a blockade must be properly declared and notified to the neutral States with a specific statement as to geographical limits of the coastline to which access is barred."[7]

(vi) *Exemption to neutral ports.*—Certain exemptions are provided to neutral ports during the blockade.

(vii) *Geographical limits of blockaded area.*—It is also necessary that the geographical limits of the blockaded areas should be clearly determined and specified.

Violation of Blockade.—Since from the point of view of the belligerent State declaring blockade, violation of blockade is a criminal act, it is not justified when the ship concerned has no knowledge of blockade. According to the practice prevalent in America and Britain, blockade is considered established only when it is notified locally and diplomatically. In accordance with the practice prevalent in France and Italy, a blockade can be said to be violated only after the prior warning has been given to the ships entering the blockaded area. There is a great controversy among the writers in regard to violation of Blockade and the practices of States also differ. The better and balanced view seems to be that the blockade should be properly declared and notified. A State may be held guilty of violating the blockade only if it has been given prior intimation of the blockade. Reference may be made here to the case of *The Franciska.*[8] The facts of this case may be summarised as follows :—

The Francisca, a ship belonging to Denmark, was sailing on Baltic Sea towards Riga. At that time, Britain had Blockaded Russian ports during Cremean War. British Government had declared that only her ships could go through Baltic Sea for the purpose of trade. Similar declarations were made by Russia and France. Consequently the trade of even neutral States was stopped in the area. *The Francisca* was caught by Britain on the charge of violation of Blockade. The owners of the ship argued that the ship was ordered to go to Riga prior to the declaration of blockade and that they did not intend to violate the blockade for they had no knowledge of the blockade. But the court did not accept this argument because the captain of the ship had come to know about blockade before leaving the earlier port. But despite this the court decided in favour of the owners of the ship because the blockade was not being enforced impartially. It was lifted or relaxed for belligerent States but was tightened or strictly enforced for neutral States. The court, therefore, declared it invalid.

Consequences of Violation of Blockade.—It is generally recognised that the ship attempting to violate blockade may be caught. Since there is no unanimity as to whether violation or attempts to violate should be continuous, there is great controversy in this connection. It is, however, certain that after seizure it should be produced before the Prize Court. The Sailors of the Ship may be detained for a temporary period because they may be produced as witnesses. About three centuries ago, the Sailors could be imprisoned. This practice was abolished in eighteenth century. In the present period, sailors cannot be imprisoned and they are released immediately after the decision of the court. For violation of blockade only the ship and its cargoes can be seized. The practice of States, however, varies in this respect.[9]

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[7] Starke, note 1, at p. 595.

[8] (1855) 2 E.C.C. and Ad. 113.

End of Blockade

A blockade will be deemed to have ended under the following circumstances :

(1) If the war comes to an end.
(2) If the country enforcing blockade withdraws the blockade.
(3) If there is continuous violation of blockade and it ceases to be effective.
(4) Blockade is also deemed to have ended when the country enforcing the blockade conquers the State whose coast is being blockaded.
(5) When the State enforcing blockade is defeated in the war.
(6) When the fleet of the ship enforcing blockade moves away from the area to be blockaded, it is deemed as if the blockade has ended.

A leading case relating to blockade is the *Zamora,* (1916).

The Zamora (1916).—[10]*Zamora was a Swedish maritime ship. During the first World War, it was carrying rubber and food materials from New York to Stockholm. It was stopped and seized by the British ship and was taken to a British port. Britain claimed that the cargoes of Zamora could be seized as they were contraband. The matter relating to this was submitted to the adjudication of the Prize Court. While the case was pending for a decision of the Prize Court, the Procurator-General by issuing an order requisitioned more than half of the cargoes of the Zamora which was claimed to be contraband. The cargoes requisitioned included timber and copper and was seized on the ground that they were required for the successful prosecution of war and other matters of national security. The owners of the ship protested against this. The Prize Court, however declared the order of the British Government valid. The owners of the ship filed an appeal in the Judicial Committee of the Privy Council. Lord Parker, delivering the judgment on behalf of their Lordships of the Judicial Committee of the Privy Council, set aside the order of the lower courts and invalidated the order of requisition of copper by Procurator-General of England. It was laid down that the Prize Court is a national court but it decides cases in accordance with the principles and rules of international law. The Judicial Committee of the Privy Council held that a British Prize Court had to apply international law of prize even though it conflicted with an order in council. The British Prize Court would however, be bound by a British statute.[11] As aptly remarked by Oppenheim, "There is no doubt that a British Prize Court, being a municipal tribunal, would be bound to apply an Act of Parliament inconsistent with the law of Nations. But then, as the court said in *The Zamora,* the Prize Court 'would no longer be administering International Law' and it would to that extent 'be deprived of its proper function as a Prize Court."[12] A state may, however, order its Prize Courts to apply the rules of International Law and when no statutes are enacted or regulations are given, Prize Courts have to apply International law.[13]

Strategic and Commercial Blockade.—It has been indicated earlier that blockade is an act of war through which the sea coasts of the enemy States are partly or completely blockaded. The chief objective of this is that supplies of food materials, etc., may not reach the enemy country so that the enemy may be defeated or may be compelled to accept the conditions of the other belligerent State. This is called strategic blockade. On the other hand, blockade may also be peaceful or commercial. A commercial blockade is one, the objective of which is to prevent the sea coast of enemy for the purpose of trade. Commercial blockade, strictly speaking is not an act of war.

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[9] L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 790.

[10] (1916) 2 A.C. 77; See also Chapters on "Right of Angary" and "Prize Courts."

* See also for I.A.S. (1959) Q. No. 6 (d).

[11] Ibid, at p. 93.

[12] Oppenheim, note 98, p. 871.

[13] Ibid, at p. 485.

Long distance Blockade*.—Long distance blockade was started for the first time in the First World War. It was a new method of blockade. During the First World War, Germany laid contact mines under the seas. In reaction to this Britain declared North Sea as area of danger and laid contact mines in it. As a reaction to it, Germany declared the seas throughout the British Island as war areas and declared that if the ship of any country entered that area it would be destroyed. In reply to this, Britain declared that if the ship of any enemy State entered that area its owners shall be treated as enemies, and it shall be destroyed. Consequently, both Germany and Britain adopted the new methods of long distance blockade. Some neutral countries (the prominent among them being America) opposed this type of blokade and contended that it was not a legal blockade. Great Britain, however, contended that it was a legal blockade and argued that it was the blockade adopted under special circumstances. However, on the pressure exercised by America and certain other neutral States, the long distance blockade was ended in the First World War, but it was again resorted to during the Second World War. "The 'long distance' blockade was reinstituted in 1939 in the Second world War, and its rational justification was likewise the necessity for waging 'total' economic warfare against the enemy. In both wars, France took action similar to that of Great Britain. Without Great Britain's predominant naval power in relation to the enemy the blockade could not have been enforced."[14] As pointed out by Oppenheim : "Thus viewed, measures, regularly and uniformly, repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent must be regarded as a development of the latent principle of the law of blockade, namely that the belligerent who possesses the effective command of the sea is entitled to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or of conveying on neutral vessels such goods as are destined to or originated from him."[15] Prof. Julius Stone also subscribes to this view. In his view the long distance blockade should be viewed in the changed context of the present century and should not be considered as the violation of traditional international law.[16]

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* See also for I.A.S (1977), Q. No. 7(a) ; P.C.S. (1965), Q. No. 7(b).

[14] Starke, note 1, at p. 596.

[15] Oppenheim, note 2, at pp. 796-97.

[16] See Legal Controls of International Conflict, pp. 508-510.

CHAPTER 63

UNNEUTRAL SERVICE AND RIGHT OF VISIT AND SEARCH

Unneutral Service*

As pointed out by Starke, "......the doctrine of unneutral service......is the duty of owners or persons incharge of neutral vessels or air-crafts not by any acts or conduct on their part to employ a vessel or air-craft for objects or purposes (other than carriage of contraband or breach of blockade) which may advance belligerent interests of one State and injure the same interests of the opponent."[1] It is often said that unneutral service is connected with the rights and duties of the neutral citizens during naval war and consequently it is deemed to be related to the doctrine of contraband. The position is, in fact, a little different. The doctrine of unneutral service is wider than the doctrine of contraband. While contraband is limited only to naval war, the doctrine of unneutral service besides being connected with the naval war may also be connected with aerial warfare. The belligerent State which is affected by unneutral service may stop such ships and remove the persons and the cargoes of the ship. In serious cases, the ship can also be seized as a prize and may be produced for adjudication before a Prize Court. Unneutral service includes both persons and things. If a neutral State is carrying some private person for the service of enemy then it will be deemed to be Unneutral service. The State affected by such service may take necessary action against it. In the famous *Caroline case*,[2] it was decided that the ground that the ship had been compelled to carry the armed forces of enemy State could not be deemed to be valid ground. Similarly, in another case the *Oro-Zembo*,[3] which was seized when war was going on between England and Netherland, the owners of the ship had contended that they know nothing about the unneutral service, but this argument was also rejected by the court and it was ruled that necessary action could be taken irrespective of the ignorance of the owners of the ship relating to unneutral service. The facts of this case are as follows :—

Oro-Zembo was an American ship. In 1807, under the command of the Dutch Government, it was taking three Dutch military officials and 2 officers of Civil Service to Batavia. At that time war was going on between Britain and Holland. Britain seized this ship on the ground of unneutral service. The court held that even if the captain of the ship is unaware of the ship being engaged in unneutral service and assists or helps the enemy, the belligerent State can seize such ship. The Court further added that the number of military personnel is immaterial because it is possible that a few high ranking military officials may be more important than a large number of soldiers.

Similarly if a neutral merchant ship performs the service of sending spies in enemy State then it will be called unneutral service. In the view of Prof. Oppenheim, in respect of unneutral service, it is necessary to establish or prove that the persons concerned were acquainted with the nature of the cargoes being sent and yet they sent or transported it and used their ship for this purpose. As pointed out earlier, goods can be seized and persons can be arrested on the charge of unneutral service. Persons can also be made prisoners of war for performing unneutral service and may be punished accordingly. "The more usual guilty activities of unneutral service are transport of members of the enemy armed forces, carriage of despatches to the enemy, taking a direct part in the hostilities, operating under Charter to the enemy, and the transmission of intelligence in the interest of the enemy."[4]

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* See also for I.A.S. (1961), Q. No. 12 (c) ; P.C.S. (1965), Q. No. 9 ; P.C.S. (1977), Q. No. 8.

[1] J. G. Starke, An Introduction to International Law, Tenth Edition (1989), p. 586.

[2] Moore Digest, 11 S. 217.

[3] (1807) 6 Ch. Rob 430.

[4] Starke, note 1, at p. 586.

Distinction between unneutral service and contraband.—There are some points of differences between contraband and unneutral service. According to Lawrence, there is difference in the nature of their functions. Contraband goods are carried or transported for commercial purposes and their chief objective is to earn profits. On the other hand, unneutral service is unconnected with commerce or trade. It is more connected with war. The second difference is this that in contraband only goods can be sent whereas under unneutral service persons may also be sent. For seizure of contraband goods it is necessary that its destination should be the enemy territory or State, but it is not necessary in case of unneutral service. The punishment awarded for unneutral service and contraband goods also differs. According to Prof. Oppenheim, ordinarily contraband goods are not directly used in the service of the enemy whereas unneutral service may ordinarily be directly used in the service of the enemy State.[5]

Distinction between unneutral service and hostile service.—There are some points of difference between unneutral service and hostile service although there are also several similarities between the two. The Declaration of London, 1909, laid down the following essential elements of hostile service :

(1) Direct participation of the neutral State in the war;
(2) Its being under the control of the agent or government of enemy State;
(3) Its being under the government of enemy State; and
(4) Carrying of armed forces of the enemy State or to send secret messages in the interest of the enemy State.

Unneutral service may also possess the above-mentioned four elements, but if the above mentioned four elements are present in unneutral service it assumes a very serious form and the affected State acquires the rights to seize the ship and its cargoes.

Right of visit and search*

As observed by Starke, "co-extensive with the right of seizing contraband or of capturing ships in breach of blockade, belligerents have by long established custom of the right to visit and search neutral vessels on the high seas in order to determine the nature of the cargo and to check the destination and neutral character of the vessel."[6] In the view of Starke, the right of visit and search should be very cautiously exercised so that there should be the least inconvenience to the neutral ships. But if there are suspicious circumstances in respect of the ship then in order to take a thorough search of the ship, the ship can be taken to the port and, if necessary, may be submitted for the decision of the Prize Court.[7]

The leading case relating to the right of visit and search is *The Maria*[8] wherein it was laid down that each belligerent State possesses the right of visit and search. Under this right, belligerent State may visit any neutral State ship in open Sea and if necessary it may search in order to ascertain the nature of the cargoes on the ship. This right can also be exercised against the private ship. Ordinarily this right is not exercised against public ships and the ships of neutral State.

The right of visit and search may be exercised by warships and military aircraft of belligerents. This right may be exercised only after the outbreak and before the end of war. If a neutral merchantman resists visit or search, it may be captured and confiscated.

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[5] Oppenheim, International Law, Vol. II, Seventh Edition, p. 832.

* See also for I.A.S. (1957), Q. No. 6 (h).

[6] Starke, note 1 at p. 597.

[7] Ibid.

[8] (1805), 5 Ch. Rob. 365.

CHAPTER 64

PRIZE COURTS*

The enemy properties seized in the sea on violation of the rules of blockade or contraband are called prize. But it should be noted here that simply by seizing such properties or ships as prize, the belligerent State does not acquire the ownership over them. In order to acquire ownership over such goods or ships, the general practice is that such goods or ships are produced before the courts which are called Prize Courts. These courts determine the validity of the seizure of the goods or ships. They determine whether the goods or ships have been validly seized, or not. If they decide that the goods or ships have been validly seized, then the belligerent State which seized them acquires ownership. Such goods are called lawful Prize. Once the Prize Court decides that the goods or ships have been validly seized, the matter in regard to these goods ceases to be the matter of international law and becomes a matter of State law. According to Oppenheim, one of the main objects of Prize Courts is the wish of the belligerents to be guarded by a decision of a Court against claims by neutral states regarding alleged unjustified capture of neutral vessels and goods.

Nature of Prize Courts.—Though Convention XII of the Second Hague Conference provided for the establishment of an International Prize Court, it is now well recognized that Prize Courts are national courts. They acquire validity from State law. They are not international courts. It was laid down in the famous case of the *The Zamora*[1] that the British Prize Courts are, in fact, national tribunals. They acquire validity from national orders and notifications. Thus we see that the prize courts are the national courts but they decide the cases in accordance with the rules and principles of international law. In this way, they are different from national courts. They are open for the people of all the nations. They cannot be instituted in neutral territory. They can be instituted by belligerents in their own territory or in any part of territory under military occupation.

Jurisdiction of Prize Courts.—The Prize Courts derive jurisdiction from the belligerent State which establishes them. The belligerent State establishes these courts because it is necessary for them to get the validity of the goods or ships seized by them. Since Prize Courts are national courts the State law and notifications are binding upon them.

Law applied by Prize Courts**.—As pointed above, the Prize Courts are National Courts but they decide cases submitted before them in accordance with the principles and rules of international law. But since they are established by the State law and derive jurisdiction from national orders and notifications, in fact, they apply the State law or the utmost that can be said is that they apply international law as followed and applied in that particular State. In the leading case the *Zamora*,[2] it was laid down that the Prize Courts are bound by the Acts and Statutes of the Parliament, but they are not bound by such orders of King-in-Council as are contrary to the provisions or rules of international law or the effect of which is to modify international law. Thus in short it may be said that Prize Courts decide cases in accordance with international law.[3] But in case the provisions of International law are inconsistent with the provisions of the statute or law laid down by the Parliament, then they apply the law laid down by the Parliament. As pointed out by Prof. Oppenheim, the Prize Courts are in fact not international Courts, but national

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* See also for I.A.S. (1968), Q. No. 10 ; I.A.S. (1965), Q. No. 10 ; I.A.S. (1961), Q. No. 10 ; I.A.S. (1955), Q. No. 12 ; P.C.S. (1970), Q. No. 9 ; P.C.S. (1968), Q. No. 10(a) ; P.C.S. (1965), Q. No. 4 ; C.S.E. (1979), Q. No. 11 (a) (ii) ; C.S.E. (1985), Q. 5 (d) ; P.C.S. (1987), Q. 10 (b).

[1] (1916) 2 A.C. 77, For facts and law applied see also Chapter on "Blockade".

** See also for I.A.S. (1977), Q. No. 7(b).

[2] (1916) 2 A.C. 77.

[3] See also the Maria (1799) 1 C. Rob. 340; The Recovery (1807) 6 C. Rob. 341.

Courts. Further, it may be noted that under international law each State has a duty to make such rules and laws for Prize Courts as may be in accordance with the rules and principles of international law. Pitt Cobbett has also expressed the view that Prize Courts are essentially national courts, but their aim is to enforce international law.

A leading case in regard to the jurisdiction of Prize Courts is *The Appam.*[4] A brief discussion of the facts and principles laid down in this case will not be out of place here.

The Appam[5]

The Appam was a British ship which was seized by German ships in 1916 during the First World War. The German officers took the ship under their control, placed it under the authority and control of German officers and took it to the nearest American port. Till this time, America was a neutral State. The German officers requested the Secretary of State of America to detain the ship and its crew in the American port for an indefinite period. America rejected this request and released the crew of the ship. Subsequently the owners of the ship, the Appam, filed a suit in the Admiralty Court of America for the recovery of the ship and its cargoes. The owners of the ship contended that (a) Taking of ship as a prize to neutral port was contrary to international law; (b) It was contrary to American Law; and (c) It was contrary to the laws of neutrality. In reply to the above contentions the respondent, Germany contended that (a) taking of ship seized as prize to a neutral port is not contrary to the international law, (b) detention of the ship in a neutral port is beyond the jurisdiction of the judicial court, and lastly (c) proceedings have been started against the Appam in a Prize Court of appropriate jurisdiction in Germany. The American court decided the case in favour of the owners of the ship. The court held that taking of the Appam (seized as prize) to the American port was a violation of American neutrality. It was also the violation of international law as applied in America. Lastly, the court laid down in clear terms that it had the jurisdiction to decide the case because it involved the violation of the neutrality of America. The court concluded that the moment the Appam entered the American waters, Germany ceased to have any legal claim over it.

Ransom of Prize.—As indicated above, it is necessary to produce the prize before a Prize Court. But international law does not forbid the ransoming of the captured vessel. This may be done either directly after the capture, or after the vessel has been conducted to port, but before adjudication. The practice of accepting and paying ransom grew up in the sixteenth century. This practice has now been prohibited by municipal law of many countries.

Loss of Prize.—The State which seized a prize acquires ownership over the prize only after the validity of its seizure is accepted by the Prize Court. But under certain circumstances a prize may be lost. A prize is lost under the following conditions :—

(1) when the escapes through being rescued by her own crew;
(2) when the captor intentionally abandons her; and
(3) when she is recaptured.[6]

When a captured vessel is intentionally abandoned by her captor and afterwards its possession is taken by a neutral vessel or by her home state, the question whether the original ownership revives through abandonment is a matter to be determined by municipal law. So is the case with recapture of the vessel.[7]

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[4] 243 U.S. 124.
[5] Ibid.
[6] Oppenheim, International Law, Vol. II, Seventh Edition, p. 494.
[7] Ibid, at pp. 494-95.

Part VII

HUMAN RIGHTS

CHAPTER 65

UNIVERSAL PROTECTION OF HUMAN RIGHTS*

(i) Introduction

What are Human Rights?—Broadly speaking human rights may be regarded as those fundamental and inalienable rights which are essential for life as human being. Human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex, etc., simply because he or she is a human being. Human rights are thus those rights which are inherent in our nature and without which we cannot live as human beings. Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents, and our conscience and to satisfy our physical, spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection. "Human rights are sometimes called fundamental rights or basic rights or natural rights. As fundamental or basic rights they are the rights which cannot, rather must not, be taken away by any legislature or any Act of the government and which are often set out in a Constitution. As natural rights they are seen as belonging to men and women by their very nature. They may also be described as 'common rights' for they are rights which all men and women in the world would share, just as the common law in England, for example, was the body of rules and customs which, unlike local customs, governed the whole country.[1]

Since human rights are not created by any legislation, they resemble very much the natural rights. Any civilized country or body like the United Nations must recognise them. They cannot be subjected to the process of amendment even. The legal duty to protect human rights includes the legal duty to respect them. Members of the U.N. have committed themselves to promote respect for and observance of human rights and fundamental freedoms.[2] International concern with human rights as enshrined in the United Nations charter is not a modern innovation. It is, in fact, "heir to all the great historic movements for man's freedom to the enduring elements in the tradition of natural law and natural rights and in the most of the world's great religions and philosophies, and the findings of contemporary science about interrelations of simple respect for human dignity and other individual and community values".[3]

It has been aptly remarked, "A human right violation is now conceived as a violation of not only of those personally and directly aggrieved but of everyone".**

(ii) U.N. and Human Rights***

U.N. Charter and Human Rights[4]

The Charter of the United Nations represents a significant advancement so far as faith in and respect for human rights is concerned. The appalling atrocities of the Nazis against the Jews and against other races during the Second World War led to a strong movement for the international protection of fundamental human rights, and the Charter contains numerous references to them.[5] As a matter of fact, with the horrors perpetrated by Nazi and Fascist leaders still in their minds, the makers of the Charter were determined that the rights of the individual be made an international concern.[6] "Human rights are mentioned for the first time...in any international treaty (not counting the treaties for the protection of minorities concluded after the First World War, which related to the rights of special groups but not to human rights in general)—because the drafters of the Charter were...looking behind the facts of war to its causes, that is to say, to the existence of dictatorship which makes wars possible".[7]

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* See also for IAS (2008) Q. 8(a).

[1] J.E.S. Fawcett, The Law of Nations (Alien Lane, The Penguin Press, London, 1968), p. 151.

[2] Lauterpacht, International Law and Human Rights, op cit, at p. 152.

[3] M. S. Mc Dougal and Bebr, "Human Rights, in the United Nations," *A.J.I.L.* Vol. 56 (1964), p. 604.

** See also for IAS (2009) Q. 5 (c) ; see also matter discussed below.

*** See also for IAS (2005) Q. 5 ; IAS (2006) Q. 7(b) ; IAS (2009) Q. 5 (b).

[4] See for I.A.S. (1991), Q. No. 1; P.C.S. (1975), Q. No. 7; P.C.S. (1969), Q. No. 6.

The provisions concerning human rights run throughout the U.N. Charter "like a golden thread". Much of the credit for this goes to the determined lobbying by non-governmental organisations at the San Francisco Conference.[8] The delegates of some of the States at the San Francisco Conference were in favour of the adoption of even stronger provisions concerning human rights. An attempt, which proved abortive, was also made to incorporate in the U.N. Charter an International Bill of Human Rights.

Provisions of the Charter Concerning Human Rights[9]

Human rights would occupy a significant Chapter in any story of the U.N.[10] Their place in the original conception of the U.N. is underlined in the Charter and there are as many as seven references in the Preamble; among purposes of the U.N. (Article 13); among the responsibilities of the General Assembly [Article 55 (c)]; among the objectives of the International Economic Co-operation [Article 13 (2)]; among the functions of the ECOSOC [Article 62 (2)] as a responsibility of one ECOSOC's Commission (Article 68); and among the objectives of the Trusteeship system [Article 76 (c)]. The provisions of the U.N. Charter concerning human rights provide a foundation for and an impetus to further improvement in the protection of human rights.[11] They indicate the wide possibilities of the international recognition of human rights.[12]

The Preamble of the U.N. Charter begins with the words, "We the people of the United Nations" and to say the least, these words are neither superfluous nor have crept in the preamble incidentally. The framers of the Charter were really serious and did not rest with the using of these words in the preamble but went on to give content to these words in numerous provisions concerning human rights, elimination of colonialism, non-self-governing territories, economic and social co-operation, etc. In this context, the words "We the people of the United Nations" are very meaningful. They show the objectives which the framers of the Charter wanted to achieve. After having made this significant innovation in an international treaty, the preamble further reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women".

Secondly, Article 1 provides that it is one of the purposes of the U.N. "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Thus Article 1 puts the promotion of respect for human rights on the same level as the maintenance of international peace and security as a purpose of the U.N.[13]

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[5] J. L. Brierly, The Law of Nations, Sixth Edition (1963), p. 292.

[6] Stephen S. Goodspeed, The Nature and Functions of International Organisation, Second Edition (1967), p. 516.

[7] A. H. Robertson, The Law of International Institution in Europe (1961), pp. 52-53.

[8] See Humphrey, The U.N. Charter and the "Universal Declaration of Human Rights" In Laurd (ed). The International Protection of Human Rights (London 1967).

[9] See also I.A.S. (1979) Q. 9 (a), see particularly the comments on Articles 55 and 56 given on next two pages.

[10] Louis Henkin, "The U.N. and Human Rights", Int. Orgn., Vol. XXI, No. 3 (Summer 1965), p. 504.

[11] Ian Brownlie, Principles of Public International Law (Second Edition, 1973), p. 552.

[12] L. Oppenheim, International Law, Vol. 1, Eighth Edition (1970), Edited by H. Lauterpacht, p. 783; See also Oppenheim's International Law, Ninth Edition, Vol. 1, Edited by Sir Robert Jennings and Sir Artiur Watts, Longman Group U.K. Ltd. and Mrs. Tomoko Hudson, 1992, p. 988.

Thirdly, it is one of the responsibilities of the General Assembly to initiate studies and make recommendations for the purpose of "promoting international co-operation in the economic, social, cultural, education and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[14] The further responsibilities, functions and powers of the General Assembly with respect to aforementioned matters are set forth in Chapters IX and X of the Charter.[15]

Fourthly,[16] with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect, for the principle of equal rights and self-determination of people. Article 55 charges the U.N. to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".[17] This provision is further strengthened by Article 56 under which "All Members *pledge* themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55".[18] As treaty provisions applicable to the organization and its members these prescriptions are of paramount importance. Article 55 is perhaps oblique—the United Nations shall promote. However, Article 56 is stronger and involves the members; and the political and judicial organs of the United Nations have interpreted the provisions as a whole to constitute legal obligations.[19] Thus, Articles 55 and 56 bind member States to observe and respect human rights. This view finds support from the interpretation of these provisions given by the world Court.[20] The International Court of Justice gave its opinion in the context of the observation of human rights in a territory having an international status but as pointed out by Egon Schwelb, the pledge contained in Articles 55 and 56 is of wider significance and is not confined to the observance of human rights in a territory having International importance.[21]

Fifthly, the Charter of the U.N. has empowered the Economic and Social Council to make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedom for all.[22]

Sixthly, the Charter imposes upon the Economic Council the responsibilities, to "set up commissions in economic and social field for the promotion of human rights, and such other commissions as may be required respect for the performance of its functions".[23]

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[13] John P. Humphrey, "The International Law of Human Rights in the Middle Twentieth Century." The Present State of International Law (1973), p. 75 at p. 84.

[14] Article 13 (1) (b).

[15] Article 13 (2) : Chapter IX deals "International Economic Co-operation" and Chapter X entitled "The Economic and Social Council" contains provisions relating to function and powers of the ECOSOC.

[16] See also for C.S.E. (1979), Q. 9 (a).

[17] Article 55 (c).

[18] Ian Brownlie, Principles of Public International Law, Second Edition (Clarenden Press, Oxford, 1973), p. 553.

[19] See the Adv. op. on Namibia : I.C.J. Reports (1971), at pp. 56-57. See further Schwelb, 66 AJ. (1972), pp. 337-51.

[20] See Advisory opinion of the I.C.J. on the Legal Consequences of the Continued Presence of South Africa in Namibia, (1971), [I.C.J. Rep. 1971), p. 16.

[21] "The International Court of Justice and the Human Rights Clauses of the Charter", A.J.I.L., Vol. 66 (1972) at p. 346 et seq.; see also Report of the Committee of Human Rights to the International Law Commission (New York Conference, 1972).

[22] Article 62-3.

[23] Article 68.

Seventhly and lastly, one of the basic objectives of the trusteeship in accordance with the purposes of the U.N. laid down in Article 1 of the Charter, shall be to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion to encourage recognition of the interdependence of the peoples of the world.[24]

There is a controversy as to whether the provisions of the Charter concerning human rights create obligation on the members. Some authors are of the view that "the Charter clauses only contain a pious injunction to co-operate" and do not impose any obligations.[25] On the other hand, a number of authors contend that the Charter "imposes upon the members of moral and, however imperfect, probably a legal duty."[26] The latter argument seems to be justified because "a pledge to co-operate in promoting at least implies a negative obligation not so to act as to undermine human rights; for this reason South Africa's racial segregation policies appear to be out of harmony with her obligations under the Charter."[27] However, "the Charter did, of course, greatly weaken the content of the Charter clauses, and so an attempt was made to fill them out by drawing up in 1948 the 'Universal Declaration of Human Rights and Fundamental Freedoms."[28] and with a view to implement the Universal Declaration Conventions such as the European Convention on Human Rights, the American Convention on Human Rights and finally the International Covenants on Human Rights were adopted.

Human Rights and Domestic Jurisdiction[29]

One of the problems that arises in the way of implementation of the Human Rights programme is the question of domestic jurisdiction. Article 2 (7) of the U.N. Charter prohibits the U.N. "to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter : Some authors have expressed the view that the prohibition contained in Article 2 (7) of the Charter reduces to a minimum the protection of human rights on part of the U.N. But this view does not seem to be correct and the question of domestic jurisdiction does not arise in the case of implementation of the provisions of Human Rights Covenants.[30] It may be noted that the domestic and international aspects are closely interwoven. Almost every problem that concerns international relation must come within the domestic boundaries of one nation and may cross over into another and create an international problem.[31] Therefore a matter is not essentially one of the domestic jurisdiction if it has become the subject of international obligation undertaken by the State. Human Rights and fundamental freedoms, having become the subject of a solemn International obligation and a fundamental purpose of the Charter, are not any longer a matter which is essentially within the domestic jurisdiction of the Members of U.N.[32]

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[24] Article 76 (c).

[25] See for Example A.H. Robertson, The Law of International Institutions in Europe (1961), p. 53, wherein he says that Charter provisions fall "short of an actual guarantee"; See also J. G. Starke, Introduction to International Law, Eighth Edition (1977), p. 393. See also Manley O. Hudson, "Charter Provisions on Human Rights", A.J.I.L., Vol. 44 (1950), p. 543. Mike M.K. Yin, "Charter Provisions Concerning Human Rights", India Quarterly Vol. 28 (1972); J.L. Kunz, "The U.N. Declaration of Human Rights", A.J.I.L., Vol. 43 (1949), p. 291.

[26] L. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 740; Ninth Edition of Oppenheim's International Law, however, adds : "Nevertheless, the provisions of the Charter on the subject do not themselves signly a full and effective guarantee of human rights on the part of International society. In particular, the Charter lacks both a precise definition of these rights and provision for their observance—although the abstacle of detailed definition of the content of obligations under the Charter provisions is less of an obstacle to their application as obligation in the case of a general and notorious practice by a State then it would be in the case of an individual complaint," Note 12, at p. 989.

[27] J.L. Brierly, The Law of Nations Sixth Edition (1963), Edited by Sir Humphrey Waldock, p. 293.

[28] *Ibid.*, at pp. 393-94.

[29] See also for O.S.E. (1981), Q. 5 (b).

[30] See for example M.S. Mc Dougal and Leighton, The Rights of man in the World Community, Constitutional and Rational World Community, 14 L. & Cont. Prob. (1949), p. 490 at p. 504, see also Dr. N. A. Noor Mohammad, "The Human Rights Programme of the United Nations and the Domestic Jurisdiction Clause", AIR 1958 Journal Sections, p. 89.

[31] Lauterpacht, International Law and Human Rights, op. cit. p. 176.

It may also be noted that Article 2 (7) which contains the prohibition in respect of domestic jurisdiction provides an exception in respect of the application of enforcement measures under Chapter VII of the Charter. Thus if violations of human rights give rise to a dispute or situation which poses a threat to international peace and security, the Security Council may take enforcement measures under Chapter VII. But as pointed out by an eminent author,[33] the organisation will act, as many resolutions particularly in matters relating to Southern Africa show, even if there is no threat to the peace. In such cases the pleas of domestic jurisdiction under Article 2 (7) of the Charter has been no obstacle. In the prevailing view, gross violations of human rights are not essentially within the domestic jurisdiction of States, nor, it would seem, are actions which the U.N. has taken intervention in the technical legal sense.

U.N. BODIES PRIMARILY CONCERNED WITH HUMAN RIGHTS

(A) U.N. Commission on Human Rights/Human Rights Council.—The Commission on Human Rights established by the Economic and Social Council in February, 1946 was "the nearest approach to permanent machinery for the supervision of the problem of protection"[34] of human rights. It was one of the six Functional Commissions established by the Economic and Social Council. Under its terms of reference, the Commission was directed to prepare recommendations and reports on :

(i) an International Bill of Human Rights;

(ii) International conventions or declarations on civil liberties; the status of women, freedom of information and similar other matters;

(iii) the protection of minorities;

(iv) the prevention of discrimination on the basis of race, sex, language or religion; and

(v) other matters concerning human rights.

The Commission's terms of reference were extensive, under them it could deal with any matter concerning human rights. The Commission made studies and recommendations either on its own initiative or at the request of the General Assembly or by the Economic and Social Council the members of the Commission were elected for three years' term and meets annually for a period of five or six weeks. All Commission decisions are made by a majority of the members present and voting. The Commission submits a report on each session to the Economic and Social Council. Originally the Commission consisted of 18 members. The membership was increased to 21 in 1962 and to 32 in 1966. Subsequently, the membership was further increased to 43 and then finally to 53. In May, 1982, India was re-elected for a new term of three years beginning from January 1, 1983.

One-third of the seats on the 53 Member Commission were open to election every year. On Thursday, 3rd May, 2001 four nations competes to fill three western vacancies for three-year terms of the Commission for the first time since the inception of the Commission in 1947 the U.S. had to suffer the mortification of being voted off the U. N. Human Rights Commission. The U.S. could secure only 29 votes while France, Austria and Sweden procured 52, 41 and 32 votes respectively. Other States which were elected to Commission were : Armenia, Bahrain, Chile, Crotia, Mexico, Pakistan, Sierra Leone, Sudan, Togo and Uganda.

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[32] Lauterpacht, International Law and Human Rights, op. cit. at p. 178.

[33] John P. Humphrey, "The International Law of Human Rights in the Middle Twentieth Century," in the present State of International Law (1973), p. 75 at p. 85.

[34] Ian Brownlie, *Principles of Public International Law*, Second Edition (1973), p. 554.

Yet another setback to the U.S. that took place on 20th January, 2003 was that Libya was overwhelmingly elected to chair the UN Human Rights Commission. Thus North African country ruled by President Muammar Gaddafi, which was under fire for years from human rights activists, would preside at the March 17th-April, 2003 session of Commission which meets annually to survey the human rights situation around the world. Even though the U.S. broke with tradition and forced a vote, for the first time since the Commission was founded in 1947, because the U.S. said that it could not "reward Libya's terrible conduct", yet the Libyan candidate, diplomat and former journalist Najat Al-Hajjaj, won 33 votes in a secret ballot of the 53 country commission with 17 States abstaining and three voting 'no' including the U.S.

In order to assist in its work, the Commission has established a number of subsidiary bodies, such as, the Sub-commission on Prevention of Discrimination and Protection of Minorities the Ad Hoc Committee on Periodic Reports, the Ad Hoc Working Group of Experts on Human Rights in Southern Africa and Other Working Groups charged with particular tasks.

The Commission, as per its reference, made studies, prepares recommendations and drafts international instruments concerning human rights. It also undertook special tasks assigned to it by the General Assembly on the Economic and Social Council, including the investigation of allegations concerning violations of human rights and the handling of communications relating to such violations. It also cooperates closely with all other United Nations bodies having competence in the field of human rights.

The Commission received thousands of private complaints. It transmitted them to the Governments concerned and asks them to reply and comment thereon. It has played an active role in investigating alleged violence of human rights. The principal functions performed by the Commission had been the preparation of the texts of the Universal Declarations of Human Rights, the Convention on the Political Rights of Women, drafts covenants on Human Rights supplementing the Universal Declaration. It also publishes Yearbook on Human Rights. It held its sessions annually and performs important functions in the field of human rights.

The General Assembly decided to replace U.N. Human Rights Commission by Human Rights Council vide its resolution 60/251 of 15 March, 2006. U.N. Commission on Human Rights was often criticized for its system of election. It was not elected by all the members of the General Assembly.

U.N. Commission on Human Rights Replaced by Human Rights Council* :

As noted above vide its resolution 60/251 of 15 March, 2006, the General Assembly in its 60th Plenary session decided to replace the U.N. Commission of Human Rights by 47 member Human Rights Council thus marking the new beginning for human rights promotions and protection.

The new Human Rights Council will be based in Geneva and will be a subsidiary organ of the General Assembly. The General Assembly shall review its status within five years.

The General Assembly also decided that the Council will assume, review and where necessary improve and rationalize all mandate, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and complaint procedures. The Council shall complete this review within one year after the holding of its first session.

The General Assembly further decided that the Council shall consist of 47 Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly, the membership shall be based on equitable distribution and seats shall be distributed as follows among regional groups :

- See also for UPPCS (2006) Q. 8 (a).

(1) African Group (13);

(2) Asian Group (13);

(3) Eastern European Group (6);

(4) Latin American and Caribbean Group (8);

(5) Western European and others Group (7).

The members of the group will serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms.

Membership of the Council shall be open to all Member States of the U.N. when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto. The General Assembly, by a two-thirds majority of members present and voting may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights.

The General Assembly also decided that the Council shall meet regularly throughout the year and schedule not fewer than three sessions per year, including a main session, for a total duration of not less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council.

It was also decided by the General Assembly that the methods of work of the Council shall be transparent, fair and impartial and enable genuine dialogue, be result oriented, allow subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms.

The General Assembly recommended to the Economic and Social Council to request the Commission on Human Rights to conclude its work at its sixty-second session and to abolish the Commission on 16 June, 2006.

The General Assembly decided to elect the new members of the Council, the terms of the membership shall be staggered and such decision will be taken for the first election by the drawing of lots, taking into consideration equitable geographical distribution.

As per decision of the General Assembly, the elections of the first members of the Council took place on 9 May, 2006 and the first meeting of the Council was convened on 19 June, 2006.

The Human Rights Council concluded its first session at Geneva on 30th June, 2006. The session began on 19th June and during the session the Council adopted 8 resolutions, three decisions and two statements by the President on 29th June, 2006 the Council adopted a landmark treaty to prevent and punish the crime of enforced disappearances estimated to amount to 40,000 cases from 60 countries. The Council also adopted U.N. Declaration on the Rights of Indigenous Peoples and it will be forwarded to the General Assembly's September session. The declaration was adopted by a vote of 30 in favour, 12 abstentions and 2 voted against.

According to U.N. Secretary-General, Kofi Annan, "The Council represents a great new chance for the U.N. and for humanity to renew the struggle for human rights". This statement was made by Kofi Annan on 19th June, 2006 in his address to the first session of the Council.

The United States of America remained outside the Council because it did not seek a seat on the Council. President George W. Bush of America took this decision stating that the U.S. would be more effective from the outside. However, he pledged to support the Council financially.

A spokesman for U.N. Secretary-General expressed his disappointment over the U.S. step and hoped that the U.S. would reconsider it in 2007.

The new Human Rights Council is more representative and democratic than its predecessor, the U.N. Commission on Human Rights. In electing the Council's first members, the 192 (one hundred ninety-two) member General Assembly followed a procedure that significantly differed from that of the often criticized Human Rights Commission, which was abolished on 16 June, 2006.

Mrs. Laura Dupuy Lasserre (Uruguay) was the President of the Human Rights Council from 19 June, 2011 to 9 December, 2012. She was followed by Mr. Remaigiuz (Poland) who joined as President on 1 January, 2014 and remained so upto 31 December, 2014.

Present President of the Human Rights Council of the U.N. is Elisabeth Tich-Fisslberger of Austria. He joined as President on 1 January, 2020. Current Members and their term are following :

Term	African States (13)	Asia-Pacific States (13)	Eastern European States (6)	Latin American and Carribbean States (8)	Western European and other States (7)
2020-2022	Libya Mauritania Sudan Namibia	Indonesia Japan Marchal Islands South Korea	Armenia Poland	Brazil Venezuela	Germany Netherlands
2019-2021	Burkina Faso Cameroon Eritrea Somalia Togo	Bahrain Bangladesh Fiji India Phillipines	Bulgaria Czech Republic	Argentina Bahamas Uruguay	Austria Denmark Italy
2018-2020	Angola DR Congo Nigeria Senegal	Afghanistan Nepal Qatar Pakistan	Slovakia Ukraine	Chile Mexico Peru	Australia Spain

(B) Sub-Commission on Prevention of Discrimination and Protection of Minorities.—At its very first session in 1947, the Commission on Human Rights established the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Its items of reference which were extended in scope by the Commission of Human Rights in 1949 are :

(a) to undertake studies, particularly in the light of Universal Declaration of Human Rights, and to make recommendations to the Commission on Human Rights concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities, and

(b) to perform any other functions entrusted to it by the Economic and Social Council or the Commission on Human Rights.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities consists of 26 persons selected by the Commission on Human Rights, normally for three years in their capacity as individuals and not as representatives of their respective States. The Sub-Commission submits a report on each session to the Commission on Human Rights.

(C) Commission on the Status of Women.—The Commission on the Status of Women is a functional Commission of the Economic and Social Council (ECOSOC) established by the Council in 1946. The functions of the Commission are :

(a) to prepare recommendations and reports to the ECOSOC on promotion of women's rights in political, economic, civil, social and educational fields; and

(b) to make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendations. Originally the Commission on the Status of Women was composed of 15 members. Subsequently the membership was increased to 21 and then to 32 and finally to 45. Thus at present the Commission is composed of 45 representatives of U.N. members elected by the ECOSOC for three-years term. It meets biennially for session of three weeks. As in the case of Commission on Human Rights, the Commission on the Status of Women adopts its own resolutions and recommends draft resolutions and declarations for adoption by the ECOSOC. The Commission submits a report on each session to the Council.

The Commission on the Status of Women has done valuable work for promoting the rights of women in political, economic, civil, social and educational fields and in achieving the goal of women having rights equal to those of men.

(D) U. N. Commissioner for Human Rights.—In a landmark decision on 20th December, 1993, the General Assembly created the position of U.N. High Commissioner for Human Rights by passing a resolution.[35] It can be reckoned as a turning point in U.N. action in the Human Rights. The High Commissioner would be appointed by the Secretary-General for a four-year term subject to the approval by the General Assembly. The High Commissioner will report, annually to the Commission on human rights and through the Economic and Social Council to the General Assembly, with a branch office in New York. The High Commissioner's principal location will be in Geneva, while creating the post of High Commissioner of Human Rights, the resolutions of the General Assembly specified that for "impartial, objective, non-selective performance of the duties, the person to be appointed to this august office must be a "person of high moral standing and personal integrity" and must possess expertise in the human rights field and an understanding of diverse cultures under the direction and authority of the Secretary-General, the High Commissioner will "promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights" and "will play an active role in removing the current obstacles, and in meeting the challenges to the full realization of all human rights" and will prevent violations throughout the world.

Within two months after the creation of the post of a High Commissioner for Human Rights, the General Assembly on 14th February, 1994 unanimously approved the appointment of Jose Ayala Lasso to the new post. A former Foreign Minister of Ecuador, he was his country's permanent Representative to the U.N. just prior to his appointment. The person holding the post of High Commissioner for Human Rights will cost the U.N. 1.47 million dollar in two years. His rank will be that of an Under-Secretary-General of the U.N. Mr. Jose Ayala Lasso assumed the office of High Commissioner for Human Rights on April 5, 1994.

The responsibilities of the High Commissioner would include :

(i) strengthening and streamlining existing human rights mechanisms;

(ii) engaging in dialogue with all Governments to secure respect for all human rights;

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[35] General Assembly Resolution 48/141 of December 20, 1993.

(iii) coordinating human rights, promotion and protection activities throughout the U.N. system, including U.N. education and public information programmes;

(iv) supervising the centre for Human Rights;

(v) to promote and protect the effective enjoyment by all of civil, cultural, economic, political and social rights;

(vi) to play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights;

(vii) to provide advisory services, technical and financial assistance in respect of the human rights to States at their request; and

(viii) to take steps for the enhancement of international cooperation for the promotion and protection of human rights.

The priorities of U.N. High Commissioner on Human Rights were set by the General Assembly and were contained in the Medium-Term Plan, 2002-2005. The plan followed the 1993 Vienna Declaration and Programme of Action, which was developed out of the 1993 World Conference On Human Rights and the Charter of the U.N. 10 December, 1998 and 10 December, 2008 were celebrated as 50th and 60th anniversary of the U.N. Commissioner for Human Rights.

(E) Other U.N. Bodies primarily concerned with human rights.—In addition to the above U.N. bodies, there are other U.N. bodies primarily concerned with human rights such as special of 24 on Decolonization, Special Committee Against Apartheid, Special Committee to investigate Israeli Practices Affecting Human Rights of the Population of the Occupied Territories, Committee on the Exercise of the Inalienable Rights of the Palestinean People, Committee on the Elimination of Racial Discrimination, Human Rights Committee, U.N. High Commissioner for Refugees. This list is simply illustrative and by no means exhaustive.

(iii) Universal Declaration of Human Rights*

The Universal Declaration of Human Rights[36] was adopted by the General Assembly by a vote of 48 to nil with eight abstentions.[37] The Declaration has been hailed "as an historic event of the profound significance and as one of the greatest achievements of the United Nations".[38] The Declaration "...is the mine from which other conventions as well as national constitutions protecting these rights have been and are being quarried".[39] As noted above, the Declaration on Human Rights was prepared by the Commission on Human Rights in 1947 and 1948 and was adopted by the General Assembly on December 10, 1948. When the Universal Declaration of Human Rights was adopted, it was a most eloquent expression of hope by a world emerging from the most devastating war in the history of human race. The experience gave the Universal Declaration a momentum that is reflected in the boldness of this document destined for a world of peace where the right to live in peace has become a reality for all.[40] On December 10, 1998, 50th anniversary of Universal Declaration of Human Rights was celebrated all over the world.

Preamble of the Universal Declaration of Human Rights.—One of the main reasons for the inclusion of the provisions concerning human rights in the U.N.

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* IAS (2006) Q. 7(b).

[36] Gen. Ass. Resolution 217-A (111) of 10 December, 1948 : Gen. Ass. Official Records, Third Session, Part I, Resolutions (U.N. Dec. A/810), pp. 71-77.

[37] The eight abstentions were : Bylorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukrainian SSR, USSR and Yugoslavia.

[38] Sir H. Lauterpacht, *International Law and Human Rights*, p. 394.

[39] J.E.S. Fawcett, *The Law of Nations*, (1968), p. 158; See also Percy E. Corbett, *The Growth of World Law* (1971), pp. 181-182.

[40] U. N. Chronicle, Vol. XXV, No. 1 (March, 1988), p. 46.

Charter was the bitter experience which the mankind had undergone during the First and Second World Wars when large scale violations of human rights were made. That is why, the preamble of the United Nations Charter expresses the determination "to save succeeding generations from the scourge of war" which twice in our lifetime has brought untold sorrow to mankind, and "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women..." Thus large-scale violations of human rights during two World Wars, epecially the Second World War, including the Nazi atrocities were fresh in the minds of the framers of the U.N. Charter. That is why, one of the first decisions that the General Assembly took was to prepare an International Bill of Human Rights and for this purpose asked the Economic and Social Council for a study by the Commission of Human Rights. The large scale violations of human rights including the Nazi atrocities were also fresh in the minds of those drafted and adopted the Universal Declaration of Human Rights. These are echoed and reflected in the wordings of the Preamble. It was also natural for the framers of the Preamble to affirm "their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women," because they considered, and rightly too, it to be the "foundation of freedom, justice and peace in the world". It is in this context that we have to see and understand preamble of the Universal Declaration of Human Rights which is as follows :

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of the freedom, justice and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspirations of the common people.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human beings should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relation between nations.

Whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observation of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now therefore,

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all people, and of all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect of these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Scheme of the Enumeration of the Rights and the Rights Enumerated in the Declaration.—The Universal Declaration consists of a Preamble as noted above and Articles 30 covering both civil and political rights and economic, social and cultural rights. The Preamble refers to the "faith in fundamental human rights in the dignity and worth of the human person and the equal rights of men and women" which the peoples of the U.N. have reaffirmed in the Charter of the U.N. and their determination "to promote social progress and better standards of life in larger freedom". It also refers to the pledge taken by the Member States "to achieve, in co-operation with the United Nations, the promotion of universal respect for the observance of human rights and fundamental freedoms". Through the Preamble, the General Assembly proclaimed the Universal Declaration of Human Rights "as a common standard of achievement for all peoples and all nations to the end that every individual and every organ of the society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction". The Preamble also notes the reasons which impelled the General Assembly to proclaim the Declaration of Human Rights and also the need for such proclamation and after having stated this in the Preamble, the General Assembly goes on to proclaim the rights—civil and political as well as economic, social and cultural. It may be noted that the Declaration is neither addressed to nations nor to Member States but to every individual. This is in keeping with the words "We the peoples of the United Nations" with which the preamble of the U.N. Charter commences. The rights proclaimed in the Universal Declaration of Human Rights may be classified into following four categories :

(i) General (Articles 1 and 2)
(ii) Civil and Political (Articles 3 to 21)
(iii) Economic, Social and Cultural Rights (Articles 22 to 27) and
(iv) Concluding (Articles 28 to 30)

(i) General.—Article 1 of the Universal Declaration provide that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 1 thus proclaims the inherent freedom and equality in dignity and rights of all human beings.

According to Article 2, everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

As noted above, a remarkable thing about the Universal Declaration is that it is neither addressed to nations nor Member States of the U.N. but to every individual. This is evident from Articles 1 and 2. Article 29 also deserves mention in this respect.

(ii) Civil and Political Rights.—The civil and political rights enumerated under the Declaration include the following :

(1) Right to life, liberty and security of person.[41]
(2) Prohibition of slavery and slavery trade.[42]
(3) Prohibition of torture, cruel, inhuman or degrading treatment or punishment.[43]

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[41] Article 3.
[42] Article 4.
[43] Article 5.

(4) Right to be recognized as a person before law.[44]

(5) Equality before the law and equal protection of law against any discrimination in violation of the Declaration.[45]

(6) Right to effective remedy by the competent national tribunals.[46]

(7) Prohibition of arbitrary arrest, detention or exile.[47]

(8) Right to a full equality to a fair and public hearing by an independent and impartial tribunal.[48]

(9) Right to be presumed innocent until proved guilty according to law in public trial.[49]

(10) Freedom from *ex-post facto* laws.[50]

(11) Freedom from arbitrary interference with privacy, family, home, correspondence or attack on honour or reputation and right to protection by law against such interference.[51]

(12) Right to freedom of movement and residence within the borders of State.[52]

(13) Right to leave any country, including his own, and to return to his country.[53]

(14) Right to seek and enjoy in other countries asylum from prosecution in respect of political crimes.[54]

(15) Right to nationality.[55]

(16) Freedom from arbitrary deprival of nationality and right to change nationality.[56]

(17) Right to marry and to found a family and equal rights as to marriage, during marriage and at its dissolution.[57]

(18) Right to own property and freedom from arbitrary deprival of property.[58]

(19) Right to freedom of thought, conscience and religion.[59]

(20) Right to freedom of opinion and expression.[60]

(21) Right to freedom of peaceful assembly and association.[61]

(22) Right to take part in the government of his country.[62]

(23) Right to equal access to public service in his country.[63]

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[44] Article 6.
[45] Article 7.
[46] Article 8.
[47] Article 9.
[48] Article 10.
[49] Article 11, para 1.
[50] Article 11, para 2.
[51] Article 12.
[52] Article 13, para 1.
[53] Article 13, para 2.
[54] Article 14.
[55] Article 15, para 1.
[56] Article 15, para 2.
[57] Article 16, para 1.
[58] Article 17.
[59] Article 18.
[60] Article 19.
[61] Article 20.
[62] Article 21, para 1.
[63] Article 21, para 2.

(iii) Economic, Social and Cultural Rights.—Economic, Social and Cultural Rights are enumerated in Articles 22 to 27. They are :

(1) Right to social security and the right to realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[64]

(2) Right to work, free choice of employment, just and favourable conditions of work and protection against unemployment.[65]

(3) Right to equal pay for equal work.[66]

(4) Right to just and favourable remuneration.[67]

(5) Right to form and to join trade Unions.[68]

(6) Right to rest and leisure.[69]

(7) Right of living adequate for the health and well-being of himself and his family.[70]

(8) Right of all children to enjoy same social protection.[71]

(9) Right to education.[72]

(10) Right of parents to choose the kind of education for their children.[73]

(11) Right to participate in cultural life of the community.[74]

(12) Right to protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[75]

(iv) Concluding or Miscellaneous Articles.—Articles 28 to 30 may be referred as concluding or miscellaneous Article because they do not fit in any of the above three categories. For example, Article 28 provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized. Besides this Article 29 (1) is an exception because this is the only provision in the whole Declaration which speaks of duties. Article 29 (1) provides that everyone has duties to the community in which alone the free and full development of his personality is possible. However, Article 29 (2) makes it clear that in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Article 29 (3) further provides that these rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The last Article of the Declaration, namely, Article 30, incorporates a rule of interpretation or a saving clause by providing that nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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[64] Article 22.

[65] Article 23, para 1.

[66] Article 23, para 2.

[67] Article 23, para 3.

[68] Article 23, para 4.

[69] Article 24.

[70] Article 25, para 1.

[71] Article 25, para 2.

[72] Article 26, para 1.

[73] Article 26, para 3.

[74] Article 27, para 1.

[75] Article 27, para 2.

Influence of the Universal Declaration of Human Rights on National Constitutions, Municipal laws and Court decisions*.—Universal Declaration of Human Rights has greatly influenced constitutions, Municipal law and International conventions. The provisions of the Universal Declaration of Human Rights have influenced various national constitutions enacted after the adoption of the Universal Declaration. For example, the Constitutions of Algeria, Burundi, Cameroon, Chad, Democratic Republic of Congo, Dhaomey, Guniea, Gabon, Ivery Coast, Madagaskar, Mali, Mauritiana, Niger, Senegal, Togo and Upper Volta (when attained independence between 1958 and 1964), the peoples of these countries solemnly affirmed their devotion to the principles and ideals of the Universal Declaration. The principles and ideals of Declaration are also found in municipal law in a number of law and decrees enacted in various countries. The Indian Constitution bears the impact of the Universal Declaration and this has been recognised by the Supreme Court of India. While referring to the Fundamental Rights contained in Part III of the Constitution in *Kesavanand Bharti* v. *State of Kerala,*[76] Sikri, C. J. of the Supreme Court observed : "I am unable to hold that these provisions show that some rights are not natural or inalienable rights. As a matter of fact, India was a party to the Universal Declaration of Human Rights...and that Declaration describes some fundamental rights as inalienable. "Even the Soviet Constitution could not escape the influence of the Universal Declaration Chapter 7 of the draft Soviet Constitution contained "the Basic Rights, Freedoms and Duties of Citizens of the U.S.S.R.". Thus the political rights and freedoms of the Soviet citizens were "far more comprehensively formulated"[77] in the Constitution.

Legal Significance of the Universal Declaration of Human Rights.*—In the course of time Universal Declaration of Humans has assumed legal implication. The Declaration has considerably indirect legal effect and is regarded by the General Assembly and by some jurists as a part of the law of United Nations. It is also regarded as constitutive interpretation of the U.N. Charter and new rules of customary international law.

(iv) The International Bill of Human Rights

On the recommendation of the Third Committee, the General Assembly unanimously adopted the two International Covenants, namely, the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights on December 16, 1966.[78] While the Covenant on Civil and Political Rights, 1966 was adopted by 106 votes to *nil,* the International Covenant on Economic, Social and Cultural Rights was adopted by 105 votes to *nil.* The General Assembly also adopted an optional Protocol to the International Covenant on Civil and Political Rights, 1966, by 66 votes to 2 with 38 abstentions. After 23 years, *i.e.* in December, 1989, the General Assembly adopted yet another Protocol *i.e.,* Second Optional Protocol to the International Covenant on Civil and Political Rights, on December 15, 1989.

• UPPCS (2005) Q. 8.

[76] AIR 1973 SC 1461, 1536; *See also* Patanjali Sastri, C. J. in *State of West Bengal* v. *Subodh Gopal,* AIR 1954 SC 92 : 1954 SCR 587, 596; *per* Hidayatullah, J. in *Ujjamabai* v. *State of U.P.,* (1963) ISCR 778 , 926-927 : AIR 1962 SC 1621 ; *Moti Lal* v. *State of U.P.,* ILR (1951) 1 All 269, 387-388 : AIR 1951 All 257 (FB) : *Per* S. K. Das. *J. in Basheshar Nath* v. *CIT,* (1959) Supp. 1 SCR 528, 605 : AIR 1959 SC 149.

[77] *See* Report of Leonid Brezhnev, CPSU. General Secretary and Chairman of the Constitution of C.P.S.U. Central Committee on May 24, 1977, reproduced in *New Times,* Vol 24 (June 1, 1977), pp. 21-33 at p. 30; for draft Constitution see *Ibid* pp. 34-48.

• UPPCS (2005) Q. 8.

[78] See Gen. Assembly Resolution 2200 A (XXI), December, 1903.

Composition of the International Bill of Human Rights.—The International Bill of the Human Rights comprises of the following :

(1) The Universal Declaration of Human Rights, 1948.

(2) The International Covenant on Civil and Political Rights, 1966.

(3) The International Covenant on Economic, Social and Cultural Rights, 1966.

(4) The Optional Protocol to the International Covenant on Civil and Political Rights, 1966.

The keystone of the two covenants is the Universal Declaration of Human Rights which was adopted by the General Assembly on 10th December, 1948. The Covenants generally elaborate on the rights set forth in the Universal Declaration of Human Rights 1948. The Universal Declaration has already been discussed in earlier chapter.

Entry into Force of the two Covenants and the Optional Protocols.—The International Bill on Human Rights, a major undertaking, which began at the inception of the organisation, entered into force on 23rd March, 1976. Both the Covenants were adopted by the General Assembly on December 16, 1966. They were opened for signature on·December 19, 1966 each of the covenant required 35 ratifications or accessions before coming into force. The optional protocol to the International Covenant on Civil and Political Rights, 1966, required ratification or accession by ten States. Its coming into force was also subject to the coming into force of the International Covenant on Civil and Political Rights, 1966. The Covenant on Economic, Social and Cultural Rights, 1966 entered into force on January 3, 1976. Thereafter, on 23rd March, 1976 the International Covenant on Civil and Political Rights, 1966 after having received the requisite number of ratifications. The Optional Protocol to the International Covenant on Civil and Political Rights, 1966, came into force on March 23, 1976. By the end of 1998, the Covenant on Civil and Political Rights had 140 parties. So far 172 countries have become parties to the International Covenant on Civil and Political Rights, 1966. So far 170 countries have become parties to the International Covenant on Economic, Social and Cultural Rights, 1966. So far 173 countries had become parties to the Optional Protocol to the International Covenant on Civil and Political Rights, 1966. Besides this 81 countries have become parties to Optional Protocol - II to the Convention on Political and Civil Rights. So far 170 countries have become parties to the Protocol to Economic, Social and Cultural Rights.

China had also signed the Covenant on Economic, Social and Cultural Rights. On 28th February, 2001 China ratified the Economic Covenant. On 27th March, 2001, China formally informed the U.N. that it would abide by the treaty but made it clear that it opted out of a clause allowing workers to form independent trade workers.

It may also be noted that the second optional protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty was adopted on December 15, 1989. As provided by Article 8, Paragraph 1, it was to come into force three months from the date of the deposit of the tenth instrument of ratification or accession. This requirement was fulfilled on July 11, 1991 and therefore the Second Optional Protocol came into force on July 11, 1991. As of July 2013, 77 countries had become parties to the II Protocol on Death Penalty, second Protocol to the International Covenant on Civil and Political Rights.

International Covenant on Civil and Political Rights, 1966.—The International Covenant on Civil and Political Rights, 1966 comprises of 53 Articles divided into VI Parts. For the convenience of study, these Articles may be classified into following categories :

(a) Preamble.

(b) General (Articles 1 to 3 and 5).

(c) Rights in Emergency (Article 4).

(d) Substantive Rights (Articles 6 to 27).

(e) Implementation of Enforcement Machinery (Articles 28 to 45).

(f) Interpretation of Saving Provision (Articles 46 to 47).

(g) Final or concluding provisions, regarding ratification, of accession of the covenant, amendments, etc.

International Covenant on Economic, Social and Cultural Rights.— Besides Preamble the International Covenant on Economic, Social and Cultural Rights comprises of 31 Articles divided into five parts. For the sake of covenience of study the provisions of the Covenant may be divided into following heads :

(a) Preamble,

(b) General (Articles 1 to 5),

(c) Substantive Rights (Articles 6 to 15),

(d) Measures for implementation (Articles 16 to 25),

(e) Final or Concluding Provisions (Articles 26 to 31).

Universal Declaration of Human Rights and the two covenants on Human Rights, 1966.—Apart from the provisions of the U.N. Charter concerning human rights, the keystone of the Covenants is the Universal Declaration of Human Rights, 1948, which interprets, extends and elaborates the provisions of the Charter. Generally, the two Covenants elaborate on the rights set forth in the Universal Declaration. But there are rights which are proclaimed in the Universal Declaration but are not incorporated in the Covenants and *vice versa* there are certain rights not proclaimed in the Universal Declaration but are incorporated in the Covenants.

I. Optional Protocol to the International Covenant on Civil and Political Rights, 1966.—Though, the optional Protocol to the International Protocol to the International Covenant on Civil and Political Rights, 1966, it will be desirable to discuss here briefly the optional Protocol because it is one of the four constituents of the International Bill on Human Rights.

The purpose of adopting the optional Protocol has been made clear in the preamble. The preamble to the optional Protocol states that "*considering*" that in order further to achieve the purposes of the Covenant on Civil and Political Rights and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in Part IV of the Covenant to receive and consider as provided in the present Protocol, communications from individuals claiming to be the victims of violations of any of the rights set forth in the Covenant. State Parties to the optional Protocol have agreed to adopt Articles 1 to 14. This is further clarified by Article 1 which says that a State party to the Covenant (*i.e.* the Civil Covenant) that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation of by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol. Article 2 further provides that subject to the provisions of Article 1, individuals who claim that any of the rights enumerated in the Covenant has been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

The Committee then, considers communications received in the light of all written information made available to it by the individual and by the State Party concerned. The Committee forwards its views to the State Party concerned and to the individual.[79] The Committee includes in its annual report a summary of its activities under the present Protocol to the General Assembly of the U.N. through the Economic and Social Council.[80]

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[79] Article 5 of the Optional Protocol.

The Optional Protocol came into force on March 23, 1976, *i.e.* three months after the date of the deposit with the Secretary-General of the U.N. of the tenth instrument of ratification or instrument of accession.[81] So far 173 countries have become parties to the Optional Protocol - I to the Convention on Civil and Political Rights.

II. Optional Protocol to the International covenant on Civil and Political Rights, regarding Abolition of Death Penalty.—So far 81 countries had become parties to this optional Protocol which aims to abolish penalty.

Critical Appraisal and Significance of the International Bill of Human Rights.—Adoption of the International Covenant on Human Rights and of the optional Protocol in December, 1966 and their entry into force on 23rd March, 1976 and the establishment of the Human Rights Committee represented the successful outcome of the long and persistent effort by the United Nations to translate the lofty aims and principles of the Universal Declaration of Human Rights into binding instruments of International Law.[82] There is not even a shade of doubt that the two Covenants have legal force as treaties for the parties to them and institute a detailed codification of human rights.[83]

(v) Measures for Implementation of Human Rights

It is proposed to discuss below the measures for implementation of human rights under the following :

1. U.N. Commission on Human Rights.
2. International Covenant on Economic, Social and Cultural Rights, 1966.
3. International Covenant on Civil and Political Rights, 1966.
4. Optional Protocol to the Covenant on Civil and Political Rights, 1966.
5. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty (1989).

Human Rights Committee.—The Human Rights Committee established under the Civil Covenant consists of eighteen members, who are nationals of State parties to the Covenant having "high moral character and recognized competence in the field of human rights" preferably having legal experience. The members of the Committee are elected and serve in their personal capacity.[84] The members of the Committee are elected by secret ballot from list of persons possessing the above qualification (as perscribed under Article 28) and nominated for the purpose by the State Parties to the Covenant. Each State Party to the Covenant may nominate not more than two persons who are its nationals and such persons shall be eligible for renomination.[85] The Committee may not include more than one nationals of the same State. In the election of the Committee, consideration shall be given to the equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.[86]

The members of the Committee are elected for a term of four years and shall be eligible for re-election in case they are renominated. But the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the chairman of the meeting referred in Article 30, paragraph 4.[87] According to Article 30, the initial election shall be held no later than six months after the date of entry into force of the Covenant.[88] At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with Article 34, the Secretary-General of the U.N. shall address a written invitation to the State Parties to the Covenant to submit their nomination for membership of the Committee within three months.[89] The Secretary General of the U.N. shall prepare a list in alphabetical order of all the persons thus nominated, and shall submit it to the State parties to the present Covenant no later than one month before the date of each election.[90] Thereafter election of the members of the Committee shall be held at a meeting of the State parties to the Covenant convened by the Secretary-General at the Headquarters of the U.N. At that meeting, for which two-thirds of the State parties to the Covenant shall constitute a quorum, the person elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of votes of the representatives of State parties present and voting.[91]

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[80] Article 6 *ibid* and Article 45 of the Civil Covenant.

[81] *See also* Article 9 of the optional Protocol.

[82] *See U. N. Monthly Chronicle*, Vol. XIV No. 4 (April, 1977), p. 49.

[83] *See also* Ian Brownlie, *Principles of International Law*, Second Edn. (1993), p. 555.

[84] Article 28 of the Civil Covenant.

[85] Article 29.

[86] Article 31.

In view of the above provision, after coming into force of the Civil Covenant, the State parties to the Covenant met for the first time on September 20, 1976 and elected 18 members of the Committee. The term of the members of the committee began w.e.f. January 10, 1977.

Methods or ways of Implementation.—The 18-member Human Rights Committee implements the human rights recognized under the Civil Covenant in following three ways :

(1) The System of Reporting
(2) Inter-State Communications system
(3) Conciliation Procedure.

Under Optional Protocol to the International Covenant on Civil and Political Rights, 1966—Individual's communication system.—In addition to the aforementioned three methods of implementation of the rights recognized under the Covenant on Civil and Political Rights, 1966 (or the Civil Covenant), a fourth method, *i.e.* individual's communication system is provided under the optional protocol to the Covenant on Civil and Political Rights, 1966 (hereinafter to be referred as the optional Protocol). This method of implementation is available to State Parties to the Civil Covenant who are also parties to the optional Protocol. Thus the optional Protocol is necessarily and invariably related to the Civil Covenant. This is clear from the preamble of the optional Protocol through which its State Parties make it clear that "considering that in order further to achieve the purposes of the Covenant on Civil and Political Rights and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in Part IV of the Covenant to receive and consider as provided in the present Protocol, communication from individual, claiming to be the victims of violations of any of the rights set forth in the Covenant" have agreed to provisions of the optional Protocol, *i.e,* from Article 1 to Article 14).

Under the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty (1989).—On 25th November, 1981, the General Assembly decided to consider the idea of elaborating a draft of a Second Optional Protocol to the International Covenant on Civil and Political Rights.[92] On December 15, 1989, the General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty[93] (hereinafter referred as "the Second Optional Protocol). According to Article 8, para 1, the Second Optional Protocol was to enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession. This requirement was fulfilled on July 11, 1991, and on that date it came into force.

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[87] Article 32.

[88] Article 30, para 1.

[89] Article 30, para 2.

[90] Article 30, para 3.

[91] Article 30, para 4.

As the title of the Second Optional Protocol suggests, it is mainly and exclusively aimed at or concerned with the abolition of death penalty. The parties to the Second Optional Protocol have, in the preamble, expressed to belief that "the abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights. The Second Optional Protocol elaborates, extends and interprets Article 3 of the Universal Declaration of Human Rights, 1948 and Article 6 of the Civil Covenant. Article 3 of the Universal Declaration says that "Everyone has the right to life, liberty and security of person." Article 6, Paragraph 1 of the Covenant on Civil and Political Rights, 1966, provides that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life. Paragraph 2 of Article 6 further provides that in countries which have not abolished the death penalty, sentence of death may be imposed for the most serious crimes in accordance with the law at the time of the Commission of the crime and not contrary to the provisions of the Civil Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. The penalty can only be carried out pursuant to a final judgment rendered by a competent court. Paragraph 5 of Article 6 further provides that sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

Article 1 of the Second Optional Protocol seeks to extend the provisions by providing that no one within the jurisdiction of a State Party to the Second Optional Protocol shall be executed. Further each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction. The Second Optional Protocol is so serious and sincere about achieving its aims *i.e.*, the abolition of Death Penalty "t", that a very limited right to reservation has been permitted Article 2 of the Second Optional Protocol provides that no reservation is admissible to the Second Optional Protocol, except for a reservation made at the time of ratification or accession that provides for the application of death penalty in time of war pursuant to a conviction for most serious crime of a military nature committed during wartime.

The Second Optional Protocol is necessarily and invariably related to the International Covenant on Civil and Political Rights and the (First) Optional Protocol. The machinery for implementation, therefore, is also the same, namely the Human Rights Commission.

Methods of Implementation.—The Second Optional Protocol provides for following three ways of implementation :

(1) The Reporting System

(2) Inter-State Communication System

(e) Individual's Communication System.

(vi) Important World Conferences on Human Rights

International Conference on Human Rights or Tehran Conference (22nd April to 13th May, 1968).—The first global conference on human rights was held at Tehran (Iran) from 22nd April to 13th May, 1968. The first world conference was held in connection with the observance of the International Year for Human Rights and marked the twentieth anniversary of the Universal Declaration of Human Rights. This conference was convened to review the progress which had been made in the field of human rights since the adoption of the Universal Declaration of Human Rights, to evaluate the effectiveness of the methods used by the United Nations in the field of human rights, and to formulate and prepare a programme of further measures to be taken subsequent to the celebration of the twentieth anniversary of the Universal Declaration. The Tehran Conference was attended by the representatives of 84 State Governments. The Conference adopted the Proclamation of Tehran and 26 resolutions. These resolutions, and the general principles set out in the proclamation, gave new directions to most of the subsequent work of the United Nations in the field of human rights. The Proclamation stressed the indivisibility of human rights and fundamental freedoms and made it clear that the enjoyment of economic, social and cultural rights is necessary for the full realization of civil and political rights. Later on this indivisibility was affirmed in the Vienna Conference on Human Rights, 1993.

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[92] *See* Resolution No. 36/95 of 25th November, 1981.

[93] *See* G. A. Resolution 44/128, December 15, 1989.

The Proclamation asked the States to fulfil their obligations of promotion and encouragement of human rights and fundamental freedoms for all without any distinction as to race, colour, sex, language, religion, political or other opinions. Further, since the primary aim of the U.N. in the field of human rights is the achievement of maximum freedom and dignity by each individual, the laws of each and every country should accordingly grant each individual freedom of expression, information, conscience and religion and provide for the right of each individual to participate in the political, economic, social and cultural life of his country. Last but not the least, the Proclamation reaffirmed the determination to enforce effectively the principles of the Charter of the U.N. and of other international conventions concerning human rights and fundamental rights and accordingly asked all the States to do the same.

World Conference on Human Rights, Vienna (14th to 25th June, 1993) or Vienna Conference.—The World Conference on Human Rights was held at Vienna from 14th to 25th June, 1993. This World Conference was held some 25 years later after the International Conference on Human Rights (or Tehran Conference) held at Tehran (Iran) in 1968 to assess the progress achieved under the Universal Declaration on Human Rights (1948) and had laid the foundation for subsequent work in the field of human rights at the international level.

The Conference called for specific measures designed to strengthen international human rights instruments and their monitoring mechanism and to improve co-ordination of UN activities for the furtherance of human rights. The Conference condemned ethnic cleansing. The Conference also adopted two declarations one on Bosnia and Herzegovina and the other on Angola. The Conference recommended that the General Assembly at its next session consider, as a matter of priority, the question of the establishment of a High Commissioner for Human Rights for the protection and promotion of all human rights. The Conference supported the creation of an International Criminal Court to bring those responsible for serious violations of humanitarian law to justice as individuals. The International Law Commission was encouraged to continue work on an International Criminal Court.

Vienna Declaration.—Vienna Conference adopted a two-part Vienna Declaration and a six-part 150 paragraph Programme of Action. The Declaration consists of 16 preambular paragraphs and 39 operative paragraphs. The main points of Vienna Declaration are following :

(i) Universality and Indivisibility of Human Rights.—All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind. It held that it was the duty of States, regardless of their political, cultural systems, to promote and protect all human rights.

(ii) Right to self-Determination.—Vienna Declaration reaffirmed the right of all peoples to self-determination recognizing the right of peoples to take any legitimate action, in accordance with the Charter to realize their inalienable right of self-determination. The declaration, however, hastened to add that "this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples."

(iii) Effective International measures to guarantee and monitor implementation of human rights of peoples under foreign occupation.—The declaration calls for effective international measures to guarantee and monitor the implementation of human rights of people under foreign occupation. It also calls for effective legal protection against the violation of their human rights, in accordance with human rights norms and international law particularly the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War and other applicable norms of humanitarian law.

(iv) Democracy, Development and Respect for Human Rights.—The declaration states that democracy, development and respect for human rights are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems, and their full participation in all aspects of life.

(v) Right to Development.—Vienna Declaration reaffirms the right to development, established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. While development facilitates the enjoyment of human rights lack of it may not be invoked to justify abridgement of internationally recognized human rights. The adoption of a far reaching consensual language on the right to development including for the first time that development is an inalienable right is an important achievement of the conference.

(vi) Alleviation of external debt burden of developing countries.—The declaration calls on international community to make all efforts to help alleviate the external debt burden of developing countries to supplement efforts of their Governments to attain the full realization of economic, social and cultural rights of their people.

(vii) Unilateral measures creating obstacles to Trade Relations.—The declaration calls on States to refrain from any unilateral measure not in accordance with international law that created obstacles to trade relations among States and impeded the full realization of human rights. It affirmed that "food should not be used as a tool for political pressure".

(viii) Gender-based violence and all forms of sexual harassment and exploitation.—The declaration observes that gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking were incompatible with the dignity and worth of human person and must be eliminated. That could be achieved by legal measures and through national action and international co-operation in economic and social development, education, safe maternity and health care, and social support.

(ix) Right of minorities.—The Declaration states that persons belonging to minorities have the right to enjoy their own culture, to practice their own religion and to use their own language in private and in public and without interference or any form of discrimination.

In addition to the foregoing, the Declaration encourages States to accede to international human rights instruments, and to avoid as far as possible, to resort to reservations. The importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues was reaffirmed. The declaration urged Governments, UN system as well as other multilateral organization to considerably increase the resources allocated to programmes aimed at the establishment and strengthening of national legislation, national institutions and related infrastructures which upheld the rule of law and democracy; electoral assistance ; human rights awareness through training, teaching and education ; popular participation and civil society. The declaration underlined the importance of objective, responsible and impartial information about human rights and humanitarian issues. The declaration also encouraged the increased involvement of the media, for whom freedom and protection should be guaranteed within the framework of national law.

One of the greatest achievements of the Vienna Declaration is the proposal to establish a post of High Commissioner for Human Rights. *Secondly,* while the Declaration has reaffirmed the right of self-determination, it has made it clear that this right cannot be used to dismember or unsettle the established States. *Thirdly,* the Declaration calls upon the international community to enhance co-operation to combat terrorism. It also noted that terrorism and its linkage in some countries to drug trafficking are aimed at the destruction of human rights, democracy, territorial integrity, security of States and destablishing of legitimately constituted Governments. *Fourthly,* its adoption of right to development as an inalienable right is indeed a great achievement. *Fifthly* its emphasis on prosecution and punishment of persons responsible for the crime of ethnic cleansing is really praiseworthy. So is the case with affirmation of universality, indivisibility and interdependence of human rights affirmation and that food should not be used as a tool for political pressure ; affirmation of rights of minorities ; affirmation that democracy, development and respect for human rights are independent and mutual reinforcing etc.

Fourth World Conference on Women, Beijing (China) [4th-15th September, 1995].—Fourth World Conference on Women held at Beijing (China) from 4th to 15th September, 1995. The Beijing Conference is the fourth in a series of U.N. sponsored global conference on women which laid the foundation in the field of human rights of women who constitute nearly half of the world population. The First World Conference on Women was held in Mexico City in 1975 which highlighted the themes of "Equality, Development and Peace". These themes were further developed during the U.N. Decade for Women (1976-1985). The second world conference on women convened in Copen Hagan in 1980 which added three sub-themes; or Education, Employment and Health". The Third World Conference on Women, held in Nairobi in 1985, incorporated those themes into the Nairobi Forward-looking Strategies for the Advancement of Women to the year 2000. The Fourth Conference held at Beijing (China) from 4th to 15th September, 1995 carried forward the themes of "Equality, Development and Peace" which highlighted the first U.N. Conference on Women, held in Mexico City in 1975.

The Forward-looking strategies provided a frame-work for action at all levels to promote empowerment of women and their enjoyment of human rights. The goals of the strategies which were intended to be implemented by the year 2000, include equal rights for women, the abolition of slavery and prostitution, establishment of a legal minimum age for marriage and punishment for female infanticide.

Thus moving into the 21st Century, the drive for women's rights has accelerated and taken in a powerful global momentum. Within two decades, *i.e.* since the First World Conference on Women in Mexico city in 1975, the campaign for equality between women and men has witnessed significant changes and undeniable advances. Internationality, many treaties have been entered into and State Governments on their part have adopted various legislations. A pertinent question arises as to whether these advances have improved the everyday life of the average woman? A direct answer is not possible. Though it cannot be denied that there has been definite improvement yet millions of individual women continue to face discrimination in social, political and cultural spheres. The position is mixed. In 1993 only six women around the world headed Government and in 1995 only 6 of the 185 ambassadors to the U.N. were women. In some field the situation continues to be grim. According to an estimate, two-thirds of the world's illiterates are women and they are getting educated at a slower rate than men. On average women's salaries are 30 to 40% lower than those of men for the same work. Half a million women die each year from complications due to child birth, and another 1,00,000 from unsafe abortions. Violence against women is pervasive, from the United States where a woman is battered every 18 minutes, to India, where five women are burnt in dowry-related disputes each day.

In order to assess the progress and shortfalls of the past two decades and identify action to be taken into the next century on Beijing Conference or Fourth-World Conference on Women was held from 4th to 15th September, 1995. It adopted platform for action, concentrating on key issues identified as obstacles to the advancement of women throughout the world. It also determined priority actions to be taken by the international community including the UN, between 1996 and 2001 for the advancement of women. The Conference also mobilized women and men at both the policy making and grassroots levels to achieve those objectives.

(vii) Key International Covenants on Human Rights

We have discussed earlier International covenants on Human Rights which alongwith Universal Declaration of Human Rights and Optional Protocol to the International Covenant on Civil and Political Rights constitute International Bill of Human Rights. The International Bill of Human Rights which "constitute a detailed codification of Human Rights" has ushered in a new era in the field of human rights. However, it cannot but be admitted that though it has laid a solid foundation for further development of human rights, it does not constitute the whole of human rights. There are various other international legally binding conventions on human rights in different fields. It will, therefore, be desirable to discuss briefly International Conventions on human rights other than those which constitute International Bill of Human Rights. These conventions can be divided into two broad categories—Conventions Relating to Inhuman, Cruel and Degrading Acts; and Conventions on Vulnerable Groups. It is proposed to discuss these conventions in a chronological order so as to have an overall idea of progressive development of human rights in different fields.

Conventions Relating to Inhuman, Cruel and Degrading Acts

1. Convention on the Prevention and Punishment of the Crime of Genocide (1948).[94]

As of May 2019, 152 countries have become parties to the Convention.

Conventions relating to Humanitarian Laws of War.—The following four conventions along with Additional Protocol constitute the humanitarian laws of war.

2. Geneva Convention Relating to the Treatment of Prisoners of War (12th August, 1949).[95]

N.B.—As of 2 August, 2006 the convention had been ratified by 194 countries. At present, nearly 200 countries have ratified this convention.

3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12th August, 1949).

N.B.—For this please see chapter on "Laws of Land Warfare". As of 2 August, 2006, the convention had been ratified by 194 countries. At present, nearly 200 countries have ratified this convention.

4. Geneva Convention of 12th August, 1949 further Amelioration of the Condition of Wounded, Sick and Ship-wrecked Members of Armed Forces of Sea.

N.B.—This has already been discussed in chapter on "Laws of Maritime Warfare". As of 2 August, 2006, the convention had been ratified by 194 countries. At present, nearly 200 countries has ratified this convention.

5. Geneva Convention Relating with Protection of Civilians in Time of War (12th August, 1949).

This Protocol has as many 169 Parties.

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[94] This has already been discussed in detail earlier in chapter on "Genocide".

[95] For this please see chapter on Laws of Land Warfare.

N.B.—For this please see chapter on "Belligerent Occupation". What is true of the above three conventions is also true of this convention.

6. Protocol Additional to the Geneva Conventions of 12th August, 1949 and Relating with Protection of Victims of International Armed Conflicts.—As of January 2013, 174 countries had become parties to the Additional Protocol.

N.B.—For this please see chapters on "Laws of Land Warfare", "Laws of Maritime Warfare" and "Belligerent Occupation".

7. Protocol Additional Relating to Protection to Victims of Non-International Conflicts (Protocol II).—This Protocol Additional has been ratified by January 2015.

8. Protocol Additional Relating to the Adoption of Distinctive Emblems, 2005 (Protocol III).—So far 69 countries have become parties to this Protocol Additional.

9. International Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of others (December 2, 1949).

This Convention was adopted on 2nd December, 1949. It was opened for signature on 31st March, 1950. It entered into force on 25th July, 1951. As of 30th June, 2013, 82 countries have become parties to this convention.

10. International Convention on the Elimination of All Forms of Racial Discrimination (21 December, 1965).

This Convention was adopted by the General Assembly on 21st December, 1965. It came into force on 4th January, 1969. The Convention consists of a preamble and 30 Articles. The Convention had entered into force on 4 January, 1969. So far 182 countries have become parties to this Convention.

11. International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

This Convention was adopted on 30th November, 1973 and was opened for signature by the General Assembly of the U.N. The Convention declared that "Apartheid" is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar practices of racial segregation and discrimination are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the U.N. and constituting a threat to the International peace and security.

The Convention entered into force on 18 July, 1976. As of 13 June, 2013, it had 107 parties.

12. International Convention Against Apartheid in Sports (1985).

This convention was adopted by the General Assembly on 10th December, 1985. The Convention entered into force on 3rd April, 1988. So far it has been ratified by 60 countries.

13. International Convention Against the Taking of Hostages (1979).

The General Assembly adopted this Convention on 17th December, 1979.

This Convention became effective on 3 June, 1983 when twenty-two countries deposited their instrument of ratification. As of December, 2014, 174 countries had become parties to this convention.

14. Conventions Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

This Convention was adopted by the General Assembly on 10th December, 1984. This Convention entered into force on 26th June, 1987. As of September 2013, 154 countries had ratified the convention and become parties to this convention.

15. Second Optional Protocol to the International Covenant on Civil and Political Rights. Aiming at the Abolition of Death Penalty (1989).

This protocol was adopted in 1989 and came into force on 11th July, 1991. As of 26 May, 2019, 81 countries had become parties to this convention.

16. Optional Protocol (II) to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002).

On December 18, 2002, the General-Assembly of the U.N. adopted optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and called upon all States that have signed, ratified or acceded to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to sign and ratify or accede to the optional Protocol.

The optional Protocol provides for the establishment of *sub-committee on Prevention,*[96] which shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol the number of members of the sub-committee on Prevention shall increase to twenty five.

The sub-committee shall :

(a) visit the places referred to Article 4 (*i.e.* places where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority, or at the instigation or with its consent or acquiescence) and make recommendations to State Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment ;

(b) In regard to the national preventive mechanism :

  (i) Advise and assist State Parties, when necessary, in their establishment ;

  (ii) Maintain direct and if necessary confidential contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities ;

  (iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment ;

  (iv) Make recommendations and observations to the States with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

(c) Co-operate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organisations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.[97]

In order to enable the sub-committee to fulfil its mandate, States Parties to the present Protocol have to undertake certain obligations.[98]

Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under Part III or Part IV, of the present Protocol.[99]

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[96] *See* Article 5 of the Protocol.

[97] Article 11 of the Protocol.

[98] Article 14.

[99] Article 24.

The present Protocol would enter into force in the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument ratification or accession.[100]

Last but not the least, the Protocol provides that no reservations shall be made to the present Protocol.[101]

The optional Protocol was made available for signature, ratification from 4 February, 2003.

The optional Protocol entered into force on 22 June, 2006. As of February 2014, 72 countries had become parties to this convention.

17. Protocol to Prevent, supress and Punish Trafficking of Persons Especially Women and Children.—This Protocol was adopted by the United Nations in 2000. It entered into force on 25 December, 2003. As of June 2013, 156 countries had become parties to this Protocol.

Conventions Relating to Vulnerable Groups

(1) The Convention on Status of Refugees, 1951.

The General Assembly adopted this convention on 28th July, 1951.

It entered into force on 22 April, 1954. So far 147 (one hundred forty-seven) countries are parties to this convention.

In 1967 a Protocol to this Convention was adopted. Before this Protocol, the convention was applicable only on the people who had become refugees before 1 January, 1951. By 1967 Protocol protection was given to new groups of refugees. This Protocol entered into force on 4 October, 1967. This Protocol widened the scope of the convention. According to this Protocol, refugee is a person who on account of caste, religion, nationality, membership of a social group or basis of political opinion is away from his/her previous home. As of December 2014, 166 countries had become parties to this Protocol.

(2) Convention on the Political Rights of Women (1952).

This Convention was adopted on 20 December, 1952. It entered into force on 7 July, 1954. So far 123 countries have become parties to this Convention.

(3) The Convention Relating to the Stateless Persons (1954).

This convention has adopted on 28th September, 1954. It came into force on 6th June, 1960. As of February, 2014, 82 countries had become parties to this convention.

(4) The Convention on the Reduction of Statelessness (1961).

N.B.—For this please see chapter on "Nationality". It entered into force on 13 December, 1975. As of 11 December, 2010, 37 countries had become parties to this convention.

(5) Convention on the Nationality of Married Women (1957).

N.B.—For this also see chapter on "Nationality".

(6) Convention on the Elimination of All Forms of Discrimination Against Women (1979).

Adopted by the General Assembly on 18th December, 1979, the Convention entered into force in 1981. As of 2nd June, 2012, 188 countries had become parties to this convention.

(7) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 1999.—The United Nations General Assembly adopted

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[100] Article 28.

[101] Article 30.

this Optional Protocol on 6 October, 1999. After ratification by the tenth State, this Protocol entered into force on 22nd December, 2000. As of 2014, 105 countries had become parties to this optional Protocol. The Protocol provides two types of procedures—(i) Individual communication procedure; and (ii) Enquiry procedure.

(8) Covention on the Rights of the Child (1989).

This convention was adopted on 20th November, 1989. So far 194 countries have become parties to this convention. It entered into force on 2 September, 1990. Under this Convention, every person below the age of 18 years is regarded as child.

(9) Optional Protocol to the Convention on the Involvement of Children in Armed Conflict, 2000.—This Protocol was adopted by the U.N. General Assembly on 25th May, 2000 and was opened for signature. This Protocol entered into force on 12 February, 2002. The main aim of this Protocol is to prevent children below 18 years from being involved in armed conflict. So far 159 countries had become parties to this Protocol.

(10) Optional Protocol to the Convention on the Rights of the Children on the Sale of Children, Child Prostitution and Pornography.—As of February 2015, 169 countries had become parties to this optional Protocol.

(11) Optional Protocol to the Convention on the Rights of Child Relating to Communication Procedure of Complaints, December 2011.—Adopted in December 2011, it came into effect on 14 April, 2014. As of April 2014, 14 countries had become parties to this optional Protocol.

(12) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).—This Convention was adopted by the U.N. General Assembly on 18 December, 1990. According to Article 87 of the convention, the Convention would come into force three months after the ratification of the convention by the 20th State. According to this convention, a migrant worker is a person who for money or salary works in a country whose nationality he does not possess. The convention enumerates the rights of migrant workers. The convention also provides for implementation of the provisions of the convention. The convention provides for the establishment of a committee for the implementation of provisions of the convention. The committee is empowered to implement the provision of the convention through following three methods—(i) Reporting Procedure; (ii) Inter-State Communication System; and (iii) Individual Communication System. The convention entered into force on 1 July, 2003. As of 2014, 47 countries have become parties to the convention.

(13) Protocol Against Smugglers of Smuggling of Migrants by Land, Sea or Air, 2000.—This Protocol entered into force on 28 January, 2004. So far 138 countries have become parties to this Protocol.

(14) Convention on the Rights of Persons with Disabilities.—This convention was adopted on 13 December, 2006. This convention provides the right of persons with disabilities. This convention came into force on May 3, 2008. As of October 2013, 141 countries had become parties to this convention.

(15) Optional Protocol to the Rights of Persons with Disabilities, 13 December, 2006.—This Protocol came into force on May 3, 2008. So for 78 countries have become parties to the Optional Protocol.

(16) International Convention on Protection of Persons from Enforced Disappearance, 20 December, 2006.—This convention has not yet entered into force. It will enter into force on the deposit of 20th instrument of ratification. As of 2014, 93 countries have signed this convention. So far there are 38 parties to this convention.

(17) Convention on the International Recovery of Child Support and other Forms of Family Maintenance, 23 November, 2007.—The convention provided that it would come into force on ratifications by two State Parties.

It entered into force on 1 January, 2013. So far 5 countries including, Alabama, Norway and Bosnia Harzegovina have become parties to the convention. The other two countries are Norway and Ukraine.

(18) II Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.—This Protocol entered into force on 18 January, 2002. As of February 2015, 169 countries have become parties to this Protocol.

(19) III Optional Protocol Relating to Communication Procedure of Complaints, December, 2011.—Adopted on December 2011, this optional Protocol came into effect on 14 April, 2014. So far 76 countries had become parties to this optional Protocol.

CHAPTER 66

REGIONAL PROTECTION OF HUMAN RIGHTS

I. European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)[*]

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as "ECHR") was signed at Rome in November, 1950. It entered into force in September, 1953. There are 22 parties to it. They are : Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. A State to become a party of ECHR must be a member of Council of Europe. Eleven Protocols to ECHR have also been signed, either, adding the rights recognised in convention or amending the convention. For example, Protocol I, which was signed on March 20, 1952 and entered into force on May 18, 1954, adds certain new rights such as right to peaceful enjoyment of one's possessions, and right to education. It also includes an undertaking of the State Parties to hold free elections at reasonable intervals by a secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Protocol II which was signed on May 6, 1963 and came into force on September 21, 1970, enabled the Court of Human Rights to give advisory opinion at the request of Committee of Minister on legal question with regard to the interpretation of ECHR and Protocols. Protocol III, which was signed on May 6, 1963 and came into force on September 22, 1970, amended certain articles, namely, Articles 29, 30 and 34 of ECHR. Protocol IV was signed on September 16, 1963 and entered into force on May 2, 1969. It added certain rights such as no person can be expelled from a State of which he/she is a national, (ii) Right to choose residence and liberty of movement and (iii) right not to be imprisoned for failure to pay debts. Having been signed on January 20, 1966 and came into force. Protocol V amended the Convention regarding procedure of election of members of the Commission and the Court. Protocol VI, which came into force in March, 1985, abolished death penalty except in respect of acts committed in time of war or of imminent threat of war. The Protocol does not permit any reservation on derogation from this provision.

Protocol VII to the ECHR, which entered into force on November 1, 1988 added the right of review of a conviction by a higher court (Article 2). Protocol VIII, which came into force on January 1, 1990, enabled the Commission to set up chambers or committees. Protocol IX came into force on October 1, 1994 allows individual applications to refer cases to Court under certain conditions. Protocol X having been signed on March 25, 1992 amended Article 32, para 1 by deletion of the words "of two-thirds" therefrom. That is to say, now matter shall be decided by the Committee of Ministers by simple majority instead of two-thirds' majority as was earlier provided. Lastly, Protocol XI, which was signed on May 11, 1994 made several changes to improve the implementing machinery so as to enhance its efficiency for the protection and observation of human rights. Thus the Convention has been amended several times by above-mentioned Protocols adding the rights recognized in the Convention, enabling the European Court of Human Rights to give advisory opinions on matters relating to interpretation of the Convention and allowing use of special chambers abolishing the death penalty and providing certain procedural safeguards for expulsion of aliens thereby improving the procedural efficiency of the European Commission on Human Rights. The European Convention comprises of 66 Articles, divided into five sections.

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[*] IAS (2001) Q. 7(a).

Rights and Freedoms Recognized under ECHR.—Under Article 1 of the Convention (*i.e.*, ECHR) the State Parties to the Convention undertake to secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention. Thereafter Section I enlists and defines the following rights and freedoms :

(1) Right to life. (Article 2).

(2) Freedom from torture or inhuman or degrading treatment or punishment. (Article 3).

(3) Freedom from slavery or servitude. (Article 4, para 1).

(4) Freedom from, forced or compulsory labour. (Article 4, para 2).

(5) Right to liberty and security of person (Article 5, para 1) including right of arrested person to be informed of the reasons of his arrest and of any charge against him (Article 5, para 2), to be brought before a judge and to be entitled to trial within reasonable time (Article 5, para 3) and right of victims of arrest or detention in contravention of the provisions of this Article to an enforceable right to compensation. (Article 5, para 5).

(6) Right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6, para 1) including presumption of innocence of a person charged with a criminal offence until proved guilty according to law (Article 6, para 2) and certain specified minimum rights of everyone charged with a criminal offence. (Article 6, para 3).

(7) Non-retroactive application of criminal law under national or international law. (Article 7).

(8) Right to respect for private and family life, home and correspondence. (Article 8, para 1).

(9) Right to freedom of thought, conscience and religion including freedom to change religion or belief, and freedom either alone or in community with others and public or private, to manifest religion or belief, in worship, teaching, practice and observance subject only, to the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. (Article 9).

(10) Right to freedom of expression including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontier. (Article 10, para 1).

(11) Right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (Article 11, para 1).

(12) Right of men and women of marriageable age to marry and to found a family, according to the national laws governing to exercise of this right. (Article 12).

(13) Right to have an effective remedy before a national authority against violations of rights and freedoms set forth in this Convention. (Article 13).

(14) Right of every natural or legal person to the peaceful enjoyment of his possessions. (Article 1, Protocol I).

(15) Right to education. (Article 2, Protocol I).

(16) Right to have free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. (Article 3, Protocol I).

(17) Right not to be expelled from a State of which a person is a national. (Article 3, Protocol IV).

(18) Freedom from collective expulsion from a State. (Article 4, Protocol IV).

(19) Abolition of death penalty. (Article 7, Protocol VI).

(20) Right of review of a conviction by a higher Court. (Article 2, Protocol VII).

It is made clear in Article 14 of ECHR that the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground, such as, sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 15, para 1 provides that in time of war or public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. But under this provision no derogation shall be permissible from Article 2, except in case of death resulting from lawful acts of war, or from Articles 3, 4 (paragraphs 1 and 7) (Article 15, para 2). Moreover, any State Party availing itself of this right of derogation is required to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are being fully executed (Article 15, para 3). Last but not the least, Article 16 provides that nothing in Articles 10 (right to freedom of expression); 11 (right to freedom of peaceful assembly and to freedom of association) and 14 (non-discrimination including on the ground of national or social origin in the enjoyment of rights and freedoms set forth in the Convention) shall be regarded as preventing, the High Contracting Parties from imposing restrictions on the political activity of aliens. That is to say, despite the provisions of Articles 10, 11 and 14, State Parties to the Convention can impose restrictions on the political activity of aliens.

It may be noted that ECHR was drafted long before the International Covenant on Human Rights. It contains only civil and political rights. Even in respect of civil and political rights there are certain rights which are contained in the International Covenant on Civil and Political Rights, such as, the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11), right of everyone to be recognized everywhere as a person before the law (Article 16), right of every child to acquire a nationality (Article 24), and prohibition of propaganda of war and any advocacy of national, racial or religious hatred that constitutes to discrimination, hostility or violence (Article 20) but these rights are conspicuous by their absence from the ECHR. In other words, the International Covenant on Civil and Political Rights is more exhaustive in the enumeration of civil and political rights than the ECHR.

European Court of Human Rights

Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereinafter referred as the European Convention) provides for the setting up of a European Court of Human Rights which shall function on a permanent basis. For coming into being of the Court the original Convention required at least eight States Parties must accept the jurisdiction of the Court. This requirement having being fulfilled in September, 1958, the Court was set up in January, 1959 but only the States accepting its jurisdiction could bring a case before the Court.

Composition of the Court.—The Court consists of a number of Judges equal to that of the contracting Parties.[1] The Judges shall be of a high moral character and must either possess the qualifications required for appointment to high judicial office or be juris consultants of recognised comptence. The Judges shall sit on the Court in their individual capacity.[2] The Judges shall be elected by the Parliamentary Assembly with respect to each State Party by a majority of votes cast from a list of three candidates nominated by the State Party.[3] The Judges shall be elected for a period of six years. However, the terms of office of one half of the Judges elected at the first election shall expire at the end of three years. The terms of the Judges shall expire when they reach the age of 70. The Judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.[4] No Judge may be dismissed from his office unless the other Judges decide by majority of two-thirds that he has ceased to fulfil the required conditions.[5]

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[1] Article 20 of the amended European Convention.

[2] Article 21.

[3] Article 22.

Currently there are 47 Member States of the Council of Europe. Therefore, there are 47 Judges of the Court—One from each Member State of the Council of Europe. Currently Dean Speimann is President of the European Court of Human Rights since 2012. His term expired in 2015. He was Judge of the Court since 2004.

Brief History and Structure of the Court.—The accession of new state to the European Court of Human Rights following the fall of Berlin in 1989 led to a sharp rise in the applications filed in the Court. Consequently, the efficiency of the Court was threatened seriously in the large number of pending applications. As a result of this applications were accumulating and thus were increasing steadily. Thus, in 1999, 8,400 applications were allocated to be heard. In 2003, 27,000 cases were filed and thereby the number of applications rose to approximately 65,000. In 2005 the Court opened 45,000 case filed. In 2009, 57,000 applications were allocated along with the number of pending applications which rose to 1,19,300.

At that time 90 per cent of them were declared to be inadmissible and the majority of cases decided around 60 per cent of the decision of the European Court of Human Rights related to repetitive cases wherein the Court had already delivered judgment finding a violation of the European Court of Human Rights and where the established case law already existed on a similar case. Protocol was designed to deal with the backlog of pending cases by establishing the Court and its Judges as a full time institution by simplifying the procedure and reducing the length of proceeding. However on the workload of the Court to increase the contracting states agreed that further reforms were necessary and in 2004 the Council of European Committee of Ministers adopted Protocol 14 to the European Convention on Human Rights.

Protocol 14 was drafted with the aim of reducing the workload of the Court and that of the Committee of Ministers of the Council of Europe which supervises the execution of judgments so that the Court could focus on the cases that raise important human rights issue.

Protocol 14 Reforms.—Protocol 14 entered into force on 1 June, 2010 three months after it was ratified by all 47 contracting states to the Convention. Between 2006 and 2012, Russia was the only country who refused to ratify Protocol. In 2010, Russia's opposition to Protocol 14 ended. It was because that Russia was able to procure the guarantee that Russian Judge would be involved in reviewing complaints against Russia.

Protocol 14 led to reform in three areas. First, the conflict filtering capacity was reinforced to deal with clearly inadmissible applications and new admissions. Criterion was introduced so that cases where the applicant has not suffered significant disadvantage would be decided inadmissible and measures were introduced to deal more effectively with repetitive cases.

Plenary Court.—The Pleanary Court shall :

(a) elect its President and one or two Vice-Presidents for a period of three years;
(b) set up Chambers, constituted for a fixed period of time;
(c) elect the Presidents of the Chambers of the Court, they may be re-elected;
(d) adopt the rules of the Court;
(e) elect the Registrars and one or more Deputy Registrars.[6]

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[4] Article 23.

[5] Article 24.

[6] Article 26.

Committees, Chambers and Grand Chamber

Committees.—To consider cases before it, the Court shall sit in Committees of three Judges, in Chambers of seven Judges and in Grand Chamber of seventeen Judges. The Court's Chambers shall set Committees for a fixed period of time.[7] They shall sit as an *ex officio* member of the Chamber and the Grand Chamber.[8]

A Committee, may, by a unanimous vote, declare inadmissible or strike out of its list cases of individual application submitted under Article 34 where such a decision can be taken without further examination. Such a decision shall be final.[9]

Chambers and their Powers.—If no decision is taken on the admissibility of individual application under Article 28 by the Committee, a Chamber shall decide on the admissibility and merits of *individual application* under Article 34. A Chamber shall also decide on the admissibility and merits of inter-State application submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.[10]

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question before it might have a result inconsistent with the judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.[11]

The judgment of a Chamber shall become final :

(a) When the parties declare that they will not request that the case be referred to the Grand Chamber; or

(b) Three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

(c) When the panel of the Grand Chamber rejects the request to refer under Article 43.

The final judgment shall be published.[12]

Grand Chamber and its powers.—The Grand Chamber consists of seventeen Judges.[13] The Grand Chamber shall also include the President of the Court, the Vice-Presidents, Presidents of the Chamber and other Judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no Judge from the Chamber which rendered the judgment shall sit in the Grand Chamber with the exception of the President of the Chamber and the Judge who sat in respect of the party concerned.[14]

Where a case pending before a Chamber raises a question affecting the interpretation of the Convention or the Protocols thereto or where resolution of a question might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered the judgment, relinquish jurisdiction in favour of the Grand Chamber unless one of the parties to the case objects.[15]

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[7] Article 27, Para 1.

[8] Article 27, Para 2.

[9] Article 28.

[10] Article 29.

[11] Article 30.

[12] Article 44; *see also* Article 42.

[13] Article 27 (1).

[14] Article 27 (3).

[15] Article 30.

As regards the powers of the Grand Chamber, Article 31 of the European Convention provides that it shall :

(a) determine applications submitted under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43. It may be noted here that Article 33 deals with "inter-State cases". Article 34 deals with "individual applications" and Article 43 provides that within a period of three months from the date of the judgment any party to the case may, in exceptional cases request that the case be referred to the Grand Chamber. A panel of five Judges of the Grand Chamber shall accept the request of the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance, if the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

(b) Consider requests for advisory opinions submitted under Article 47. The Grand Chamber renders advisory opinions at the request of the Committee of Ministers.

Jurisdiction of the European Court of Human Rights.—Article 32 of the European Convention provides that the jurisdiction of the Court shall extend to all matters concerning interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34 and 47.

In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Thus the European Court may have following three types of jurisdiction :

(1) Inter-State cases (Article 33).

(2) Individual application (Article 34).

(3) Advisory opinions (Article 47).

1. Inter-State cases.—The States Parties may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another State Parties.[16]

2. Individual Applications.—The Court may receive from any person, non-government organisation or group of individuals claiming to be the victim of violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of the right.[17]

It may, however, be noted that the Court may deal with the matter after all domestic remedies have been exhausted according to the generally recognized rules of international law and within a period of six months from the date on which the final decision was taken.[18]

Conditions or criteria for admissibility of individual application.—The Court shall not deal with any individual application submitted under Article 34 that :

(a) Is unanimous; or

(b) Is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant; new information;[19]

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[16] Article 33.

[17] Article 34.

[18] Article 35 (1).

[19] Article 35 (2).

(c) Further, the court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or Protocols thereto, manifestly ill-founded or an abuse of the right of application;[20]

(d) Lastly, the Court shall reject any application which it considers inadmissible under this Article (*i.e.*, Article 35). It may do so at any stage of proceedings.[21]

Just satisfaction.—If the Court finds that there has been a violation of the Convention or Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford the satisfaction to the injured party.[22]

Binding Force and Execution of Judgments.—Under Article 46 of the Convention, the High Contracting Parties have undertaken to abide by the final judgment of the Court in any case to which they are parties. Further, the final judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

3. Advisory opinions.—The third type of jurisdiction possessed by the Court is that of rendering advisory opinions. As noted above, Article 31 provides that the Grand Chamber shall consider requests for advisory opinions submitted under Article 47. Article 47, which deals with advisory opinions, provides that the Court may at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the convention and the Protocols thereto.[23]

Such opinions shall not deal with any question relating to the content or scope of the rights or freedom defined in Section 1 of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the consequence.[24] Further, decisions of the Committee of Ministers to request an advisory opinion shall require a majority vote of the representations entitled on the Committee.[25]

Article 48 provides that the Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49 of the European Convention provides that the Court shall give reasons for its advisory opinion. If the advisory opinions do not represent in whole or in part, the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate opinion. Further advisory opinion of the advisory opinions shall be communicated to the Committee of Ministers.

Comparison between old and present or new system of enforcement of rights set forth in the European Conventions.—The old system continued upto 31st October, 1998. In consequence of the amendment of the European Convention by Protocol XI, the new system started with effect from 1st November, 1998.

A perusal of the above discussion, makes it clear that while in the old system (*i.e.*, before 1st November, 1998) there were two main bodies :

(i) Commission; and

(ii) The Court for the enforcement of rights set forth in the European Convention, in the present system, the Court is the only body to enforce rights set forth in the Convention. A pertinent question arises as to whether the present system has become weaker? The answer is obviously in the negative. No doubt the Commission had become very popular and had received a large number of applications whereas a very few cases had gone to the Court. But the Commission had its own limitations. It had no power to give binding decisions. It could only give its recommendations but its recommendation were not binding.

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[20] Article 35 (3).

[21] Article 35 (4).

[22] Article 41.

[23] Article 47, Para 1.

[24] Article 47, Para 2.

[25] Article 47, Para 3.

On the other hand amendment of the Convention by Protocol XI has enlarged the powers of the Court. Under Article 46 the States Parties to the European Convention have undertaken to abide by the final judgment of the Court in any case to which they are parties. Moreover, it is provided that the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. The jurisdiction of the Court after the said amendment has become very wide. It has both contentious as well as advisory jurisdiction. Under contentious jurisdiction it has power to consider (i) inter-State cases, as well as, (ii) individual application. Besides this, the Court has power to render advisory opinions at the request of Committee of Ministers. Under the old system, after a case was decided by the Commission, it could still go to the Court under certain conditions. Under the present systems, State Parties, individuals, non-governmental organizations or group of individuals can directly go to the Court and it need not be over-emphasized again that the final judgment of the Court is binding on the Parties to the case. Thus the present system of enforcement of human rights and fundamental freedom set-forth in the European Convention is much more effective and expeditious.

Some Important cases decided by the European Court of Human Rights

1. Lawless v. Ireland.[26] —This was the first case decided by the European Court of Human Rights. Its judgment was delivered on 14th November, 1960. In this case, the Court applied Article 15 of the European Convention which is relating to derogation from the obligations under the Convention on the ground of public emergency threatening the life of the nation.

2. Brogan v. United Kingdom.[27]—In this case, the Court applied Article 5 (3) of the European Convention on Human Rights (ECHR) which provides "Every one arrested or detained in accordance with the provisions of paragraph (1) (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial..." The Court held that there was a breach of Article 5 (3).

3. Handyside v. United Kingdom.[28]—This case was relating to right of freedom of expression contained in Article 10 of ECHR. In this case seizure of the book of Handyside his conviction and fine were held to be justified under Article 10 (2) on the ground of "protection of morals".

4. Lingens v. Austria.[29]—This case is also relating to Article 10 of the ECHR. This case was relating to an article published in a Magazine containing words such as 'basest opportunism' and 'immoral' about the Federal Chancellor of Austria. Considering all the aspects of the case and the backgrounds in which the said words were written the Court held that interference with Mr. Lingens exercise of freedom of expression was unjustified. The Court also awarded in favour of the applicant just satisfaction of 284,538,60 shillings under Article 50 of the Convention.

5. Soeuring v. United Kingdom.[30]—This case related to Article 3 of ECHR which prohibits 'extradition which may lead to death phenomenon' Soeuring a German national was charged of a murder in the State of Virginia. He fled away to U.K. his extradition was sought by the U.S. Soeuring resisted his extradition under Article 3 of the Convention. The Court upheld the plea of Soeuring.

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[26] (1961) ECHR Ser. A. Vol, 3.

[27] (1988) HECHR 117.

[28] (1968) ECHR Ser. A, Vol. 24.

[29] (1986) 8 ECHR 407.

[30] (1989) 11 ECHR 439.

6. *Ireland v. United Kingdom.*[31]—This case is also relating to Article 3 of ECHR which deals with freedom from torture and inhuman or degrading treatment. In this case the Court held that the techniques applied amount to a practice of inhuman and degrading treatment constituting a breach of Article 3.

7. *Wemhoff v. Federal Republic of Germany.*[32]—This case related to the liberty of the person and involved the interpretation of Article 5 (3) and Article 6(1) of ECHR.

8. *Golder v. United Kingdom.*[33]—This case related to right of fair trial in Article 6 (1) and right of correspondent in Article 8 of ECHR on the basis of facts of the case, the Court held that there had been a breach of Article 6 (1) as well as a breach of Article of ECHR.

9. *Sunday Times v. United Kingdom.*[34]—This case is relating to Article 10 of the ECHR which deals with freedom of Expression on the basis of facts of the case, the Court held that the restraint imposed was not justified under Article 10 (2).

10. *Paton Case.*[35]—In 1980, the Court ruled out the foetal rights to sue the mother carrying the foetus. In *Paton* v. *U.K.*, it was held that the life of foetus is intimately connected with and cannot be regarded in isolation from the life of the pregnant woman.

11. *Batasuna and Herri Batasuna v. Spain.*—In June, 2009, the Court supported the illegalization of the Basque party Batasuna (formerly Herri Batasuna) on the basis that the activity was the part of the terrorist group ETA, stating that the illegalization by Spain could be justified as necessary in a democratic society in the pursuit of the legitimate aim of preventing terrorism.

12. *Rafah partisi v. Turkey.*—In this case the Court upheld the Turkish Constitutional Court's dissolution of the Welfare Party (Rafah partisi) for violating the Turkey principle of secularism (by calling for the re-introduction of religious law). The Court held that "Sharia is incompatible with the fundamental principle of democracy". The Court justified the breach of the appellant's rights by reasoning that a legal regime based on Sharia would diverse from the convention's values, "particularly with regard to criminal law and criminal procedure, its rules and the status of a woman and the way it intervenes in all sphere of private life in accordance with religious precepts".

13. *Chechnya cases.*—Since Russian military invaded Chechnya for the second time in 1999, the Court heard cases of human rights abuse brought forward by Chechnya civilians against Russia in the course of the second Chechnya with 104 rulings to date as of April, 2009 including cases of torture and extra-judicial executions. In 2007, the Court ruled that Russia was responsible for the killing of human rights activists Zura Bityeva and her family. Bityeva herself had filed a complaint against Moscow with the Court in 2000 for abuse while intention the then second case from Chechnya but she was murdered in 2003 before the ruling was issued. Other cases which ruled against Russia included the death (or presumed deaths after years of forced disappearance of Russia) of Russian Alikhadahyer Shakil Bays a yar, Nurce, Litenvena and Khandzhi—Murat Yand lyer. The case of the indiscriminate bombing of Katyer and some of the deaths during the Novye, Dldi massacre. As of 2009 the Court has been flooded by complaint from Chechnya, what the Human Rights Watch called the last hope for the victims.

14. *Appleby v. U.K.*—This case of 2003 involved balancing of the rights of freedom of speech against the rights of property owners. The issue involved in this case was whether

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[31] (1978) ECHR Ser. A, Vol. 25.

[32] (1968) ECHR Ser. A. Vol. 8.

[33] (1975) ECHR Ser. A, Vol. 18.

[34] (1979) ECHR Ser A, Vol. 30.

[35] *Paton* v. *U.K.*, 981 HHR 408 at para 22.

shopping centre in new towns, by assuming the function of traditional high streets must also assume the responsibility of serving as a public forum. The Court considered but declined to follow the decision of the Supreme Court of California in the landmark case of *Robins* v. *Pruneyard Shopping Centre* [affirmed by the U.S. Supreme Court in *Pruneyard Shopping Centre* v. *Robins*, (1980)].

15. A and others v. U.K. (19th February, 2009).—In this case, the applicant complained that they were detained in high security conditions under a statutory scheme which permitted the indefinite detention of non-nationals certified by the Secretary of State as suspected of involvement in terrorism. The applicants were 11 (eleven), six of Algerian nationality, four respectively of French, Jordanian, Murrocan and Tunisian nationality and one born in Palestinian refugee camp in Jordan, and thus stateless. The Court made awards under Article 41 of the European Convention of Human Rights (just satisfaction) which were substantially lower than those which it had made in past cases of unlawful detention. In view of the fact that the detention scheme was devised in the face of public emergency and as an attempt to reconcile the need to protect the U.K. public against terrorism with the obligation not to send the applicant back to countries where they faced a real risk of ill-treatment. The Court, therefore, awarded Euro 3400, Euro 3900, Eur 3800, Euro 3400, Euro 2500 and Euro 1700 respectively, to the stateless and Tunisian applicant Euro 3900 each and to the Jordanian applicant Euro 2800. The applicants were jointly awarded Euro 60,000 for legal costs. On 19 February, 2009 the grand chamber of the Court held unanimously that there had been a violation of right to life and liberty and security, a violation of a right to have lawfulness of detention decided by a Court, and a violation of a right to be compensated for such violation.

16. Decisions on Religious Symbols and Clothing.—These cases relate to the rulings of the Court in favour of abstention of symbols and clothing as religious signs. In *Leyla Sahin* v. *Turkey*, where adult women were refused entrance into lectures and examination rooms if they wore a headscarf, the Court ruled in favour of the ban on the argument that it was based on the principle of secularism and equality.

In 2001, in case of *Dahlab* v. *Switzerland*, the Court upheld the Government's right to require a teacher, who had recently converted to Islam, to remove her headscarf given that it was a "powerful external symbol that could influence" young children.

In November and December, 2009, the European Court considered in *Dogru* v. *France* and *Kevance* v. *France*, both cases of 12 years old Muslim girl who were expelled in 1999 for covering their head during physical education class. The European Court held that there was no violation of the right to religious saying that *i.e.* girls had made an "ostentatious" display.

In *Mann Singh* v. *France* where a Sikh who had held driving licenses for 20 years with his pictures showing him wearing a turban now had to remove his turban to continue to do so. The European Court rejected the case without a hearing.

In *Lautsi* v. *Italy*, the Court held unanimously in 2009 that crucifixes in Italian public schools classes are contrary to parent's right to educate their children in line with their convictions and to children's right to freedom of religion (Article 2 of 1st Protocol, and Article 9 of the Convention). The Court ruled, "the presence of crucifix, which it was impossible not to notice in the classroom could easily be interpreted by pupils of all ages as a religious sign and they would feel that they were being educated in a school environment bearing a stamp of a given religion.

In addition to the above cases, the European Court of Human Rights has decided several other cases. For example, in *Young James and Welister*, (1981), where railway employees were dismissed from service because they refused to become members in a professional union under a new system. The European Court ruled that dismissal of railway employee was violation of Article 11 (1) of the European Convention on Human Rights. In another case, namely *Dudgeion* (1981), the European Court held that the law of North Ireland under which relation between homosexuals was declared a crime, was a violation of Article 8 of the European Convention on Human Rights. Similarly, *Malone*

(1984) relating to privacy of communication through letter or telephone; *Gullow* (1986) regarding right to respect for home of an individual; *H.V. Belgium* (1987) concerning right to just and public hearing; *Bozano* (1987) relating to right not to be illegally detained and expelled; *Barrehle* (1988) relating to respect for families of foreigners living in the country etc. have been decided by the European Court of Human Rights. The decisions in these cases have resulted in the development of a law which can aptly be described as the law of human rights of the European Court of Human Rights.

II. European Social Charter, 1961

As noted and seen earlier, the European Convention for the Protection of Human Rights and Fundamental Rights is concerned only with civil and political rights. Therefore, after its adoption and coming into force, the Council of Europe turned its attention to the protection of economic and social rights. The European Social Charter was, therefore, signed and adopted in October, 1961 and came into force on February 26, 1965.

Economic and Social Rights

Part I of the European Social Charter contains the following rights and principles :

1. Everyone shall have the opportunity to earn his living in an occupation freely entered upon.
2. All workers have the right to just conditions of work.
3. All workers have the right to safe and healthy working conditions.
4. All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.
5. All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interest.
6. All workers and employers have the right to bargain collectively.
7. Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.
8. Employed women, in case of maternity, and other employed women as appropriate, have the right to a special protection in their work.
9. Everyone has the right to appropriate facilities for vocational guidance with a view to helping him choose an occupation suited to his personal aptitude and interests.
10. Everyone has the right to appropriate facilities for vocational trading.
11. Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.
12. All workers and their dependants have the right to social security.
13. Anyone without adequate resources has the right to social and medical assistance.
14. Everyone has the right to benefit from social welfare services.
15. Disabled persons have the right to vocational training, rehabilitation and resettlement, whatever the origin and nature of their disability.
16. The family as a fundamental unit of society has the right to appropriate social, legal and economic, protection to ensure its full development.
17. Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.
18. The nationals of any one of the Contracting Parties have the right to engage in any gainful occupation in the territory of anyone of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons.

19. Members who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party.

The Contracting Parties have accepted as the aims of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the above rights and principles may effectively be released. Thus the nature of binding obligation taken by the Contracting Parties is vague and weak. Instead of directly accepting the above rights as binding, they have simply accepted the obligation of attainment of conditions in which the above rights may effectively be realized.

It may be noted that European Social Charter contains only social and economic rights. It does not contain any cultural rights. Thus as compared to International Covenant on Economic, Social and Cultural Rights, it is deficient in that respect. Secondly, it does not incorporate some social and economic rights which find mention in the International Covenant. For example, it does not contain the right of self-determination of peoples by virtue of which they may freely determine their political status and freely pursue their economic, social and cultural development. Similarly the European Social Charter is conspicuous for the absence equal right of men and women to the enjoyment of all economic, social and cultural rights, right of everyone to education, social insurance (though it talks of social security) etc.

However, Part II of the European Social Charter provides certain rights which the Contracting Parties undertake as provided for in Part III, to consider themselves bound by the obligations laid down therein. The first of these rights is the right to work contained in Article of Part II of the Charter. Article 1 provides that with a view to ensuring the effective exercise of the right to work, the contracting parties undertake :

1. to accept as one of the primary aim and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance training and rehabilitation.

Other rights are right to organize;[36] right to bargain collectively;[37] right to social security;[38] right to social and medical assistance;[39] right of family to social, legal and economic protection;[40] right of migrant workers and their families to protection and assistance.[41]

The above seven articles of the charter are fundamental in the sense that the parties have undertaken to be bound by at least five of them and to implement them fully and promptly. In addition to these rights the parties are required to select from the 12 further articles a certain number of either full articles or separate paragraphs, so that the party is bound by not less than 10 articles or 45 numbered paragraphs.

As in the European Convention for the Protection of Human Rights and Fundamental Freedoms, European Social Charter also permits derogation of the obligation under the Convention in time of war or other public emergency which threats the life of the nation.

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[36] Article 5.

[37] Article 6.

[38] Article 12.

[39] Article 13.

[40] Article 16.

[41] Article 19.

Derogation is permissible only to extent strictly required by the exigencies of the solution. This is however, subject to the condition that the measures taken in derogation are not inconsistent with its other obligations under international law. Besides this, the party availing the right of derogation is required to keep the Secretary-General of the Council of Europe fully informed of the measures taken by it and also stating the reasons thereof. When the measures have ceased to operate the party concerned shall inform the Secretary-General. The Secretary-General on his part shall inform other Contracting Parties and the Director-General of the International Labour Office of all the said communications received by him.[42]

Implementation of the Charter.—The enforcement scheme of the Charter is different and much weaker than that of the European Convention. It is more general and less effective. It constitutes of a Reporting Procedure. The Charter provides for the establishment of a Committee of Experts for examining the reports submitted by the State Parties. The States Parties have to submit a biennial report to the Secretary-General of the Council of Europe containing the measures they have taken to implement the rights accepted by them.[43] Copies of such report are also transmitted to those national organisations who are members of the International Organisation of Employers and Trade Unions. Comments on the said reports received from the National Organisations are then forwarded by the Contracting Parties to the Secretary-General.[44]

These reports and comments are then examined by the Committee of Experts.[45] The Committee of Experts comprises of not more than seven members who are appointed by the Committee of Ministers from a list of independent experts who are required to be persons of the highest integrity and recognized competence in international social questions. The persons of the said list are nominated by the Contracting Parties.[46] International Labour Organisation is requested to send one representative to participate in a consultative capacity in the deliberation of the Committee of Experts.[47] After the deliberations are complete and conclusions are reached, these conclusions alongwith the reports of the Contracting Parties are transmitted to a Sub-Committee of the Governmental Social Committee of the Council of Europe. The Sub-Committee consists of one representative of each of the Contracting Parties and National Organisations of Employers and International Trade Organisation.[48] The Sub-Committee after examining the said conclusions and reports of the Contracting Parties submits a report containing its conclusions to the Committee of Ministers.[49] The Committee of Ministers after consulting with the Consultative Assembly makes its recommendations to the Contracting Parties.[50]

As noted earlier, the implementation or enforcement scheme of the European Social Charter is weaker and less effective than that of the European Convention. However, both the European Convention and European Social Charter depend on the Council of Europe and especially its executive organ, the Committee of Ministers for the implementation.

III. European Convention for Prevention of torture and inhuman or degrading treatment or punishment (1987)

Article 5 of the Universal Declaration of Human Rights provided :

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

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[42] Article 30.

[43] Article 21.

[44] Article 23.

[45] Article 24.

[46] Article 25.

[47] Article 26.

[48] Article 27.

[49] Article 27.

[50] Article 29.

In order to implement the above provision, European countries adopted European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987). It was signed at Strasbourg on 26 November, 1987. The main provision of this convention are following :

(1) European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.—Article 1 of the convention provides for the establishment of a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary the protection of such persons from torture and from inhuman or degrading treatment or punishment.

(2) State Parties to Permit Visits of Committee.—According to Article 2, each party shall permit visits, in accordance with this convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority.

(3) Cooperation between Committee and National Authorities.—In the application of this convention, the committee and the competent national authorities of the party concerned shall cooperate with each other. (Article 3)

(4) Constitution of Committee.—The Committee consists of a number of members equal to that of Parties. The members shall serve in their individual capacity, shall be independent and impartial, and shall be available to serve the committee effectively. (Article 4)

(5) Visits of the Committee.—The Committee shall organise visits to places referred to in Article 2. Apart from periodic visits, the committee may organise such other visits as appear to it to be required in the circumstances.

(6) Competent authorities of party concerned to make representation to the committee in exceptional circumstances.—In exceptional circumstances, the competent authorities of the party concerned may make representation to the committee against a visit at the time or to the particular place proposed by the committee. Such representation may only be made on grounds of national defence, public safety, serious disorders in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to serious crime is in progress. (Article 9)

(7) Committee to draw a Report.—After each visit, the committee shall draw a report on the facts found during the visit. It shall transmit to the latter its report containing any recommendations it considers necessary. The Committee may consult with the Party with a view to suggesting if necessary, improvements in the protection of persons deprived of their liberty.

(8) Information to be gathered to be confidential.—The information gathered by the committee in relation to a visit, its report and its consultations with the party concerned shall be confidential. (Article 11)

(9) Committee to Submit Annual general report to the Committee of Ministers.—Subject to the rules of confidentiality in Article 11, the committee shall, every year, submit to the Committee of Ministers a general report on its activities which shall be transmitted to the Consultative Committee and made public. (Article 12)

Subsequently, two Protocols to the above convention were also adopted.

IV. First protocol to the european convention for the prevention of torture and inhuman or degrading treatment or punishment :

By Article 1 of the First Protocol (1993), a sub-paragraph shall be added to Article 5, paragraph 1, of the Convention as follows :

"Where a member to be elected to the committee in respect of a non-member State of the Council of Europe, the Bureau of the Consultative Assembly shall invite the Parliament of that State to put forward three candidates of whom two at least shall be its nationals. The election by the Committee of Ministers shall take place after consultation with the party concerned."

Article 2 of the First Protocol provided that Article 12 of the convention shall read as follows :

"Subject to the rules of confidentiality in Article 11, the Committee shall every year submit to the Committee of Ministers a general report on the activities which shall be transmitted to the Consultative Assembly and to any non-member State of the Council of Europe which is a party to the convention, and made public."

Further, Article 3 of the First Protocol provided :

"1. The text of Article 18 of the Convention shall become paragraph 1 of that article and shall be supplemented by the following second paragraph :

2. The Committee of Ministers of the Council of Europe may invite any member State of the Council of Europe to accede to the Convention."

V. Second protocol to european convention for the prevention of torture and inhuman or degrading Treatment or punishment (1993)

Article 1 of the Second Protocol provides that in Article 5, paragraph 3 the second sentence shall read as follows :

"They may be re-elected twice."

Further, Article 5 of the Convention, shall be supplemented by the following paragraphs 4 and 5 :

"4. In order to ensure that, as far as possible, one half of the membership of the Committee shall be renewed every two years, the Committee of Ministers may decide before proceeding to any subsequent election that the term or terms of office of one or more members to be elected shall be for a period other than four years but not more than six and not less than two years.

5. In cases more than one term of office is involved and the Committee of Ministers applies the preceding paragraph, the allocation of terms of office shall be effected by the drawing of lots by the Secretary-General, immediately after the election."

VI. American Convention on Human Rights, 1969

Background.—The Bogota Charter of the Organisation of American States (OAS), the American Counterpart of the Council of Europe, was adopted by the ninth Inter-American Conference in 1948. Besides establishing new institutions of the OAS, the 1948 Bogota Conference also adopted the American Declaration on the Rights and Duties of Man. It is significant to note that this Declaration was adopted seven months before the adoption of the Universal Declaration of Human Rights. The main difference between the American Declaration and the Universal Declaration is that while the latter contains only rights, the former also contains articles on duties of man. In the American Declaration, while twenty eight articles proclaim the rights of man, eight articles deal with the duties of man. As against this, of 30 Articles of the Universal Declaration, only one article, namely, Article 29 deals with duties of man. The preamble of the resolution which embodied the American Declaration stated that the affirmation of the essential human rights formed the initial system of protection "suited to the present social and juridical conditions". It also recognized the need to strengthen that system in the international field as conditions become more favourable.

The Bogota Conference which adopted the American Declaration of the Rights and Duties of Man also requested the Inter-American Juridical Committee to prepare Statute for an American Court to guarantee the rights of man. But the Committee instead of preparing the draft statute recommended to the Juridical Council of the OAS that before purporting the draft statute a convention on human rights should be adopted because that would involve a radical transformation of the constitutional system of American Countries.

Therefore, the Tenth Conference of the American States simply advised the Juridical Council of the OAS to continue its studies on the jurisdictional aspects of the protection of human rights with a view to analyse the possibility of the establishment of an Inter-American Court of Human Rights.

Five years after the Tenth Conference of the American States the meeting of the Consultation of the Foreign Ministers decided that keeping in view the progress achieved at the United Nations, and in Europe in respect of the international protection of human rights, action in this field should also be initiated by American State with this objective in view the meeting of the consultation of the Foreign Ministers established an Inter-American Commission on human rights and requested the juridical Council to prepare draft convention on Human Rights and a Statute of the Court of Human Rights. The Juridical Council accordingly prepared the draft convention on human rights.

This draft was considered at the Second Special Inter-American Conference in Rio de Janeiro in 1965. Two other drafts—the one submitted by Chile and other by Uruguay—were also considered. The Conference referred these drafts to the Council of the OAS so that an acceptable draft could be evolved after hearing the view of the Inter-Commission of Human Rights. Meanwhile another important development took place for the Inter-American Commission on Human Rights was empowered to receive and consider individual complaints of violation of certain basic human rights such as, right to life and liberty, freedom of expression, right to a fair trial, equality, before law and freedom from religion.

The Commission on Human Rights was formally recognized as a statutory organ of the OAS in the Third Special Inter-American Conference held at Bunes Aires in 1967. By 1968, the Commission has prepared a draft 'convention on human rights'. To adopt this convention, a Special Conference on Human Rights was called at San Jose, Costa Rica. on 22nd November, 1969, the Conference finally adopted the American Convention on Human Rights. The Convention came into force on July 11, 1978. Out of 32 members of the OAS, the Convention has been ratified by 21 member States. But these 21 States do not include the United States. According to the Preamble of the Convention the essential rights of man are based upon the attributes of human personality, are not upon one's being a national of a certain State and therefore they justify international protection in the form of a convention which should reinforce and complement the protection provided by the domestic law of the American States. Like the European Convention on Human Rights, the American Convention incorporates only civil and political rights.

Right Recognized under the Convention.—The American Convention on Human Rights, 1969, guarantees the following civil and political rights :

(1) the right to juridical personality;[51]
(2) the right to life;[52]
(3) the right to humane treatment;[53]
(4) freedom from slavery and involuntary servitude;[54]
(5) right to personal liberty;[55]
(6) right to a fair trial;[56]
(7) freedom from *ex post facto* laws;[57]
(8) the right to compensation for miscarriage of justice;[58]

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[51] Article 3.
[52] Article 4.
[53] Article 5.
[54] Article 6.
[55] Article 7.
[56] Article 8.
[57] Article 9.
[58] Article 10.

(9) the right to privacy;[59]
(10) freedom of conscience and religion;[60]
(11) freedom of thought and expression;[61]
(12) the right of reply;[62]
(13) the right of assembly;[63]
(14) freedom of association;[64]
(15) right of family;[65]
(16) the right to name;[66]
(17) rights of the child;[67]
(18) the right to nationality;[68]
(19) the right to property;[69]
(20) freedom of movement and residence;[70]
(21) right to participate in government;[71]
(22) the right of equal protection before law;[72] and
(23) the right of judicial protection.[73]

Like the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention also contain a non-discrimination provision by guaranteeing the free and full exercise of the rights and freedoms recognized in the Convention without any discrimination on grounds of race, colour, sex, religion, political or other opinion, national or social origin, economic status, births or any other social condition. Yet another similarity with its European Counterpart is that under the American Convention also the State parties have undertaken to achieve progressively the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the charter of the Organization of American States. Besides this like the European Counterpart, the American Convention also permits the State parties to suspend rights and freedoms in time of war, public or other emergency that threatens the independence and security of a State Party. During the period of such an emergency the State Party may thus avail the right of derogating from the obligations under the Convention. But this is subject to the condition that the measures taken in derogation must not be inconsistent with other obligations under international law and that no discrimination is made on the ground of race, colour, sex, language, religion or social origin. Moreover, the State availing the right of derogation from the obligations under the Convention is not permitted to suspend certain specified rights and freedoms, namely, right to juridical personality (Article 3); right to life (Article 4); freedom from torture (Article 5); freedom from slavery (Article 6); freedom from *ex post facto* laws (Article 9);

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[59] Article 11.
[60] Article 12.
[61] Article 13.
[62] Article 14.
[63] Article 15.
[64] Article 16.
[65] Article 17.
[66] Article 18.
[67] Article 19.
[68] Article 20.
[69] Article 21.
[70] Article 22.
[71] Article 23.
[72] Article 24.
[73] Article 25.

rights of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); right to nationality (Article 20); and right to participate in government (Article 23). In other words, these rights are regarded so fundamental that no derogation is permissible in respect of these rights. Lastly, a State Party which avails the right of derogation is required to inform immediately the other State Parties through the Secretary-General of the OAS, of the provisions it has suspended and application thereof and the date fixed for termination of such suspension.[74]

Implementation of the Convention.—The American Convention on Human Rights, 1969, provides for two specialized enforcement mechanism—(i) Inter-American Commission of Human Rights; and (ii) Inter-American Court of Human Rights.

(i) Inter-American Commission of Human Rights.—The Commission is head quartered at the OAS in Washington, D.C. The Commission consists of seven members who are persons of high moral character and recognized competence in the field of human rights.[75] They are elected by the General Assembly of the OAS from a list of candidates nominated by the Governments of the member-States. They serve in their individual capacity and not as the representatives of their member-States.[76]

The main functions of the Commission are to promote respect for observance of human rights. The functions of the Commission include : developing on awareness of human rights among the peoples of State Parties; receiving and considering petitions and other communications and to submit annual report to the General Assembly of the OAS, requesting the government of the member States to furnish measures adopted by them to give effect to the Convention rendering of advisory opinions making recommendations to the governments of member States to adopt progressive measures of human rights in their domestic law and constitutional provisions and also to take appropriate measures to ensure observance of human rights and preparing studies and reports.[77]

The Commission may receive petitions from any person or group of persons, or any non-governmental entity recognized in member States containing denunciations or complaints of violation of the Convention. It may also receive a complaint from a State party alleging that another State Party has committed a violation of human rights set out in the Convention. But such a procedure is optional. This is subject to the condition that a State Party which alleges that another State Party is violating human rights recognized under the Convention must have made a declaration recognizing the competence of the Commission to receive such complaints and the State Party against which complaint is made must have also made a similar declaration.[78] Moreover, a complaint is considered to be admissible only if it fulfils certain further conditions. In the first place, before making the complaint domestic remedies must have been exhausted. Secondly, the complaint must have been made within six months of the date of the alleged violation was noticed or final judgment. Thirdly, a petition on the same subject must not have been pending before any other international procedure for settlement.[79] Fourthly, the complaint or communication must not be anonymous or written in offensive language. Fifthly, it must not be the same complaint which was previously studied by the Commission. Sixthly and lastly, it must not be incompatible with the provisions of the Statute, the Regulations are obviously unfounded or referring to events or situation having no bearing to a violation or disregard of human rights by the Government against which it is made.[80]

After a petition is received, the Commission may request the government concerned, *i.e.* state against which complaint is made, to furnish information within a reasonable period. After the receipt of the information the Commission considers the complaint to take a decision as to whether grounds for the complaint exist. If it decides in negative, the matter is closed. In case, however, the decision is in affirmative, the Commission proceeds to examine the matter so as to verify the facts. For this purpose, the Commission may conduct an investigation and may also ask the States concerned to furnish all requisite facilities.[81]

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[74] Article 27.

[75] Article 34.

[76] Article 36.

[77] Article 41.

[78] Article 45

[79] Article 46.

[80] Article 47.

The main object of the Commission is to secure a friendly settlement. If a friendly settlement is made the Commission draws up a brief statement of the facts and the solution arrived at.[82] In case such a friendly settlement is not made, the Commission draws up a report containing the facts and its conclusions.[83] Then the report is transmitted to the States concerned. If within three months from the date of the transmission of the said report the matter is not settled or is not submitted to the Court either by the Commission or the States concerned, the Commission may, by votes of an absolute majority of its member draw up a report setting forth its opinion and conclusions on the question submitted for its consideration.[84] The Commission may also make recommendations to the State Party to take measures to remedy the situation within a prescribed period. The matter does not end here. After the expiry of said prescribed period, the Commission takes a decision, by the votes of an absolute majority of its members, as to whether the State concerned has taken adequate measures to remedy the situation.[85]

A persual of the above discussion shows that the Inter-American Commission on Human Rights performs two main functions : (i) the general educative function, *i.e.*, to develop an awareness of human rights among the peoples of America; and (ii) the administrative-cum-judicial functions, namely, to make recommendations to the governments of Member States, to prepare studies and reports, making requesting governments to furnish information, rendering advisory services, considering and deciding individual petitions and to submit annual reports to the General Assembly.[86]

(ii) Inter-American Court of Human Rights.—Like the European Court of Human Rights the Inter-American Court of Human Rights is not accessible to individuals. Again, like its European counterpart, the Inter-American Court is accessible only to the Inter-American Commission and to those State Parties who have expressly recognized its jurisdiction. The Inter-American Court consists of seven judges who are jurists of the highest moral authority of recognized competence in the field of human rights and are qualified for the appointment to the highest judicial office of the State. They ought to be nationals of the member States of the OAS and are elected in their individual capacity.[87] But no two judges can be the nationals of the same State. They are elected for a period of six years and can be re-elected only once.[88] The quorum of the Court is five judges.[89] The Commission has to appear in all cases brought before the Court.[90]

Contentious Jurisdiction.—The Court has two types of jurisdiction—(i) contentious and (ii) advisory. The contentious jurisdiction is optional. For availing this jurisdiction of the Court a State Party while ratifying or adhering to the Convention has to make a declaration recognizing as binding the jurisdiction of the Court on all matters concerning the interpretation or application of the Convention.[91] The powers of the Court are much wider than its European Counterpart. Cases before the Court may result in order for compensatory damages, permanent or temporary injunctive relief or both. If the Court arrives at a decision that there has been a violation of the rights or freedoms recognized by the Convention, it can order that the injured party be ensured the enjoyment of his right or freedom that was violated and in appropriate cases can order that violation of such right or freedom be remedied and fair compensation be given to the injured party.[92]

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[81] Article 48.

[82] Article 49.

[83] Article 50.

[84] Article 51.

[85] Article 51.

[86] *See* also V.S. Mani, "Regional Approaches to the Implementation of Human Rights", IJIL, Vol. 21, No. 1 (1981), p. 96 at p. 105.

[87] Article 52.

[88] Article 54.

[89] Article 56.

[90] Article 57.

The State parties have undertaken to comply with the judgment of the Court in any case to which they are parties.[93] The judgment of the Court is "final and not subject to appeal".[94] However, the Court lacks the power to enforce its judgments and preliminary rulings and has to rely mainly on the OAS General Assembly. The Court may submit annual report to the General Assembly of the OAS specifying the particular cases in which its judgments have not been complied with by State Parties and may make its recommendations.[95] The Court has so far decided only a few cases.

In *Velasquez Rodriguez* Case.[96]—Regarding the detention and disappearance of a Honduran student the Court decided that the Honduran Government was responsible for violation of Articles 4, 5 and 7 of the Convention and therefore Honduras was liable to pay compensation to the student's family.

Some of the main cases decided by Inter-American Court of Human Rights are :

(1) Barrios Altos Massacre case,
(2) El Caraca Zu (Venezuela),
(3) Lev Berenson (Peru),
(4) The Last Temptation of Christ (Chile),
(5) Mapiripan Massacre (Colombia),
(6) Community of Moiwana (Suriname),
(7) Myna Mack Chang (Guatemala),
(8) La Nacion (Costa Rica),
(9) Plan de Sanchez massacre (Guatemala).

Advisory Jurisdiction.—Inter-American• Court of Human Rights possesses advisory jurisdiction also. Member States of the OAS or certain Inter-American organs including the Commission may consult the Court with regard to the interpretation of the Convention or other treaties relating to protection of human rights in the American States. At the request of any such State the Court may give advisory opinion regarding the compatibility of its domestic laws with such international instruments.[97] Though the Court decided only a few contentious cases, it has given some advisory opinions. It has given some important advisory opinions having important bearing upon the interpretation of the Convention. For example, in its advisory opinion on Effect of Reservations on Entry into Force of the American Convention,[98] the Inter-American Court was requested to give its advisory opinion on the question : "From what moment is a State deemed to have become a party to the American Convention on Human Rights when it ratified or adheres to the Convention with one or more reservations : from the date of the deposit of instrument of ratification or adherence or upon the termination of the period specified in Article 20 of the

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[91] Article 62.

[92] Article 53.

[93] Article 66.

[94] Article 67

[95] Article 65.

[96] (1989) 28 ILM 291.

[97] Article 64.

[98] (1982) 67 ILR 559.

Vienna Convention on the Law of Treaties?" While giving its advisory opinion the Court emphasized that modern rights treaties in general, and the American Convention in particular are not multilateral treaties of the traditional type concluded to accomplish exchange of rights for the benefit of the contracting parties. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the *States can be deemed to submit themselves to a legal order which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.*

The Court further emphasized that the Convention, unlike other international human right treaties, including the European Convention, confers on private parties the right to file a petition with the Commission against any State as soon as it has ratified the Convention (Article 44 of the Convention). By contrast, before one State may institute proceedings against another State, each of them must have accepted the Commission's Jurisdiction to deal with inter-State communications (Article 45). This *structure indicates the overriding importance the Convention attaches to the commitments of State Parties,* vis-a-vis *individuals which can be readily implemented without intervention of any other State.*

In view of the above observations, the Court concluded that viewed in this light and considering that the Convention was designed to protect the basic rights of individual human beings irrespective of their nationality, against States of their own nationality or any other State Party, the *Convention must be seen for what in reality it is a multilateral legal instrument of framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.* The Court finally held unanimously that "the Convention enters into force for a State which relieves or adheres to it with or without reservation on the date of the deposit of its instrument of ratification or adherence".

Advisory Opinion Relating to Interpretation of Right to Life.—In its advisory opinion on *Restrictions to the Death Penalty,*[99] the Inter-American Court of Human Rights was requested by the Inter-American Commission to interpret Article 4 (right to life) of the Convention invoking Article 64 (1) thereof. While rendering an advisory opinion, the Court made certain observations about the advisory jurisdiction conferred on the Court by the American Convention. The Court observed that the advisory jurisdiction conferred on the Court by Article 64 of the Convention *is unique in contemporary international law. Neither the International Court of Justice nor the European Court of Human Rights has been granted as extensive advisory jurisdiction which the Convention confers on the Inter American Court. The Court emphasized that the Convention, by permitting Member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 and offers an alternative judicial method of a consultative nature, which is designed to assist States and organs to comply with and apply human rights treaties without subjecting them to the formalism and sanctions associated with the contentions of judicial process. It would therefore be inconsistent with the object and purpose of the Convention and the relevant individual provisions, to adopt an interpretation of Article 64 that would apply to the jurisdictional requirements* of Article 62 and thus role it of its intended utility merely because of the possible existence of a dispute regarding the meaning of the provisions at issue in the request.

VII. Additional protocol to the american convention on human rights in the area of economic, social and cultural rights or "protocol of San Salvador" (1988)

According to American Convention on Human Rights (1969), any State Party or Commission may propose a Protocol in the General Assembly for the consideration of State Parties so as to include it slowly and gradually other rights and freedoms in the system. In the preamble of this Additional Protocol, State Parties reaffirm their intention to consolidate in the American hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man. The State Parties to the Additional Protocol recognized that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of human person, for which they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of American States. Further, bearing in mind, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self determination, and the free disposal of their wealth and natural resources. Finally, considering that the American Convention on Human Rights provides that draft additional protocol to this convention may be submitted for consideration to the State Parties, meeting together on the occasion of the General Assembly of the organisation of American States, for the purpose of progressively incorporating other rights and freedoms into the protective system thereof, State Parties adopted the Additional Protocol to the American Convention on Human Rights also known as 'Protocol of San Salvador'.

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[99] (1983) 70 ILR 449.

The main provisions of the Additional Protocol are following :

(1) Obligation to Adopt Measures.—The State Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their resources and taking account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol. (Article 1)

(2) Obligation to Enact Domestic Legislation.—If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the State Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality. (Article 2)

(3) Obligation of Non-Discrimination.—The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Rights mentioned or Incorporated in the Protocol

(1) Right to work.—Everyone has the right to work, which includes the opportunity to secure the means of living a dignified and decent existence by performing a freely elected or accepted lawful activity. (Article 6)

(2) Trade Union Rights.—The State Parties shall ensure :

(a) The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As the extension of that right, the State Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The State Parties shall also permit trade unions, federations and confederations to function freely.

(b) No one may be compelled to belong to a trade union. (Article 8)

(3) Right to Social Security.—Everyone shall have the right to social security protecting him from the consequence of old age and of disparity which prevents him physically or mentally from securing the means for a dignified and decent existence. In the event of the death of a beneficiary social security benefits shall be applied to his dependents. (Article 9)

(4) Right to Health.—Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. (Article 10)

(5) Right to Healthy Environment.—Everyone shall have the right to live in a healthy environment and to have access to basic public services. Further, the State Parties shall promote the protection, preservation and improvement of the environment. (Article 11)

(6) Right to Food.—Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development. In order to promote to exercise of this right and eradicate malnutrition, State Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of relevant national policies.

(7) Right to Education.—Everyone has the right to education. The State Parties to this Protocol recognize that in order to achieve the full exercise of right to education :

(a) Primary education should be compulsory and accessible to all without cost.

(b) Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education.

(c) Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education.

(d) Basic education should be encouraged or intensified as far as possible for those persons who have not recessed or completed the whole cycle of primary education.

(e) Programms of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies. (Article 13)

(8) Right to Benefits of Culture.—The State Parties to this Protocol recognize the right of everyone :

(a) To take part in the cultural and artistic life of the community;

(b) To enjoy the benefits of scientific and technological progress;

(c) To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author. (Article 14)

(9) Right to the Formation and the Protection of Families.—Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation. (Article 15)

(10) Rights of Children.—Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially recognized circumstances, a child of young age ought not to be separated from the mother. Every child has the right to free and compulsory education, atleast in the elementary phase, and to continue and his training at highest levels of the educational system. (Article 16)

(11) Protection of the Elderly.—Everyone has the right to special protection in old age. (Article 17)

(12) Protection of the Handicapped.—Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality. (Article 18)

Means of Protection.—Article 19 of the Additional Protocol provides that the State Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure respect for the rights set forth in this Protocol. Further all reports shall be submitted to the Secretary-General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council of Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary-General shall send a copy of such reports to the Inter-American Commission on Human Rights.

The Inter-American Commission on Human Rights may formulate such observation, and recommendation as it deems pertinent concerning the status of the economic, social and cultural rights established in the Present Protocol. In all or some of the State Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers appropriate.

VIII. Protocol to the American Convention on Human Rights to abolish death penalty (1990)

Article 1 of this Protocol provides that the State Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction. Article 2 further provides that no reservation may be made to this Protocol. However, at the time of ratification or accession, the State Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

IX. Inter-American convention to prevent and punish torture (1985)

Under Article 1 of the Convention, the State Parties undertake to prevent and punish torture in accordance with the terms of this convention.

Article 2 of the Convention defines "torture" as "any act internationally performed whereby physical or mental pain or suffering is inflicted on a person for the purpose of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose". Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. However, the concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures provided that they do not include the performance of the acts or use of the methods referred to in this article.

Persons to be held guilty of the crime of torture.—According to Article 3 of the Convention the following shall be guilty of the crime of torture :

(a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.

(b) A person who at the instigation of a public servant or employee mentioned in sub-paragraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

No exemption for the plea of orders of a superior.—Article 4 provides that the fact of having acted under orders of a superior shall not provide exemption from the cases pending criminal liability.

Other grounds not be invoked as justification of the crime of torture.—According to Article 5, the existence of circumstances such as a State of War, Threat of War, State of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantee, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture. Further, neither the dangerous character of the detainee or prisoner nor the lack of security of the prison establishment or penitentiary shall justify torture.

Obligation of State Parties to take effective Measures.—In accordance with the terms of Article 1, the State Parties shall take effective measures to prevent and punish torture within their jurisdiction. (Article 6)

Further, the State Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case. (Article 8)

Compensation for victims of torture.—The State Parties undertake to incorporate into their national laws, regulations, guaranteeing suitable compensation for victims of torture. (Article 9)

Extradition for Persons Accused of having committed the crime of torture.—The State Parties shall take necessary steps to extradite anyone accused of having committed the crime of torture or sentenced for commission of that crime, in accordance with their respective national laws on extradition and their international commitments on this matter. (Article 11)

Necessary Steps to Establish Jurisdiction.—Article 12 of the convention provides that every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this convention in the following cases :

(a) When torture has been committed within its jurisdiction;
(b) When the alleged criminal is a national of that State; or
(c) When the victim is a national of that State and it so deems appropriate.

Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11. (Article 12)

Crime of Torture Deemed to be included in Extradition Treaty.—The crime of extradition shall be deemed to be included among the extraditable crimes in every extradition treaty entered into between State Parties. The State Parties undertake to include the crime of torture as an extraditable offence in every extradition treaty to be concluded between them. (Article 13)

When a State Party does not grant the extradition, the case ought to be submitted to its competent authorities as of the crime had been committed within its jurisdiction for the purposes of investigation and when appropriate, for criminal action in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition. (Article 14)

X. African Charter on Human and People's Rights, 1981

African Charter on Human and People's Rights, also popularly known as Banjul Charter, was adopted on June 27, 1981 and entered into force on October, 1986. So far 49 States, of the 50 members of the Organisation of African Unity (OAU) and ratified or acceded to it. The only State which has not so far ratified or acceded to the African Charter is Sahrawi Arab Democratic. A special feature of the African Charter is that along with rights, it also lays down the duties of the individuals. As noted earlier, even the American Convention contained an Article entitled "Relationship Between Duties and Rights". But the difference is whereas the American Convention did so very briefly or even casually, the African Charter enumerates the duties in detail laying greater emphasis on the duties of the individuals. This is evident from the preamble of the African Charter.

Preamble.—Through the Preamble the State Parties being the member of the OAU recognize, on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of people's right should necessarily guarantee human rights. Emphasizing the duties, the preamble states "that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone". The preamble also emphasizes "the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

Human and People's Rights.—Chapter 1 of Part I of the African Charter contains the following rights :

(1) Equality before law.[100]
(2) Right to respect for life and integrity of person.[101]
(3) Right to the respect of the dignity inherent in a human being and the recognition of his legal status.[102]
(4) Right to liberty and security of person.[103]
(5) Right to have his cause heard including (a) right to appeal to competent national organs against violations of fundamental rights; (b) right to presumption of innocence until proved guilty. (c) right to defence; and the right to fair trial within a reasonable time by an impartial court or tribunal. (Article 7)
(6) Freedom of conscience, the profession and free practice of religion. (Article 8)
(7) Right to inform. (Article 9)
(8) Right to free association. (Article 10)
(9) Right to assemble free by with others. (Article 11)
(10) Right to freedom of movement and residence. (Article 12)
(11) Right to participate freely in the government of the country. (Article 13)
(12) Right to property. (Article 14)
(13) Right to work under equitable and satisfactory conditions. (Article 15)
(14) Right to enjoy state of physical and mental health. (Article 16)
(15) Right to education and take part freely in the cultural life of community. (Article 17)
(16) Family to be the natural unit and basis of society and shall be protected by the State. (Article 18)
(17) Article to equality and prohibition of domination of a people by another. (Article 19)
(18) Right to existence including the unquestionable and inalienable right to self determination. (Article 20)
(19) Right to freely dispose of wealth and natural resources. (Article 21)
(20) Right to economic, social and cultural development. (Article 22, para 1)
(21) Right to development. (Article 22, para 2)
(22) Right to national and international peace and security. (Article 23)
(23) Right to a general satisfactory environment favourable to their development. (Article 24)

The African Charter provides that the Member States of the OAU Parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. (Article

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[100] Article 3.

[101] Article 4.

[102] Article 5..

[103] Article 6.

1). The Charter also contains guarantee of non-discrimination. It provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction of any kind, such as, race, ethnic group, colour, sex, language, religion, political or any other opinion national and social origin, fortune, birth or other status (Article 2). Further, the State Parties to the present Charter shall have the duty to guarantee the Independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter (Article 26).

Duties.—Chapter II of Part I of the African Charter lays down following duties of each individual :

(1) Duties towards family and society, the State and other legally recognized communities and international community. (Article 27, para 1)

(2) Each individual to exercise the rights and freedoms with due regard to the rights of others, collective security, morality and common interest (Article 27, para 2).

(3) Duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance. (Article 28)

(4) Duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need. (Article 29, para 1)

(5) Duty to serve his national community by placing his physical and intellectual abilities at its service. (Article 29, para 2)

(6) Duty not to compromise the security of State whose national or resident he is. (Article 29, para 3)

(7) Duty to preserve and strengthen social and national solidarity particularly when the latter is threatened. (Article 29, para 4)

(8) Duty to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law. (Article 29, para 5)

(9) Duty to work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the Society. (Article 29, para 6)

(10) Duty to preserve and strengthen positive African Cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and in general, to contribute to the promotion of the moral well being of society. (Article 29, para 7)

(11) Duty to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity. (Article 29, para 8)

African Commission on Human and People's Rights.—Article 30 of the African Charter provides for the establishment within the OAU an African Commission on Human and People's Rights as the mechanism to promote human and people's rights and ensure their protection in Africa. The Commission consists of eleven members to be chosen from amongst African personalities of the highest reputation known for their high morality, integrity, impartiality and competence in matters concerning human and people's rights, preference being given to persons having legal experience. They serve in their personal capacity.[104]

(12) There is also provision for the appointment of a Secretary to the Commission to be appointed by the Secretary-General of the Organisation of African

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[104] Article 31.

Unity.[105] His main function is to provide for the staff and services necessary for the effective discharge of the duties of the Commission.

The functions of the Commission are following :

(1) To promote human and people's rights and in particular : (a) to collect documents, undertake studies and researches, organize seminars, symposia and conferences disseminate information, encourage national and local institutions concerned with human and people's rights and also in case of need, give its views or make recommendation to governments of State Parties to the present convention; (b) to formulate and lay down, principles and rules aimed at solving legal problems concerning human and peoples rights and fundamental freedoms upon which African governments may base their legislations and (c) to cooperate with other African and international institutions concerned with the promotion, and protection of human and people's rights.

(2) To ensure the protection of human and people's rights.

(3) To interpret all the provisions of the Charter at the request of a State Party, institutions of the OAU or an African Organisation recognised by the OAU.

(4) To perform any other task which may be entrusted to it by the Assembly of Heads of States and Governments.[106]

Implementation of the African Charter.—The African Charter provides mainly three main procedures—(i) the Reporting procedure; (ii) inter-State communications and (iii) communications other than those of State Parties concluding individuals—for the implementation of the provisions, of the Convention and the main machinery for implementation is the Commission.

(i) Reporting procedure.—State Parties to the African Charter have undertaken to submit every two years, beginning from the date of the Charter enters into force, a report on the legislative or other measures they have taken to give effect to the rights and freedoms recognized and guaranteed under the Charter.[107]

(ii) Inter-State Communications.—The African Charter provides that if a State Party has good reasons to believe that another State Party has violated the provision of the Charter, it may bring the same to the notice of the State in writing. A communication to the same effect shall also be sent to the Secretary-General of the OAV and to the Chairman of the Commission. The State Party concerned against whom the said communication is sent is required to send a written explanation.[108] If the matter is not settled to the satisfaction of the two State parties concerned bilaterally or through other peaceful procedure within three months from which the complaint was originally made, either State will be entitled to refer the matter to the Commission through the Chairman notifying the other State concerned.[109] Further in case the State Party considers that another State Party is guilty of the violation of the provisions of the African Charter, it need not follow the above procedure and may refer the matter directly to the Commission through the Chairman to the Secretary-General of the OAU and the States concerned.[110] The Commission may ask the States concerned to submit all relevant information relating to the matter. The States concerned are permitted representation when their matter is being considered and may make written or oral representation.[111] It may be noted here that before dealing with the matter the Commission satisfies itself that before the complaint

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[105] Article 41.

[106] Article 45.

[107] Article 62.

[108] Article 67.

[109] Article 48.

[110] Article 49.

[111] Article 51.

has been made all local remedies have been exhausted. However, the Commission may exempt from this requirement if it finds that the procedure of exhausting the said remedies would be unduly prolonged.[112] After making all efforts to reach an amicable settlement based on respect of Human and People's rights, the Commission, within a reasonable period, is required to draw a report containing the facts and its findings and transmit the report to the States concerned and communicate the same to the Assembly of Heads and Governments[113] will such recommendation which it deems useful or fit.[114]

If one or more communications reveal the existence of a serious or massive violations of human and people's rights, the matter is taken seriously and it shall bring the same to the notice of the Assembly of Heads of States and Governments which may in its turn ask the Commission to make an in-depth study of the said cases and submit a factual report including its findings and recommendations.[115]

(iii) Other Communications (including individuals).—African Charter provides that the Secretary of the Commission shall make a list of communications other than those of State parties before each session and transmit the same to the members of the Commission who shall decide by a simple majority of members, as to which Communication ought to be considered by the Commission.[116] Though this provision does not expressly mention individuals, obviously individuals communications are included in the term 'communication other than those of the States Parties'. It is further provided that communications relating to human and people's rights referred to in Article 55 received by the Commission, shall be considered if they :

1. indicate their authors even if the latter request anonymity;
2. are compatible with the Organization of African Unity, or with the present Charter;
3. are not written in disparaging or insulting language directed against the State concerned and its institutions or to the OAU;
4. are not based exclusively on news disseminated through the mass media;
5. are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter; and
7. lastly, they do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the OAV or the provisions of the present Charter.[117]

The Commission submits report of all its activities to the Assembly, of the Heads of States and Governments. All measures taken by the Commission remain confidential until such a time as the Assembly of Heads of States and Government otherwise decide. After considering the report by the Assembly of Heads of States and Governments, the Chairman gets the report published.[118]

Appraisal.—A special feature of the African Charter which distinguishes this regional convention from other regional convention in the enumeration of duties in detail. Liberty is a social contract. If a person wants to enjoy his rights, he will have to respect the right of others. Every right has a corresponding duty : Enumeration of duties is therefore a welcome feature. Unfortuntely the African Charter does not take the matter to its logical conclusion. After enumeration of the duties it stops there and does not provide for the enforcement of duties in case of breach. While providing for the implementation of the provisions of the Convention no provision whatsoever is made for the enforcement of duties. Even the functions of the Commission are conspicuous of any mention of the enforcement of duties. Thus the provisions relating to duties are simply figurative or decorative lacking any substance the only provision (Article 1) obligating State Parties to recognize duties is to adopt legislative or other measure to give effect to them. But this is far from being effective.

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[112] Article 50.

[113] Article 52.

[114] Article 53.

[115] Article 58.

[116] Article 55.

[117] Article 56.

[118] Article 59.

Yet another deficiency or the point which distinguishes it from the European and American Conventions is that the African Charter has not established any court for the enforcement of human and people's rights thereby relying heavily on mediation, conciliation and arbitration which are considered more in keeping with the traditional African dispute resolution system.

The Commission as the main mechanism for the implementation of the provisions of the African Charter only performs essentially on fact finding and information providing role. The Commission can simply investigate and submit to the Assembly of Heads and Governments report on human rights violations. It can neither take a binding decision nor can it enforce it. It is only the OAU Assembly which can decide and take necessary action.

Both inter-State and individual's communications are accepted upon ratification of the African Charter. Last but not the least, African Charter on Human and People's Rights is the International or regional Convention on Human Rights which specifically enumerates and protects people's rights.

XI. Other Regional Arrangements for the protection of Human Rights

Following are some of the other regional arrangements for the protection of human rights:

(i) Helsinkie Act (Final Act) of the Conference on Security and Cooperation in Europe, 1975.

(ii) The Arab Commission on Human Rights.

CHAPTER 67

NATIONAL PROTECTION OF HUMAN RIGHTS—I

Human Rights and Indian Constitution

The Indian Constitution bears the impact of the Universal Declaration of Human Rights and this has been recognized by the Supreme Court of India. While referring to the Fundamental Rights contained in Part III of the Constitution, Sikri, C.J., of the Supreme Court, in *Kesavanand Bharti* v. *State of Kerala,*[1] observed : "I am unable to hold these provisions how that rights are not *natural or inalienable rights.* As a matter of fact, India was a party to the Universal Declaration of Rights...and that Declaration describes some fundamental rights as inalienable."

Earlier, in *Golak Nath* v. *State of Punjab,*[2] the Supreme Court observed :

"Fundamental rights are the modern name for what have been traditionally known as 'natural rights'."

The Supreme Court has also recognized the interpretative value of the Universal Declaration of Human Rights.[3] The Universal Declaration of Human Rights does not define the term 'human rights'. It refers them as "the equal and inalienable rights of all members of the human family". The framers of the Indian Constitution were influenced by the concept of human rights and guaranteed most of human rights contained in the Universal Declaration. The Universal Declaration of Human Rights contained civil and political as well as economic, social and cultural rights. While Civil and Political rights have been incorporated in Part III of Indian Constitution, economic, social and cultural rights have been incorporated in Part IV of the Constitution. The following chart is being given below to indicate the human rights which have been incorporated in Indian Constitution.

NATIONAL PROTECTION OF HUMAN RIGHTS—II

(Under Protection of Human Rights Act)

Introduction.—India decided to establish a National Commission of Human Rights for the redressal of grievances of human rights violations. On 28 September, 1993, the President of India promulgated an Ordinance which established a National Commission of Human Rights. Thereafter, a Bill on human rights was passed in the Lok Sabha on December 18, 1993 to replace the Ordinance earlier promulgated by the President. This Bill received the assent of the President on January 8, 1994 and was published in the Gazette of India, Extraordinary, Part II, Section 1, on January 10, 1994. Thus the Protection of Human Rights Act (No. 10 of 1994) came into force. But since the National Commission of Human Rights has already been established and certain acts in pursuance of the Ordinance had already been performed, Article 1 (3) provided that the Act shall be deemed to have come into force on the 28th day of September, 1993. Section 1 (2) provides that the Act extends to the whole of India [4][* * *].

The Preamble of the Act makes it clear that it is an Act to provide for the constitution of National Human Rights Commission; Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto.

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[1] AIR 1973 SC 1461, 1536.

[2] AIR 1967 SC 1643, 1656.

[3] *Kishore Chand* v. *State of H.P.*, 1991 (1) SCJ 68, 76.

[4] Omitted by the Jammu and Kashmir Reorganisation Act, 2019, Sections 95 and 96, Vth Schedule, Table 1. Prior to omission it stood as follows :

"Provided that it shall apply to the State of Jammu and Kashmir only in so far as it pertains to the matters relatable to any of the entries enumerated in List I or List III in the Seventh Schedule to the Constitution applicable to that State".

*Definition of 'Human Rights' under the Act**.—Section 2 (d) of the Act defines 'human rights' as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India. Thus for the purposes of the Act, 'human rights' are rights relating to *life, liberty, equality and dignity* of the individual guaranteed in the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, the Act gives a very narrow definition of 'human rights' and does not even include all the fundamental rights guaranteed by the Constitution. It simply includes the fundamental rights relating to the life, liberty, equality and dignity guaranteed in the Constitution or embodied in International Covenants on Human Rights and enforceable in India. For example, it does not include fundamental rights of prohibition of employment of children in factories etc. (Article 25), Protection of interests of minorities (Article 29), Right of Minorities to establish and administer educational institutions. As regards the words "embodied in the International Covenants and enforceable by courts in India", they certainly widen the scope of Human Rights (fundamental rights) enforceable by Courts in India. As pointed out in the preceding chapter human rights enforceable by courts in India can be divided into three categories : (i) Enumerated Fundamental Rights; (ii) other Fundamental Rights; and (iii) Unenumerated Rights.

The term 'Enumerated Fundamental Rights' means the human rights embodied in the International Covenants on human rights, especially the International Covenant on Civil and Political Rights and which are specified as Fundamental Rights in Part III of the Constitution. The term 'other Fundamental Rights' means the human rights embodied in the International Covenants and recognized as Fundamental Rights by courts in India even though they have not been specified as Fundamental Rights in Part III of the Constitution such as the right to privacy, right to travel abroad, right to compensation etc. These have been discussed in detail in earlier chapter. The term 'Unenumerated Rights' means the human rights which have been enumerated in the International Covenants but are neither enumerated as Fundamental Rights in the Constitution nor have been so far recognised as Fundamental Rights as courts in India, one may, however, add that even unenumerated rights may in future be recognized as Fundamental Rights in a particular case. For example, in *Vishaka* v. *State of Rajasthan,*[4] the three-Judge Bench of the Supreme Court has recognized the right of Gender Equality and guarantee against sexual harassment and abuse of working women at their work places as emanating from Articles 14 and 21 of the Constitution. But once such a right is recognized as a fundamental right emanating from existing or specified Fundamental Rights it ceases to be in the category of 'Unenumerated Rights' and comes in the second category of Rights namely 'other Fundamental Rights'. But before such a right is included in the definition of 'human rights' a *condition* precedent is that it must be embodied in the International Covenants. Since *Section 2(f)* defines "International Covenants as the International Covenants on Civil and *Political Rights and* the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16th December, 1966, the said right must be embodied in these two International Covenants and not in any other International Convention on Human Rights for the purpose of definition of 'human rights' as given under Protection of Human Rights Act, 1993 (Act No. 10 of 1994).

In *T. Vellaiyan* v. *The Registrar, State Human Rights Commission, Chennai,*[5] the question for consideration before the court was whether right to property is included in the definition of human rights under the Act. The Madras High Court held that the definition of human rights under the Act cannot be extended to the right to property also, moreso, when the legislature has explicitly omitted right to property within the said definition.

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* UPPCS (2002) Q. 7(a).

[4] AIR 1997 SC 3011 ; *See also Apparel Promotion Council* v. *A. K. Chopra*, AIR 1999 SC 625.

[5] AIR 2005 Mad. 30.

Similarly, the right to work cannot be included in the definition of 'human rights'. This has been held in the *State of Maharashtra* v. *Sau Shobha Vithal Kolte*[6] by the Bombay High Court. The Court held :

"The right to employment in the absence of suitable legislation cannot be placed on the same footing as to right to livelihood. Though........................ the Apex Court has observed the right to work becomes as much fundamental as right to life that would be once a person is appointed."[7]

The High Court referred to the observation of the Supreme Court in *Air India Statutory Corporation* v. *United Labour Union*[8] and further observed that "The observation must be considered in tune what is set out in paragraph 15 of the judgment. So reading, it would mean that the right to work as fundamental right can only be considered as fundamental right in those cases where there is a legislative guarantee in the form of legislation. In the absence of right to work being fundamental right, it would not fall within the expression "life" under Article 21 and if so would not fall within the definition of "Human Rights" as set out under Section 2 (d) of the Act on this count also, the act of the Commission would be without jurisdiction".[9]

Reference may also be made here to the Full Bench case of the Apex Court, namely *M/s. Zee Tele Films Ltd.* v. *Union of India.*[10] The Supreme Court observed that the promotion of human development and the preservation and protection of human rights proceed from a common platform. Both reflect the commitment of the people to promote the freedom, the well-being and dignity of individuals in society. Human development as a human right has a direct nexus with the increase in capabilities of human beings as also the range of things they can do. Human development is eventually in the interest of society and on a larger canvas. It is in the national interest also. Progress and development in all field will not only give a boost to the economy of the country but also result in living conditions for the people of India.

Even a hybrid body is bound to protect human rights as it cannot be violated even by such a body. The Board of Control for Cricket in India (BCCI) which has the pervasive control over the entire sport of cricket including the participants as well as spectators cannot apparently act in violation of human rights.[11]

Further, "In our constitutional scheme rule of law would, by all means, prevail over rule of cricket. A body regulating the game of cricket would be compelled by the court to abide by rule of law".[12]

The Supreme Court concluded that the law requires to be expanded in this field and it must be held the Board answerable the description of "other authorities" as contained in Article 12 of the Constitution of India and satisfies the requisite legal tests. It would, therefore, be a "State".[13] Giving the reason for this conclusion, the Apex Court observed that the Board discharges a public function. It has its duties towards the public. The public at large will look forward to the Board for selection of the best team to represent the country. It must manage its housekeeping in such a manner so as to fulfil the hopes and aspirations of millions. It has, thus, a duty to act fairly. It cannot act arbitrarily, whimsically or capriciously. Public interest is, thus, involved in the activities of the Board. It is, thus, a State actor.[14]

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[6] AIR 2006 Bom. 44.

[7] Ibid. at p. 49.

[8] (1997) SCC 377 : AIR 1997 SC 645.

[9] AIR 2006 Bom. 44, 49.

[10] AIR 2005 SC 2677 (FB).

[11] *M/s. Zee Tele Films Ltd.* v. *Union of India*, AIR 2005 SC 2677 at pp. 2714-2715 (F.B.).

[12] Ibid. at p. 2724.

[13] Ibid. at p. 2728.

[14] Ibid. at p. 2727-2728.

In *P.I. Manichild Canna Reddy* v. *Ravamma and others*,[15] the Supreme Court held that there is another aspect which cannot be lost sight of. The right of property is now considered to be not only a constitutional or statutory right but also a human right.[16]

Further, in *Tukaram Kana Joshi* v. *Maharashtra Industrial Development Corporation*,[17] the Supreme Court has recently held that the right to property is now considered to be not only statutory right but also a human right. Though, it is not a basic feature of the constitutional or a fundamental right. Human rights are considered to be in the realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment etc. Now, however, human rights are gaining an even greater multi-faceted dimension. The right to property is considered very much to be a part of such new dimension.[18]

In the case at hand, there has been no acquisition. The question that emerges for consideration is whether, in a democratic body polity, which is supposedly governed by the rule of law, the State should be allowed to deprive a citizen of his property, without adhering to the law. The matter would have been different had the State pleaded that it has right, title and interest over the said land. It however, concedes to the right, title and interest of the appellants over such land and pleads the doctrine of delay and laches as grounds for the dismissal of the petition/appeal.[19]

Further, a question then arises with respect to the authority or power under which the State entered upon the land. It is evident that the act of State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called the abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the landowner as a subject of medieval India, but not as a "Citizen" under our Constitution.[20]

The State, especially a welfare State which is governed by the rule of law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause of action etc. That apart, if the whole thing shocks the judicial conscience, then the court should exercise the discretion more so, when no third-party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.[21]

Lastly, depriving the appellants of their immovable properties was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfilment of their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be borne in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/human rights, under the garb of industrial development.[22]

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[15] AIR 2007 SC 1753, Para 15.

[16] Ibid.

[17] (2013) 1 SCC (Civil) 491 : (2013) 1 SCC 353.

[18] *Lachman Dass* v. *Jagat Ram*, (2007) 10 SCC 448 ; *Amarjit Singh* v. *State of Punjab*, (2010) 10 SCC 43; *State of M.P.* v. *Naramada Bachao Andolan*, (2011) 7 SCC 639 ; *State of Haryana* v. *Mukesh Kunwar*, (2011) 10 SCC 404, (2011) 9 SCC 354.

[19] *Lachman Dass* v. *Jagat Ram*, (2007) 10 SCC 448 at p. 497.

[20] Ibid. at p. 498.

[21] Ibid.

[22] Ibid. at p. 500.

In a case, the Supreme Court has held that domestic violence is also a matter of human rights.[23] Besides this, in *National Legal Services Authorities* v. *Union of India*,[24] the Supreme Court has held that human right is a moral and prior legal right; it have not been given by people nor can it be withrawn by them.

However, it may be noted that human rights are rights of human concerning to their life, liberty, equality and dignity. The term 'human right', would therefore not apply to individual rights of parties even against state arising under a contract. This has been held by Bombay High Court in *Maharashtra Housing and Development Authority* v. *Maharashtra State Human Rights Commission*.[25]

Amendment of Section 2.—The Protection of Human Rights (Amendment) Act, 2019 has made the following amendments in Section 2 :

(i) In Section 2, in sub-section (1), after clause (b) the following clause shall be inserted, namely :

> (ba) "Chief Commissioner" means the Chief Commissioner for Persons with Disabilities referred to in sub-section (1) of Section 74 of the Rights of Persons with Disabilities Act, 2016;

(ii) In Section 2 after clause (g), the following clause shall be inserted, namely :

> (ga) "National Commission for Backward Classes" means the National Commission for Backward Classes constituted under Section 3 of the National Commission for Backward Classes Act, 1993;

(iii) In Section 2, in sub-section (1), after clause (h), the following clause shall be inserted, namely :

> (ha) "National Commission for Protection of Child Rights" means the National Commission for Protection of Child Rights constituted under Section 3 of the Commissions for Protection of Child Rights Act, 2005.

Amendment of Section 3.—In Section 3 of the Principal Act—

(a) In sub-section (2)—

- (i) in clause (a) for the words "Chief Jusitce", the words, "Chief Justice of India or a Judge" shall be substituted;
- (ii) in clause (d) for the words "two Members" the words "three Members out of which atleast one shall be a woman" shall be substituted.

(b) In sub-section (3)—

- (i) for the words "the National Commission for Minorities", the words, ",the National Commission for Backward Classes, the National Commission for Minorities, the National Commission for Protection of Child Rights" shall be substituted;
- (ii) for the words, "and the National Commission for Women" the words "the National Commission for Women and the Chief Commissioner for Persons with Disabilities" shall be substituted;

(c) in sub-section (4), for the portion beginning with "shall exercise such powers and discharge such functions" and ending with "as the case may be", the following shall be substituted "shall, subject to control of the Chairperson, manely : exercise all administrative and financial powers (except judicial functions and the power to make regulations under Section 40-B)".

A perusal of the above provisions indicates that as regards the appointment of Chairperson previously only a person who had been the Chief Justice of Supreme Court of India could be appointed. But with the above amendment besides a Chief Justice of the

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[23] AIR 2014 SC 309.

[24] AIR 2014 SC 1863.

[25] (2010) 2 AIR Bom. R. 567.

Supreme Court of India, a person who had been a Judge of Supreme Court of India can be appointed.

As regards other provisions, apart from National Commission for Minorities, National Commission for Backward Classes, National Commission for Women, National Commission for Protection of Child Rights have been incorporated by mention of these, the scope of the above provisions have been widened.

National Human Rights Commission

Constitution.—The National Human Rights Commission is constituted by the Central Government to exercise the powers conferred upon, and to perform the functions assigned to it under the Act.[26] The Commission consists of :

(a) a Chairperson who has been the Chief Justice of the Supreme Court;

(b) one Member who is, or has been the Judge of the Supreme Court;

(c) one Member, who is, or has been the Chief Justice of a High Court;

(d) two Members to be appointed amongst persons having knowledge of, or practical experience in, matters relating to human rights.[27]

Besides these, the Chairperson of National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of Section 12.[28]

The Act also makes provision for a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.[29]

As pointed out by the Supreme Court in *Paramjit Kaur* v. *State of Punjab,*[30] the Chairman of the Commission in his capacity as a Judge of the High Court and then as a Judge of the Supreme Court and also as Chief Justice of India, and so also two other members who have held high judicial offices as Chief Justice of High Courts, have throughout their tenure, considered, expounded and enforced the Fundamental Rights and are, in their own way, experts in the field. The Commission is truly an expert body to which a reference can be made by the Supreme Court under Article 32 and once such a reference has been made no prohibition under the Protection of Human Rights Act will affect the jurisdiction of the Commission to investigate a case referred to it by the Supreme Court.

Reference may be made here to *People's Union for Civil Liberties* v. *Union of India.*[31] In this case, appointment of a retired Police Officer, who had held the post of Director, CBI and Vice-President (Asia) Interpol, as member of National Human Rights Commission had been challenged through a writ petition. The appointment had been challenged on the ground that there was public perception that personnel in police force are biggest violator of human rights. The Supreme Court observed, that "we certainly feel that these remarks cannot be so generalised as to make every personnel of the force, constituting nearly 2.2 million people, violators of human rights solely on the ground that out of thousands of cases investigated and handled by them, in some cases the personnel involved have indulged in violation of human rights".

It was also contended by the petitioner that "the judgments apart, the public perception of Indian Police Force as a whole is so poor that it considers to police as an organisation to be violator of human rights. Therefore, selecting a retired police officer as a member of the Commission would lead to erosion of confidence of the people in the Commission. The Supreme Court observed that it is sincerely unable to gauge this public perception or its magnitude so as to import this concept on institutional basis.[32]

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[26] Section 3 (1), Protection of Human Rights Act, 1993.

[27] Section 3 (2), *ibid.*

[28] Section 3 (3), *ibid.*

[29] Section 3 (4), Ibid.

[30] AIR 1999 SC 340, 343.

[31] AIR 2005 SC 2419.

Further, public displeasure as presently perceived is not confined to the police force only. The views expressed in the media very often show that the displeasure is reflected against many a department of the Government including constitutional bodies and if public displeasure or perception were to be the yardstick to exclude people from holding constitutional or statutory offices then many such posts in the country may have to be kept vacant.

Then again what is the yardstick to measure public perception. Admittedly there is no barometer to gauge the perception of the people. In a democracy people get elected by thumping majority to high legislative offices. Many a times public perception of a class of society in regard to such people may be that they are not desirable to hold such post but can such a public opinion deprive such people from occupying constitutional or statutory offices without there being a law to the contrary? There is a vast qualitative difference between public prejudice and judicial condemnation of an Institution based on public perception. At any rate as stated above, public perception or public opinion has no role to play in selection of an otherwise eligible person becoming a member of the Commission under the Act".[33]

Finally, the fact that the Constitution of NHRC is covered by an Act of the Indian Parliament, no U.N. General Assembly Resolution can override the express provisions of the Act.[34]

Headquarters of the Commission.—The headquarters of the National Human Rights Commission (NHRC) is located at Delhi. The Commission may, however, with the previous approval of the Central Government establish offices at other places in India.[35] The Commission shall ordinarily hold its meetings and sittings in its offices located at Delhi.[36] However, it may, in its discretion, hold its meeting at any other place in India if it considers it necessary and expedient.[37] The Commission or some of the Members may transact business at places outside its headquarters as and when previously approved by the Chairperson, provided that if the parties are to be heard in connection with an enquiry under the Act at least two Members shall constitute the bench of the Commission for such purpose.[38]

Appointment of Chairperson and other Members.—The Chairperson and other Members are appointed by the President by warrant under his hand and seal after obtaining the recommendations of Committee consisting of :

(a) Prime Minister—Chairperson
(b) Speaker of the House of People—Member
(c) Minister-in-Charge of Ministry of Home Affairs in the Government of India—Member
(d) Leader of the Opposition in the House of the People—Member
(e) Leader of the Opposition in the Council of States—Member
(f) Deputy Chairperson of the Council of States—Member

Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.[39]

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[32] *People's Union for Civil Liberties* v. *Union of India*, AIR 2005 SC 2419 at p. 2425.
[33] Ibid.
[34] Ibid.
[35] Section 3 (5), Protection of Human Rights Act, 1993.
[36] Regulation 3, The National Human Rights Commission (Procedure) Regulation, 1994.
[37] Regulation 4, *ibid.*
[38] Regulation 12, *ibid.*
[39] Section 4 (1) of Protection of Human Rights Act, 1993.

It is further provided that no appointment of a Chairperson or a Member shall be invalid by reason of any vacancy in the above Committee headed by the Prime Minister.[40]

Term of Office of Members.—A person appointed as chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier.[41] A person appointed as a Member shall also hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years. This is however, subject to the condition that no Member shall hold office after he has attained the age of seventy years.[42]

Amendment of Section 6.—Amendment of sub-sections (1) and (2) of Section 6 of the Principal Act—

(i) (a) in sub-section (1) of Section 6 for the words, "five years" , the words "three years" shall be substituted;

(b) after the words "whichever is earlier" occurring at the end, the words "and shall be eligible for re-appointment" shall be inserted;

(ii) (a) in sub-section (2), for the words "five years", the words "three years" shall be substituted;

(b) the words "for another term of five years" shall be omitted.

The result of the above amendment is that the term of Chairperson shall be now three years instead of five years.

Further, on ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government or the Government of any State.[43] This is indeed a welcome feature of the Act. Such a provision ought to be compulsory in respect of the offices of Speaker of the Lok Sabha, Deputy Speaker of the Rajya Sabha, Chief Election Commission and Governors of States.

Removal of a Member of the Commission.—The Chairperson or any other Member of the Commission can be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground be removed.[44] But despite this provision or notwithstanding this provision the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other person, as the case may be :

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment outside the duties of his office; or

(c) is unfit to continue in office by reason of infirmity of mind or body; or

(d) is of unsound mind and stands so declared by a competent Court; or

(e) is convicted and sent to imprisonment for an offence which in the opinion of the President involves moral turpitude.[45]

In the above cases, it will not be necessary for the President to refer the matter to the Supreme Court and obtain its report before ordering the removal of a Chairperson or a Member.

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[40] Section 4 (2) of the Act; *see* also *People's Union for Civil Liberties v. Union of India*, AIR 2005 SC 2419, 2425-2426.

[41] Section 6 (1) of Protection of Human Rights Act, 1993.

[42] Section 6 (2), *ibid.*

[43] Section 6 (3), *ibid.*

[44] Section 5 (1), *ibid.*

[45] Section 5 (2), *ibid.*

Procedure of the Commission.—The Commission shall meet at such time and place as the Chairperson may think fit.[46] The Commission shall regulate its own procedure.[47] All orders and decisions of the Commission shall be authenticated by the Secretary-General or any other officer of the Commission duly authorised by the Chairperson in this behalf.[48]

Functions of the Commission.—The Commission shall perform all or any of the following functions, namely :

- (a) inquire, *suo motu* or on a petition presented to it by a victim or any other person on his behalf, into complaint of :
  - (i) violation of human rights or abetment thereof; or
  - (ii) negligence in the prevention of such violation by a public servant;
- (b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;
- (c) visit under intimation to the State Government any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of inmates and make recommendations therein;
- (d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;
- (e) review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
- (f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;
- (g) undertake and promote research in the field of human rights;
- (h) spread human rights literacy among various sections of the society and promote awareness of the guards available for the protection of these rights through publications, the media, seminars and other available means;
- (i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights; and
- (j) such other functions as it may consider necessay for the promotion of human rights.[49]

But there are certain matters which are not subject to the jurisdiction of the Commission. The Commission cannot enquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.[50] Besides this, the Commission or the State Commission shall not *enquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.*[51] This provision or inhibition of the Commission contained in Section 36 (2) of the Act came for consideration before the Supreme Court in *Paramjit Kaur* v. *State of Punjab.*[52] One of the main questions for consideration before the Court was whether the inhibition contained in Section 36 (2) would apply to the Commission even when the Supreme Court under Article 32 of the Constitution referred a matter of alleged violation of human rights to the Commission?

In *N.C. Dhoundial* v. *Union of India,*[53] a three-Judge Bench of the Supreme Court held that Section 36(a) of the Act thus places an embargo against the Commission enquiring into any matter after the expiry of one year from the date of alleged act violative of human rights. The caption or the marginal heading to the section indicates that it is a jurisdictional bar. Periods of limitation, though basically procedure in nature can also operate as fetters on jurisdiction in certain situations. The language employed in the marginal heading is another indicator that it is a jurisdictional limitation. It is a settled rule of interpretation that the section heading or marginal note can be relied upon to clear any doubt or ambiguity in the interpretation of provisions and to discern the legislative intent.

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[46] Section 10 (1), *ibid.*

[47] Section 10 (2) of Protection of Human Rights Act, 1993.

[48] Section 10 (3), *ibid.*

[49] Section 12, *ibid.*

[50] Section 36 (1), *ibid.*

[51] Section 36 (2), *ibid.*

[52] AIR 1999 SC 340.

[53] AIR 2004 SC 1272, 1278.

Further, the bar under Section 36(2) is sought to be got over by the Commission by invoking the theory of continuing wrong and the recurring cause of action. According to the Commission, every violation of human right is a continuing wrong until and unless due reparation is made. The Supreme Court found it difficult to accept this proposition propounded by the Commission. Speaking for the three-Judge Bench, P. Venkatarama Reddy, J. observed that the short answer to this view point is that such a view, if accepted, makes Section 36(2) practically a dead letter. Moreover, looking to the language employed in Section 36(2) the concept of continuing wrong could not at all be pressed into service in the instant case. The time limit prescribed is referable to the alleged 'act' constituting the violation of human rights. In a case like illegal detention, the offensive act must be deemed to have been committed when a person is placed under detention and it continues under legal detention. The commission of offensive act is complete at a particular point and it does not continue to be so even after the unauthorized detention ends.[54]

In this case one Mr. Ashok Kumar Sinha, an officer of the Telecom Department at Ranchi on 3.3.1994 he was arrested and later on produced before the Magistrate and remanded to police custody. It was not in dispute that the complainant was produced before the Special Judge on 3.4.1994 and remand was obtained in accordance with the procedure prescribed by law. The Supreme Court held that the alleged act of unauthorized detention which gives rise to violation of human rights ceased on 3.4.1994 and it does not perpetuate thereafter. It is not the effect of illegal detention which is contemplated by Section 36(2) but it is the illegal act itself. It would be a contradiction in terms to say that the arrest or detention beyond 3.4.1994 was in accordance with law and at the same time the arrest/detention continued to be wrongful. It cannot, therefore, be brought under the category of continuing wrong which is analogous to the expression 'continuing offence' in the field of criminal law, one year period for taking up the enquiry into the complaint, therefore, comes to an end by 3.4.1995. Just as in the case of Section 473, Cr. P.C., there is no provision in the Act to extend the period of limitation of one year.

Before concluding the discussion, the Supreme Court said it would like to clarify in reiteration of what was said by the Supreme Court in *Paramjit Kaur* v. *State of Punjab,*[55] that in a case where the NHRC proceeds to investigate and inquire into the violation of human rights pursuant to the directions of the Supreme Court under Article 32 of the Constitution, the bar contained in Section 36(2) will not apply because in such an event NHRC does not function under the provisions of the Act but as an 'expert body' aiding the Supreme Court in the discharge of its constitutional power under Article 32.[56]

Interpreting the order of the Supreme Court.—The Commission observed that the shackles and limitations under the Act are not attracted to the Commission, as it in the above context does not function under the provisions of the Act but under the remit of the Supreme Court. The provisions of the Act do not bind or limit the powers of the Supreme Court in exercise of its powers under Article 32. It is, therefore, reasonable to hold that the Supreme Court designated the Commission as a body *sui generis* to carry out the functions and determine issues entrusted to it by the Supreme Court. To read the order otherwise is to render it otiose.[57]

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[54] *N.C. Dhoundial* v. *Union of India*, AIR 2004 SC 1272, 1278.

[55] (1999) 2 SCC 131 : AIR 1999 SC 340.

[56] *N.C. Dhoundial* v. *Union of India*, AIR 2004 SC 1272, 1278.

[57] *Paramjit Kaur* v. *State of Punjab*, AIR 1999 SC 340 at p. 342.

Agreeing with the above interpretation of the Commission, the Supreme Court held that the power and jurisdiction of the Supreme Court under Article 32 of the Constitution cannot be curtailed by any statutory limitation including those contained in Section 36 (2) of the Act. If the Supreme Court can exercise that power unaffected by the prohibition contained in Section 36 (2), there is no reason why the Commission, at the request of the Supreme Court, cannot investigate or look into the violations of human rights even though the period of limitation indicted in Section 36 (2) might have expired. In such a situation, the Commission will not be affected by the bar contained in Section 36 (2) and it will be well within its rights to investigate the matter referred to it by the Supreme Court.[58] Further, in deciding the matters referred by the Supreme Court, National Human Rights Commission is given a free hand and is not circumscribed by any conditions. Therefore, the jurisdiction exercised by the National Human Rights Commission in these matters is of special nature not covered by enactment or law, and thus acts *sui generis*.[59] The Commission is also a body *sui juris* created under an Act made by Parliament for examining and investigating the questions and complaints relating to violation of human rights, as also the negligence on the part of any public servant in preventing such violations.[60]

In this case, the writ petition had been filed by the Union of India for clarification of the order dated 12th December, 1996 passed by the Supreme Court in Writ Petitions (Criminal) Nos. 447 of 1995 and 497 of 1995, by which a request was made to the National Human Rights Commission to examine the flagrant violation of human rights on a mass scale in the State of Punjab as disclosed in the CBI Report submitted to the Supreme Court in the aforesaid writ petitions.

Powers relating to inquiries.—While inquiring into complaints under this Act, the Commission possesses all the powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), and in particular in respect of the following matters, namely :

(a) summoning and enforcing the attendance of witnesses and examining them on oath;
(b) discovery and production of any document;
(c) receiving evidence on affidavits;
(d) requisitioning any public record or copy thereof from any court or office;
(e) issuing commissions for the examination of witnesses or documents;
(f) any other matter which may be prescribed.[61]

The Commission also has power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission may be useful for, or relevant to, the subject-matter of the enquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of Sections 176 and 177 of the Indian Penal Code (45 of 1860).[62]

The Commission or any other officer not below the rank of a Gazetted Officer, especially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject-matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) in so far as it may be applicable.[63]

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[58] *Paramjit Kaur* v. *State of Punjab*, AIR 1999 SC 340 at 343.

[59] Ibid. at pp. 343-344.

[60] Ibid. at p. 344.

[61] Section 13 (1), Protection of Human Rights Act, 1993.

[62] Section 13 (2), *ibid.*.

[63] Section 13 (3), *ibid.*

It is also provided that the Commission shall be deemed to be a Civil Court and when any offence as is described in Section 175 (omission to give notice or information to public servant by person legally bound to give it), Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code (45 of 1860) is committed in view or presence of the Commission, the Commission may, after recording the facts constituting the offence and statement of the accused as provided for in the Code of Criminal Procedure, 1973 (2 of 1974) forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under Section 346 of the Code of Criminal Procedure, 1973.[64]

Further, every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196 of the Indian Penal Code (45 of 1860), and the Commission shall be deemed to be a Civil Court for all the purposes of Section 195 (which deals with Prosecution for contempt of lawful authority of public servants for offences against public justice and for offences relating to documents given in evidence) and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).[65]

In *K. Murugesh* v. *Registrar, State Human Rights Commission, Tamil Nadu and others,*[66] the Madras High Court observed that it is clear from the above provision that the Commission has been given the power of a Civil Court in certain matters, while it enquires into any complaint under the Act.

In the instant case, the Sub-Inspector of Police was given an opportunity to cross-examine complainant in respect of his complaint. The Madras High Court ruled that there was not any fairness on the part of the Commission in adopting the said procedure, whereby the petitioner is given an opportunity to cross-examine the complainants.[67]

The Court further added that it is obvious that the enquiry before the Commission cannot be equated with the full-fledged civil trial under the Code of Civil Procedure. From the perusal of Section 13 of the Act, it is clear that what the Commission had to follow is a fair procedure. In the instant case, the petitioner was given an opportunity to cross examine the complainant on the basis of those complaints. Following the aforesaid procedure, the Commission was only giving the writ petitioner an opportunity to cross examine. So by giving an opportunity to the petitioner, the Commission cannot be said to have acted unfairly against the interest of anyone.[68]

Investigation.—The Commission may for the purpose of conducting any investigation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.[69] For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilised under Section 14 (1) noted above, may, subject to the direction and control of the Commission :

(a) summon and enforce attendance of any person and examine him;

(b) require the discovery and production of any document;

(c) requisition any public record or copy thereof from any office.[70]

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[64] Section 13 (4), Protection of Human Rights Act, 1993.

[65] Section 13 (5), *ibid.*

[66] AIR 2009 Mad 1, para 4.

[67] *Ibid.*

[68] *Ibid* at para 5.

[69] Section 14 (1), Protection of Human Rights Act, 1993.

[70] Section 14 (2), *ibid.*

But it may be noted here that no statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement.

This is however, subject to the proviso that if the statement :

(a) is made in reply to a question which he is required by the Commission to answer, or

(b) is relevant to the subject-matter of the inquiry, then it may be used against him in any civil or criminal proceeding.[71]

As regards examination of witness, in *Zahira Habibullah* v. *State of Gujarat*,[72] the witness stated that she was threatened, coerced induced and/or pressurized to give statement before trial Court, National Human Rights Commission and Supreme Court. An enquiry was made to find out truth. The statement of witness was recorded by National Human Rights Commission in the presence of Chairman (retired Chief Justice of Supreme Court) and several members which included retired Judge of Supreme Court. An allegation was made that it was not properly recorded and that, somebody else's statement was recorded and witness was asked to put signature. The Supreme Court held that this was not tenable. Further, the Supreme Court added that such a plea should not have been raised as it reflects credibility of functioning of body like National Human Rights Commission.

The officer or agency whose services are utilized under Section 14 (1) noted above, shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission within such period as may be specified by the Commission in this behalf.[73] The Commission shall satisfy about the correctness and the facts stated and the conclusion, if arrived at, the said report submitted by the officer or agency and for this purpose the Commission may make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation), as it thinks fit.[74]

Procedure for dealing with complaints.—Regulation 8 of the National Human Rights Commission (Procedure) Regulations, 1994[75] lays down the following procedure for dealing with complaints of alleged violation of 'human rights' :

(1) All complaints in whatever form received by the Commission shall be registered and assigned a number and placed for admission before a Bench of two Members constituted for the purpose not later than two weeks of receipt thereof. Ordinarily complaints of the following nature are not entertainable by the Commission :

(a) in regard to events which happened more than one year before the making of complaints;[76]

(b) with regard to matters which are subjudice;

(c) which are vague, anonymous or pseudonymous;

(d) which are of frivolous nature; or

(e) those which are outside the purview of the Commission.[77]

(2) No fee is chargeable on complaints.

(3) Every attempt should be made to disclose a complete picture of the matter leading to the complaint and the same may be made in English or Hindi to enable the Commission

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[71] Section 15, Protection of Human Rights Act, 1993.

[72] AIR 2006 SC 1367.

[73] Section 14 (4), Protection of Human Rights Act, 1993.

[74] Section 14 (5), *ibid.*

[75] These Regulations were made by the National Human Rights Commission in exercise of the powers conferred on it by sub-section (2) of Section 10 of the Protection of Human Rights Act, 1993 (No. 10 of 1994).

[76] Section 36 (2) of the Protection of Human Rights Act, 1993.

[77] Section 36 (1), *ibid.*

to take immediate action. To facilitate the filing of the complaints, the Commission shall, however, entertain complaints in any language included in English Schedule of the Constitution. It shall be open to the Commission to ask for further information and affidavits to be filed in support of allegations whenever considered necessary.

(4) The Commission may, in its discretion, accept telegraphic complaints and complaints conveyed through Fax.

(5) The Commission shall have the power to dismiss a complaint *in limine*.

(6) Upon admission of a complaint the Chairperson/Commission shall direct whether the matter would be set down for inquiry by it or should be investigated into.

(7) On every complaint on which a decision is taken by the Chairperson/Commission to either hold an inquiry or investigation, the Secretariat shall call for report/comments from the concerned Government/authority giving the latter a reasonable time therefor.

(8) On receipt of the comments of the concerned authority, a detailed note on the merits of the case shall be prepared for consideration of the Commission.

(9) The directions and recommendations of the Commission shall be communicated to the concerned Government/authority and the petitioner as provided for in Sections 18 and 19 of the Act.

(10) The Commission may, in its discretion afford a personal hearing to the petitioner or any other person on his behalf and such other person or persons as in the opinon of the Commission should be heard, for appropriate disposal of the matter before it and where necessary call for records and examine witnesses in connection with it. The Commission shall afford a reasonable hearing, including opportunity of cross-examining witnesses, if any, in support of the complaint and leading of evidence in support of his stand to a person whose conduct is enquired into by it or where in its opinion the reputation of such person is likely to be prejudicially affected.

(11) Where investigation is undertaken by the team of the Commission or by any other person under its discretion, the report shall be submitted within a week of its completion or such further time as the Commission may allow. The Commission may, in its discretion, direct further investigation in a given case if it is of the opinion that investigation has not been proper or the matter requires further investigation for ascertaining the truth or enabling it to properly dispose of the matter. On receipt of the report, the Commission on its own motion, or if moved in the matter, may direct inquiry to be carried by it and receive evidence in course of such inquiry.

(12) The Commission or any of its Members when requested by the Chairperson may undertake visits for an on-the-spot study and where such study is undertaken by one or more Members, a report thereon shall be furnished to the Commission as early as possible.

Steps after inquiry.—After the inquiry under the Act is complete the Commission may take any of the following steps :

(1) Where the enquiry discloses the commission of violation of human rights, or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against this concerned person or persons.

(2) Approach the Supreme Court or the High Court concerned for such directions, orders or writs as that court may deem necessary.

(3) Recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary.

(4) Subject to the provision of clause (5) provide a copy of the inquiry report to the petitioner or his representative.

(5) The Commission shall send a copy of its enquiry report together with its recommedations to the concerned Government or authority and the concerned Government authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission.

(6) The Commission shall publish its enquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.[78]

Regulation 11 of the National Human Rights Commission (Procedure) Regulations, 1994 further provides that report of follow-up action shall be submitted to the Commission at every subsequent sitting indicating therein the present stage of action on each item on which the Commission had taken a decision in any of its earlier meeting, excepting the items on which no further action is called for.

Procedure with respect to armed forces.—Section 19 of Protection of Human Rights Act, 1993 provides :

(1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of armed forces, the Commission shall adopt the following procedure namely :

(a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;

(b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.

(2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the commission may allow.

(3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.

(4) The Commission shall provide a copy of the report published under sub-section (3) to the petitioner or his representatives.

Matters Beyond the Jurisdiction of National and State Human Rights Commission.—National Human Rights Commission cannot *suo motu* take action against a judicial order. Recommendation by National Human Rights Commission to commute death sentence passed by Supreme Court is *non est* in law. This has been held by the Supreme Court in *Ban Kanta Das* v. *State of Assam.*[79] The Supreme Court set aside the impugned order of the commutation of death sentence to life imprisonment and directed reconsideration of application filed by accused for commutation of sentence.[80]

Similarly, the Commission cannot assume the jurisdiction of High Court and Supreme Court and cannot proceed to arrogate to itself powers under Section 482 of Cr. P.C. or Article 226. This has been held by Punjab and Haryana High Court in *Punjab State Civil Suppliers Corporation Ltd.* v. *Punjab Human Rights Commission.*[81] In this case, FIRs were registered against the respondents for forcibly lifting stock of paddy. The State Human Rights Commission recommended cancellation of FIRs on complaint filed by respondents. The Punjab and Haryana High Court held that the order was passed in flagrant disregard of statutory powers. The impugned order of Commission recommending cancellation of FIRs is liable to be quashed.[82]

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[78] Section 18, Protection of Human Rights Act, 1993.

[79] 2009 AIR SCW 3608.

[80] *Ibid*, para 16.

[81] 2007 Cr. LJ 3842 (Punj & Haryana High Court).

[82] *Ibid*, paras 13 and 14.

Annual and special reports of the Commission.—The National Human Rights Commission is required to submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.[83] After the annual report is submitted by the Commission, the Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

A high level Advisory Committee under the Chairmanship of Mr. Justice A.M. Ahmadi former Chief Justice of India to assess the need for structural changes and amendments to the Protection of Human Rights Act. The Advisory Committee submitted its report to the Commission on 18th October, 1999. After careful consideration of it in detail, the Commission sent its report to the Government in March, 2000. Among several recommendation, one recommendation was to prescribe three months time from the date of the submission of the report of the National Human Rights Commission (NHRC) to be placed before the Parliament and reports to be made public after three months, even if not placed before the Parliament. The Central Government has not acted on this recommendations. Thus the suggested amendment in the Act has yet not been made.

Thus no period has been fixed for tabling of the annual and special reports of Commission before the Parliament. Thus the Central Government is to a great extent responsible for the present situation of human rights in the country. The Commission is not sufficiently equipped to investigate and ensure respect for and observation of human rights in the country. The delay in tabling the reports of the NHRC before the Parliament shows that the Government is not serious about the recommendations of the Commission and action on such recommendations.

It may be noted that mostly poor people are the victims of violation of human rights. Though the Government claims to be the champion of the rights of poor peoples there is great difference between what the Government says or proclaims and what in fact it does. If the government is really serious and keen for the rights of common people especially, poor people, it should accept the recommendation of the Commission and amend Protection of Human Rights Act, so that after the submission of the annual reports, if the Government fails to table the report before the Parliament within three months, it after the expiry of three months since the submission of the report, the Commission may make the annual report public and may publish it.

Evaluation of the work of the National Human Rights Commission.—The National Human Rights Commission has rendered a signal service for the cause of observance of human rights, especially in the field of civil liberties. For example its work in the field of prevention of custodial deaths, rape and torture has been quite praiseworthy. Its direction to all District Magistrates and Superintandents of Police to report to the Commission all incidents of custodial death or rape within twenty-four hours has made a very salutary impact in preventing such incidents. Moreover, it is a sort of forewarning to the Police officers that if they misuse their powers or commit excesses, they may be penalised for this. Besides this the Commission has handled some cases of alleged custodial death in such an effective manner that it has inspired the confidence of the people. For example in the case of *Alleged Custodial Death of Madan Lal in Delhi*[84] the Commission took cognizance of this case *suo motu* and appointed Shri R.C. Chopra, a member of Higher Judicial Service to investigate the matter. The report dated 11th March, 1994 submitted by Mr. Chopra inferred that Sri Madan Lal had died as a result of a physical assault on his person, while he was in custody within a police station for which an Assistant Sub-

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83. Section 20 (2), Protection of Human Rights Act, 1993.

84. *See* Annual Report of the National Human Rights Commission for the Year 1994-95.

Inspector and three Constables were held *prima facie*, responsible. The Commission accepted this report and recommended to the NCTD *inter alia*, the investigation of the case be handed over to the CBI, department action against the ASI of the police station concerned be taken and *interim* compensation of Rs. 59,000/- should be paid to the dependants of the deceased within one month, without prejudice to the compensation that may be claimed in accordance with law. Subsequently *i.e.*, on 30th May, 1994, the Government of the NCTD conveyed its acceptance of the recommendations of the Commission.

It cannot but be conceded that the Commission has no teeth and it can take no action directly. It can only recommend and the Government may or may not accept its recommendation. This position is far from satisfactory. In a country where the Government can make or give excuses and can express difference of opinion in respect of the implementations of the report of the Joint Parliament Committee with regard to Bank Security Scam, the recommendations of the Commissions are not sufficient and the Government can any time for political or other reason avoid to implement the recommendation of the Commission or may not pay serious heed to it, the powers given to the Commission under Section 18 after completion of an inquiry are just insufficient. Thus there is much force in the criticism that the Commission has no teeth and it can only make recommendations. Its recommendations are not binding on the Government or the authority concerned.

However, it may be noted that even though the Commission can neither render a decision like a court nor can its decisions be enforced like judgments yet it would not be correct to say that the National Human Rights Commission is a weak or impotent body. Headed by a former Chief Justice of India and consisting of Judges of Supreme Court and Chief Justices of High Courts, its recommendation commands great respect. It is a statutory autonomous body and derives its power and authority from an Act of Parliament. The Central or State Government will have to think several times before deciding to avoid or refuse to implement the recommendations of such an august body. It also deserves mention here that under Section 18 (6), it is mandatory for the Commission to publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission. Such report when published creates strong public opinion. Obviously no Government in a democratic country like ours can afford to resist or avoid such public opinion. Therefore, instead of being reluctant or repulsive, the Government will be too willing to accept and implement the recommendations of the Commission.

Yet another point to be noted here is the narrow definition of 'human rights' given under the Act. It limits human rights to only the rights relating to 'life, liberty, equality and dignity of the individual guaranteed by the Constitution. The Commission has recommended amendments of Protection of Human Rights Act, 1993 but it is disheartening to note that the NDA Government did not pay proper heed to it. Now the Government has changed and the present coalition Government headed by Congress may again take considerable time to do the needful.

This definitely limits the scope of the Commission to ensure the observance of human rights. However, the redeeming feature is found in the words "or embodied in the International Covenant and enforceable by courts in India". Even though these words are also qualified by words "the rights relating to life, liberty, equality and dignity of the individual", they certainly widen the scope of the human rights about the observation of which the Commission will have jurisdiction. This is because of the fact that the Supreme Court has recognized a number of separate and independent fundamental rights as being either part of the existing fundamental right or rights or emanating from them. Moreover, the Supreme Court has recognized in a number of cases referred earlier that International Conventions on Human Rights can be used in interpreting the constitutional provisions and one or more existing fundamental rights are of wide amplitude to include the provisions of International Convention, they can be read into the existing fundamental rights. Thus, new fundamental rights such as right to gender equality and prohibition of sexual harassment of working women at their places of work, can be recognized in future by the Supreme Court.

Thus it may be concluded that despite several shortcomings and drawbacks in the Act, the Commission, in practice, has proved to be an effective body for the observance of human rights in the country. Within a short period. *i.e.*, only a few years, it has performed creditable and praiseworthy works. It has rendered a signal service for the observance of human rights, especially in the field of custodial violence and deaths, false encounters by police, abuse or misuse of powers by Police officials, rape cases, review of Acts and Statutes such as Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and Prevention of Terrorism (POT) Bill, 2000. Most of the recommendations of the Commission have so far been accepted. If some of its recommendations have not so far been accepted and acted upon, the fault is not of the Commission but lies somewhere else, *i.e.*, with the concerned Government or authority. It is therefore desirable that the Central or State Government should pay serious heed to the recommendation of the Commission and unless there are some very strong or cogent reasons for not accepting the recommendation, the Government should generally accept and promptly implement the recommendations of the Commission.

State Human Rights Commission.—According to Section 21 (1) of the Protection of Human Rights Act, 1993, a State Government may constitute a body to be known as the...(the name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned, to State Commission under Chapter V of the Act. The wording of this provision, especially the word 'may' indicate that it is not compulsory for the States to establish State Human Rights Commission. Thus it depends upon the discretion of the State. While under Section 3 of the Act, it is compulsory and mandatory for the Central Government to constitute a body to be known as the National Human Rights Commission for Section 3 uses the words "shall constitute", it is simply optional under Section 21 (1) for the State to constitute a State Human Rights Commission. This is a great defect and weakness of the Act. Since most of the violations of human rights take place in State territories, it should have been compulsory and mandatory for the States to establish State Human Rights Commissions. It is because of this flaw in the Act that many States have yet not established State Human Rights Commissions. Only a few States, namely West Bengal, Assam, Madhya Pradesh, Tamil Nadu and Himachal Pradesh have so far established State Human Rights Commission by the end of March, 1997. Subsequently the Government of Punjab State has established such a Commission but Uttar Pradesh has simply notified the Constitution of a State Commission. Later on the example of above-mentioned States has been followed by the Government of Jammu and Kashmir. In its annual report of 1995-96. The National Human Rights Commission (NHRC) has recommended that State Commissions be established at an early date in the remaining States also.

The Commission has, therefore, recommended that it should be mandatory for every State to establish State Human Rights Commission.

So far State Human Rights Commissions have been set up in 18 States. The names of these States are :

Andhra Pradesh, Assam, Bihar, Chattisgarh, Gujarat, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Orissa, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh and West Bengal.

The NHRC is keen that State Human Rights Commissions (SHRCs) are set up in all the States so that each and every citizen of the country has easy recourse to better protection of 'human rights' as well for matters connected therewith or incidental thereto. The Commission earnestly recommended to all those states which have not yet constituted SHRCs to follow suit at the earliest in the interest of better protection and promotion of human rights.

Constitution of State Human Rights Commission.—The State Human Rights Commission shall consists of :

(a) a Chairperson who has been a Chief Justice of a High Court;

(b) one member, who is, or has been a Judge of a High Court;

(c) one Member who is, or has been a District Judge in that State;

(d) two Members to be appointed from amongst persons having knowledge of, or practical experience, in matters relating to human rights.[85]

The Act also makes provision for the appointment of a Secretary who shall be the Chief Executive Officer of the State Commission and shall exercise such power and discharge such functions of the State Commission as it may delegate to him.[86]

As regards the District Judge to be appointed, it may be noted that Act 43 of 2006 enacted by Parliament provided that a District Judge, who is to be appointed, should also possess an experience that of the District Judge of 7 years. In *J.S. Yadav* v. *State of U.P.*,[87] under the provisions of amended Act, State Government had proceeded to reconstitute the Commission and has simultaneously issued notification stating that petitioner has ceased to hold office on account of amended provisions because the petitioner was Additional District Judge who acted as District Judge and has experience for such period would not be counted to come under definition of District Judge. The Division Bench of the High Court observed that reading of the amended Act intention of the legislature that the post ought to be filled by High Court Judge. The legislative intent is to exclude one on account of experience, Court cannot examine such intent but to honour. Human right approach is equitable in nature and flows from the principle of natural justice for which High Court Judges are more comfortable in discharging the duties conceived of.

Headquarter of the State Commission.—The headquarters of the State Commission has not been fixed or settled by the Act. It should have been at the State capital like that of NHRC which is at national capital. It has been left to the discretion of the State Government to fix or settle the place. The Act simply provides that it shall be at such place as the State Government may by notification, specify.[88]

Jurisdiction of the State Commission.—Sub-section (5) of Section 21 provides that a State Commission may inquire into violation of human rights only in respect of matters relatable to any of the Entries enumerated in List II and List III in the Seventh Schedule to the Constitution. This is however subject to a proviso that if any such matter is already being inquired into by the Commission (*i.e.*, NHRC) or any other Commission duly constituted under any law for the time being in force, the State Commission shall not inquire into the said matter.

But according to the second proviso in relation to Jammu and Kashmir Human Rights Commission, this sub-section (*i.e.*, sub-section (5) of Section 21) shall have effect as if that the words and figures "List II and List III in the Seventh Schedule to the Constitution" the words and figures "List III in the Seventh Schedule to the Constitution as applicable to the State of Jammu and Kashmir in respect of matters in relation to which the Legislature of that State has power to make laws" had been substituted.

The territorial jurisdiction of the National Human Rights Commission or the Commission has not been specifically mentioned or clarified in any provision of the Act although the wording of Section 12 in general indicate and imply that it extends to the whole territory of India. However, negatively Article 36 (1) curtails the jurisdiction by providing that the Commission shall not enquire into any matter which is pending before a

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[85] Section 21 (2), Protection of Human Rights Act, 1993.

[86] Section 21 (3), *ibid.*

[87] 2009 (4) All ALJ 485 (DB).

[88] Section 21 (4), Protection of Human Rights Act, 1993.

State Commission or any other Commission duly constituted under any law for the time being in force. Besides this, Section 36 (2) provides that both the Commission and the State Commission shall not enquire into any matter after the expiry of one year from the date on which the Act constituting violation of human rights is alleged to have been committed.

The Commission has also recommended amendment of Article 36. As regards Article 36(1) the Commission has recommended that the Commission should to allowed to enquire into any matter notwithstanding the matter may be pending before a State Commission or other Commission except an Enquiry Commission established under Commission of Enquiry Act. As regards Article 36(2), the Commission has recommended that it should be entitled to enquire into any matter even though one year has elapsed.

Thus it is certain that a State Commission cannot inquire into violation of human rights in respect of matters relatable to any of the Entries enumerated in List I. This is clear from sub-section (5) of Section 21 of the Act. But the National Commission may inquire into violation of human rights only in respect of matters relatable to any of the Entries enumerated in List I also but also in respect of Entries enumerated in List II and List III. Thus there are chances of conflict between the jurisdiction of the Commission or State Commission. But there is no provision for coordination of activities of both the Commmssion nor there is any provision for the resolution of conflict if any, arises. The Act should have made clear provisions in this respect.

Yet another vague provision in this respect is the use of the words "or any other Commission duly constituted under any law for the time being in force". This provision can be misused by the Central or State Government by constituting a Commission under any other law for the time being in force to oust the jurisdiction of the Commission or State Commission so as to keep it away from serious cases of alleged violation of human rights for political or other reasons.

The Commission has done commendable works during a brief period of nine years. If the Commission is facing certain problems in performing its task of 'better protection' of human rights assigned to it, it is the duty of the Government to solve them. Sooner the Government performs its duty the better. The appointment of a committee of Joint Secretaries which has held four meetings each after a gap of 4 to 6 months and has yet to finalise its report, is not the proper way for a democratic Government to perform its duty. By adopting such an attitude the Government is obstructing the work and progress of the Commission. A democratic Government ought to endeavour to play the role of guarantor and protector of human rights. This can be done by assisting and helping the NHRC by acting on its recommendations rather than obstructing and delaying things.

Amendment of Section 21.—Amendment of sub-section (2), sub-section (3) and insertion of sub-section (7) and sub-section (8) of Section 21 of the Principal Act—

(i) in sub-section (2), in clause (a) of Section 21, the words "Chief Justice", the words "Chief Justice or a Judge" shall be substituted;

(ii) in sub-section (3) of Section 21, for the words "shall exercise such powers and discharge such functions of the State Commission as it may delegate to him", the words "shall subject to control of the Chairperson, exercise all administrative and financial powers of the State Commission" shall be substituted;

(iii) after sub-section (6), the following sub-sections shall be inserted, namely—

"(7) Subject to the provisions of Section 12, the Central Government may, by order, confer upon the State Commission the functions relating to human rights being discharged by the Union Territories, other than the Union territory of Delhi.

(8) The functions relating to human rights in case of Union territory of Delhi shall be dealt with by the Commission."

Appointment of Chairperson and other members of State Commission.—The Chairperson and other Members of State Commissions are to be appointed by the

Governor under his hand and seal after obtaining the recommendation of a Committee consisting of :

(a) Chief Minister—Chairperson

(b) Speaker of the Legislative Assembly—Member

(c) Minister-in-Charge of the Department Home in that State—Member

(d) Leader of the Opposition in the Legislative Assembly—Member

But where there is a Legislative Council in State, the Chairman of that Council and the Leader of the Opposition in that Council shall be Members of the Committee. It is also made clear that no sitting Judge of a High Court or a sitting Judge shall be appointed except after consultation with the Chief Justice of the concerned State.[89] It is also made clear that no appointment of a Chairperson or Member shall be invalid merely by reason of any vacancy in the Committee.

Removal of a Member of the State Commission.—The Chairperson or any other Members can only be removed from his office by order of the President on the ground of misbehaviour or incapacity after the Supreme Court, on a reference being made to it by the President has on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed. This is however, subject to the provision of sub-section (2) of Section 23.[90] Sub-section (2) of Section 23 provides that notwithstanding anything contained in sub-section (1) of Section 23 the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member as the case may be :

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment outside the duties of his office; or

(c) is unfit to continue in office by reason of infirmity of mind or body; or

(d) is of unsound mind and stands so declared by a competent court; or

(e) is convicted and sentenced to imprisonment for an offence within the opinion of the President involves moral turpitude.

That is to say, for the grounds mentioned in sub-section (2), the President can remove the Chairperson or any other Member without making a reference to the Supreme Court.

Term of office of Members of the State Commissions.—A person appointed as Chairperson or as a Member is appointed for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier. While the Chairperson after completion of his term of five years, is ineligible for re-appointment. A person appointed as a Member is eligible for another term of five years subject to the condition that no Member shall hold office after he has attained the age of seventy years.[91]

Amendment of Section 24.—Amendment of Section 24 of the Principal Act—

Section 6 of Protection of Human Rights (Amendment) Act, 2019, has amended Section 24 of the Principal Act. It says :

in sub-section (1) (i),—

(a) for the words "five years", the words "three years" shall be *substituted*;

(b) after the words "whichever is earlier" occurring at the end, the words "and shall be eligible for re-appointment" shall be *inserted*;

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[89] Section 22 (1), Protection of Human Rights Act, 1993.

[90] Section 23 (1), Protection of Human Rights Act, 1993.

[91] Section 24, *ibid.*

(ii) in sub-section (2),—

(a) for the words "five years" the words "three years" shall be substituted;

(b) the words "for another term of five years" occurring at the end, shall be *omitted*.

Annual and Special Reports of State Commission.—The State Commission is required to submit an annual report to the State Government and may at any time submit special reports on any matter which in its opinion, is of such urgency or importance that it should not be deferred till the submission of the annual report.[92] After the annual and special reports are submitted by the State Commission, the State Government shall cause them to be laid before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House alongwith a memorandum of action taken or proposed to be taken on the recommendations of the State Commission and the reasons for the non-acceptance of the recommendations, if any.[93]

Human Rights Courts in Districts.—Section 30 of the Protection of Human Rights Act, 1993 provides for a Human Rights Court in each district. It provides that for the purpose of providing speedy trial of offences arising out of violation of human rights the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences. But no such Court shall be specified if (a) a Court of Session is already specified as a special court; or (b) a special court is already constituted for such offences under any other law for the time being in force.

The Act also makes provision for a special Public Prosecutor for every Human Rights Court. Section 31 of the Act provide that for every Human Rights Court, the State Government shall, by notification, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a special Public Prosecutor for the purpose of conducting cases in that Court.

While Section 31 is mandatory, Section 30 is optional. The provisions contained in Section 30 is very weak, for it uses the word 'may' that is to say, it is not mandatory for the State Government to establish Human Rights Courts in each District. That is why, only a few States, namely Andhra Pradesh, Assam, Sikkim and Tamil Nadu have notified such courts and only two States, namely, Tamil Nadu and Assam have established such Court in Madras and Guwahati respectively, other States have not so far, taken any action in this connection. Sometime back the Director General (Investigation) of National Human Rights Commission said that the greatest number of complaints of violation of human rights come from Uttar Pradesh. Despite this, District Human Rights Courts have not yet been established in Uttar Pradesh. Subsequently, however, such courts have also been notified in Uttar Pradesh.

Section 30 which provides for establishment of District Human Rights Courts does not lay down the jurisdiction of such courts. It also does not lay down as to what procedure shall be followed by such courts. This ambiguity will create problems when the cases for alleged violation of human rights are actually conducted in such Courts.

In its annual report of 2003-2004, NHRC remarked that it is unfortunate that the Central and State Governments have so far failed to resolve issues that are creating impediments in the setting up of fully functioning Human Rights Courts.

Evaluation of Protection of Human Rights Act, 1993 (Act No.10 of 1994).—Apart from the Constitution for the protection and observance of human rights, enactment of the Protection of Human Rights Act, 1993 is an important milestone and should be welcomed. However, it cannot but be remarked that it is certainly a weak effort for it suffers from certain defects and shortcomings. In the first place, there are certain ambiguities and impediments concerning the competence and autonomy of the National Human Rights Commission (NHRC). In its very first annual report for the period ending on March 31, 1994, the Commission recommended the amendment of Sections 2 (1) (d) and 2 (1) (f), 11 (1) (b) and 11 (2) (together with Section 32), Section 13 (1) (f), Sections 18, 30, 36, so as to remove ambiguities and impediments concerning its competence and autonomy of the Commission. These recommendations were reiterated by the Commission in its annual report for the year 1994-95 and the Commission even regretted that action had yet not been taken to give effect to these recommendations and urged that measures be taken without further delay. Unfortunately even this has proved insufficient to awaken the Government from its slumber. This attitude of the Government is not conducive for the proper observance and protection of human rights in the country.

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[92] Section 28 (1), *ibid.*

[93] Section 28 (2), *ibid.*

The NHRC has set up an advisory committee under the Chairmanship of former Chief Justice of India, A.M. Ahmadi to suggest revisions in the Protection of Human Rights Act, 1993.

Secondly, the definition of 'human rights' given in Section 2 (d) is very narrow. As pointed earlier, it is not proper to limit the human rights only to the rights relating to life, liberty, equality and dignity of the individual even though they are the most important basic human rights.

Thirdly, a serious defect of the Act is that establishment of State Human Rights Commissions has not been made mandatory. Section 21 (1) which provides for the establishment of State Human Rights Commission uses the words "may constitute...". This defect ought to be rectified as soon as possible. It is probably because of this, *inter-alia,* only a few States have so far established State Human Rights Commissions. This provision should be mandatory in the same way as Section 3 of the Act which makes it mandatory for the Central Government to constitute National Human Rights Commission.

Fourthly, jurisdiction of the Human Rights Court; has not been specified in the Act. It is not clear what cases will be conducted in such courts and what procedure shall be followed in such courts.

Fifthly, it has been criticized, and rightly too, that the NHRC has no teeth. Though it has been entrusted with the important task of ensuring observance of human rights, the powers conferred on it are not sufficient. It has no power to take a binding decision. It can only recommend. Even though it concludes that violation of human rights has taken place but instead of giving a binding decision it may under Section 18 simply recommend to the concerned Government or authority for the initiation of proceedings for prosecution or other action, or approach the Supreme Court or High Court concerned for such directions, orders, or writs as that court may deem necessary recommend or the concerned Government or authority for grant of some interim relief to the victim of the family. The concerned Government or the authority is not bound to accept the recommendation or may accept the recommendation with certain modifications as it may deem fit. If the Government is really serious and sincere about the observance of human rights. It should give some teeth to NHRC so to make it an effective and useful body.

Sixthly, NHRC has no independent and separate investigating agency and has to utilize and rely upon the service of any officer or investigating agency of the Central Government or of the State Government with the concurrence of the Central Government or the State Government as the case may be.

Last but not the least, it is not proper and just to specify a Sessions Court as Human Rights Courts because these courts are already over-burdened with large number of cases. Therefore, cases of alleged violations of human rights will not receive in such court the priority and importance they deserve nor their expeditious disposal can be ensured in such courts. Separate Human Rights Court under the Protection of Human Rights Act, 1993 ought to be established to achieve the desired results.

Despite the above shortcomings and weakness, National Human Rights Commission (NHRC) has performed praiseworthy and commendable work within a short period. It has rendered signal service in respect of custodial deaths, rape, torture, false police encounters and other police excesses. On March 10, 1999 Chairperson of the NHRC former C.J.I., M.N. Venkatachaliah launched Human Rights Cells in the police headquarters as an effective in-house system to deal with the rising number of cases of custodial violence in the country. "While inaugurating the project, NHRC Chairman, former C.J.I., M.N. Venkatachaliah said that the Commission received about 4,000 complaints of omission and commission of the public servants and a majority of them pertained to police brutality and custodial violence. NHRC Chairman further added that 'Human Rights Cells' will be run by policemen with their own geninus, own resources and own consciousness would go a long way in strengthening the foundation of democracy in the country." These Cells would be headed by an officer not below the rank of the Inspector-General of Police or Additional Director-General of Police who would be designated as "IGP/ADGP (Human Rights)". Though the NHRC would be consulted while nominating them, they would work under the State Government. Works such as these have enhanced the utility and significance of NHRC. Its circular or direction to all the District Magistrates and Superintendents to report to NHRC within twenty-four hours all cases of custodial deaths and rape in their jurisdiction has produced desired results. Now police officials will think several times before committing excesses or misusing or abusing their powers. All credit for this goes to NHRC.

Similarly, in March, 1999, NHRC has issued a directive to all State Governments to immediately ensure medical examination of prison inmate in accordance with the proforma designed by it and monthly reports of progress be communicated to Commission. This has been done to contain the alarming spread of contagious diseases like tuberculosis in jails. Even though the prison rules require medical examination of the inmates after admission but it is a distressing situation that the conduct of such initial examination is more an exception than the normal. That is why, the NHRC had to issue such directions in view of the seriousness of the situation of infectious disease and the gravity of the problem of cross-infection which has the prospect that persons upon being held innocent at the end of the day or after serving the sentence may find themselves in a worse position health-wise than when they entered the prison. It is such welfare activities of the NHRC which have instituted the confidence of the people in it and its utility and necessity.

Similarly the NHRC has recommended the amendment of Sections 2(1)(a), 18, 21, 30, 36(1) and 36(2) of the Protection of Human Rights Act, 1993 but the Government has yet to act on it. The former chairperson of NHRC, Justice J.S. Verma asked in January, 2003 the Governments (Centre and States) to review and amend the rules and regulations that have discriminatory provisions or lack enabling provisions for the enjoyment of full range of human rights by persons with disabilities.

It may, however, be noted that in some very important areas the National Human Rights Commission seems to insensitive, apathetic, inactive for reasons better known to the NHRC. For example, these days it has become a common scene to see whenever workers, medical students, teacher etc. protest peacefully against the wrong, biased or politically motivated decisions or policies of the government police personnel beat them mercilessly. It is not possible without the orders or sanction of the Government. Many a times police personnel get hold of an innocent person, or old person and several police personnel beat a single person merciiessly. Such horrible scenes are shown on T.V. yet neither the Government nor the NHRC takes any action or cognizance against such police personnel. The inaction of the Government can be understood because without the Government sanction or order it is not possible. But what is preventing the NHRC to recommend severe action against such personnel. There seems to be not a single known case wherein the Commission has taken cognizance of it or recommended action against such police men nor there is a single case where the Commission has recommended appropriate compensation for such victims or their relatives.

It may, therefore, be concluded that with certain amendments in the Act so as to remove the existing defects and shortcomings and streamlining the machinery of protection and observance of human rights, Protection of Human Rights Act, 1993 can become an ideal Act for the better protection of human rights in the country.

Evaluation of Human Rights in India.—As noted above, Protection of Human Rights Act can becoming an ideal Act for the better protection of Human Rights. It is also true that National Human Rights Commission has rendered a signal service for the respect and observation of human right in India. But the fact is that Protection of Human Rights Act, 1994 has yet not become an ideal Act because of certain shortcoming. National Human Rights Commission itself admits that it is not sufficiently equipped with adequate powers to enquire, investigate and to ensure respect for the observation of human rights in India.

The situation in India as a whole clearly indicates that the situation of human rights in India is far from satisfactory. Since the inception of the Human Rights Act, the number of cases have progressively increased. In 2009-2010 alone 82,021 cases of human rights violations have been registered by National Human Rights Commissions. As pointed out by "Human Rights Watch", our present Union Government has yet not addressed some of India's most pressing needs including better training of Police, providing health, education, and food security to millions still struggling for sustenance the country's economic growth, ending discrimination against Dalits, tribal groups and religious minorities and protecting the rights of women.

According to 'Human Rights Watch', failure of the government to protect minorities and other vulnerable groups endangers justified grievances and is responsible for militant activity around the country. In fact, Movists are attracting supporters in some states because of the state's long failure to address basic socio-economic needs.

Indian Government points to the independent judiciary, vibrant media and active civil society as evidence that it is a thriving, widespread impunity for human rights violations. While the Indian Government claims that its National Human Rights Commission ensures the protection of human rights but the Commission often admits and defends its insufficient resources to conduct its own investigation and it is not empowered to investigate violations by the Army, and is poorly equipped and is vulnerable to pressure groups.

India's rapidly growing economy and increasing importance as a trading partner has meant that her domestic human rights are receiving international scrutiny. After a visit to India in March 2009, U.N. High Commissioner for Human Rights, Navanethem Pillai called upon India to have good "national laws and policies that promote and protects human rights and seek to support the most vulnerable". She also sought the review of Armed Forces Special Powers Act "that breaches contemporary international human rights standard". She also observed that India is yet to act on those recommendations. India has also not responded to international recommendations to end caste and religion based discriminations. In view of India's growing economic growth, India has been repeatedly urged to play a greater role in advancing human rights and protecting civilians in Burma and Sri Lanka. In this respect, it may be submitted that India should first ensure better respect for and observance of human rights in her domestic field. Even if we set apart international comments, one cannot fail to admit that human rights situation in India is far from satisfactory.

APPENDIX—I

Charter of the United Nations
(Selected Articles)

PREAMBLE

We the Peoples of the United Nations determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained, and

to promote social progress and better standards of life in larger freedom *and for these ends,*

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

have resolved to combine our efforts to accomplish these aims.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.

CHAPTER I

Purposes and Principles

Article I.—The purposes of the United Nations are :

1. To maintain international peace and security, and to that end; to take effective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about the peaceful means, and in confirmity with the principles of justice and International Law adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problem of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion ; and

4. To be a centre for harmonising the actions of nations in the attainment of these common ends.

Article 2.—The organisation and its members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles :

1. The organisation is based on the principle of the sovereign equality of all its members.

2. All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

5. All members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

6. The organisation shall ensure that States which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the member to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II

Membership

Article 3.—The original members of the United Nations shall be the States which, having participated in the United Nations Conference on International Organisation at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4.—1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the organisation, are able and willing to carry out these obligations.

2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5.—A member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored to by the Security Council.

Article 6.—A member of the United Nations which has persistently violated the principles contained in the present Charter may be expelled from the organisation by the General Assembly upon the recommendation of the Security Council.

CHAPTER IV

The General Assembly

Composition

Article 9.—1. The General Assembly shall consist of all the members of the United Nations.

2. Each member shall have not more than five representatives in the General Assembly.

Functions and Powers

Article 10.—The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and except as provided in Article 12, may make recommendations to the members of the United Nations or to the Security Council or to both on such questions or matters.

Article 13.—1. The General Assembly shall initiate studies and make recommendations for the purpose of :

(a) promoting international co-operation in the political field and encouraging the progressive development of International Law and its codification,

(b) promoting international co-operation in the economic, social, cultural, educational and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.

Article 14.—Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations.

Article 17.—1. The General Assembly shall consider and approve the budget of the organization.

2. The expenses of the organization shall be borne by the members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialised agencies referred to in Article 57 and shall examine the administrative budgets of such specialised agencies with a view to making recommendations to the agencies concerned.

Voting

Article 18.—1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include : recommendations with respect to the maintenance of international peace and security, the election of non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (c) of Article 86, the admission of new members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19.—A member of the United Nations which is in arrears in the payment of its financial contributions to the organisation shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a member to vote, if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

CHAPTER V

The Security Council

Composition

Article 23.—1. The Security Council shall consist of fifteen members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of members of the United Nations to the maintenance of international peace and security and to the other purposes of the organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council, shall be elected for a term of two years. In the first election of the non-permanent members, after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

Functions and Powers

Article 24.—1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25.—The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26.—In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military and Staff Committee referred to in Article 47, plans to be submitted to the members of the United Nations for the establishment of a system for the regulation of armaments.

Voting

Article 27.—1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members : provided that in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

CHAPTER VI

Pacific Settlement of Disputes

Article 33.—1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of International peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34.—The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the disputes or situation is likely to endanger the maintenance of international peace and security.

Article 35.—1. Any member of the United Nations may bring any disputes, or any situation of the nature referred to in Article 34, to the attention of the Security Council or the General Assembly.

2. A State which is not a member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Chapter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under the Article will be subject to the provisions of Articles 11 and 12.

Article 36.—1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37.—1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38.—Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII

Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression

Article 39.—The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40.—In order to prevent an aggravation of the situation the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims or positions of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measure.

Article 41.—The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic relations.

Article 42.—Should the Security Council consider that measure provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea or land forces of members of the United Nations.

Article 48.—1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49.—The members of the United Nations shall join in affording mutual assistance in carrying of the measures decided upon by the Security Council.

Article 50.—If preventive or enforcement measures against any State are taken by the Security Council, any other State whether a member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to solution of those problems.

Article 51.—Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right to self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII

Regional Arrangements

Article 52.—1. Nothing in the present Charter precludes the existence of regional arrangement or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.

2. The members of the United Nations entering into suh arrangement or constituting such agencies shall make every effect to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the States concerned or by reference from the Security Council.

.4. This article in no way impaires the application of Articles 34 and 35.

Article 53.—1. The Security Council shall, where appropriate utilise such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council, with the exception of measures against any enemy

State, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such State, until such time as the organisation may on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a State.

2. The term enemy State used in paragraph 1 of this Article applies to any State which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54.—The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX

International Economic and Social Co-operation

Article 55.—With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, the United Nations shall promote :

(a) higher standards of living full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health and related problems and international cultural and educational cooperation; and

(c) universal respect for, and observation of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56.—All members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55.

CHAPTER XIV

The International Court of Justice

Article 92.—The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93.—1. All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

2. A State which is not a member of the United Nations may become a party to the Statute of International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94.—1. Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95.—Nothing in the present Charter shall prevent members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96.—1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinion of the Court on legal questions arising within the scope of their activities.

CHAPTER XVIII

Amendments

Article 108.—Amendments to the present Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional process by two thirds of the members of the United Nations, including all the permanent members of the Security Council.

Article 109.—1. A general conference of the members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of General Assembly and by a vote of any seven members of the Security Council.

APPENDIX—II

Important International Events And Topics Involving Questions Of International Law

*(I) The Problem of Legal control of International Terrorism**.—The problem of the legal control of International terrorism is not new[1]; but it has assumed added significance because of the phenomenon increase in the acts of international terrorism in recent times.[2] International terrorism has, in recent times, manifested itself in various forms including (a) aircraft hijacking; (b) kidnapping of Diplomatic Personnel and other persons and attack on Diplomatic Missions; (c) Taking of Hostages; (d) Terrorism in War of National Liberation; (e) Terrorism in Armed conflicts; and (f) Nuclear Terrorism.[3] It is heartening to note that the international community is seized with this difficult problem. The question of international terrorism was first placed on the agenda of the General Assembly at its twenty-seventh session. While proposing the item at that time, the Secretary-General urged the U. N. to face the international aspects of the problem. He had noted that there was the risk of a steady erosion, through indiscriminate violence, of the already tenuous structure of International law, order, and behaviour. The International Law Commission, in its report (A/8710 Rev. 1) to the same Assembly session, also noted that the over-all problem of terrorism throughout the world was of great complexity but that there could be no question as to the need to reduce the commission of terrorist acts if they could never be completely eliminated.[4]

On 18 December, 1972, the General Assembly adopted resolution 3034 (XXVII) establishing an *ad hoc* Committee on International Terrorism. The Committee comprising of 35 members including India met from 6 July to 11 August, 1973 and adopted its report to the Assembly. The General Assembly was unable to consider the item until the thirty-first session. In its thirty-first session on 19 January, 1977, the Assembly adopted a resolution[5] entitled, Measures to prevent International Terrorism which Endangers or Take Human Lives or Jeopardize Fundamental Freedoms, and study of the Underlying causes of those Forms of Terrorism and Acts of violence which lie in Misery, Frustration Grievance and Despair and which cause some People to sacrifice Human Lives, Including Their own, in an Attempt to Effect Radical changes.

The resolution expressed deep concern over increasing acts of International Terrorism which endanger or take innocent human lives or jeopardize fundamental freedoms. The resolution invited the *ad hoc* Committee on International Terrorism to continue its work in accordance with the mandate entrusted to it under General Assembly Resolution 3034 (XXVII). It was also decided to include the item in the provisional agenda of thirty-second session of the Assembly.

The *ad hoc* Committee on International Terrorism, met in New York from 14 to 25 March, 1977 and decided to transmit to the General Assembly a report containing a summary of views expressed during its two-week consideration of the question. The Committee's report to the Assembly stated that the debate has revealed that its members share the concern of the international community at the development of international terrorism. Although the need to condemn and repress acts of international terrorism falling within "the Common Law" was obvious, there was divergence of views as to what other acts should be included in the expression of "International Terrorism". Some delegations reaffirmed the view that condemnation and repression of international terrorism should take place without qualification. Committee members held the view that the General Assembly must continue its efforts with a view to combating international terrorism. They emphasized the need for international co-operation in dealing with the problem, on the one hand by studying its underlying causes and on the other hand, by putting into practice measures to combat racism.[6]

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* See also for C.S.E. (1989) Q. 8 (a).

[1] As pointed out by Oppenheim, "After the assassination of King Alexander of Yugoslavia in France on October 9, 1934, the Council of the League of Nations in pursuance of a proposal made by France, took steps to bring about an international convention for the prevention and punishment of a crime of political character described as acts of political terrorism. In the convention signed at Geneva on November 16, 1937, twenty-three States undertook to treat as criminal offences acts of terrorism—including conspiracy; incitement and participation in such acts—and in some cases to grant extradition for such offences....Apart from India no member of the British Commonwealth of Nations signed either conventions. The conventions have not entered into force." International Law : Vol. 1; Eighth Edn., p. 710.

[2] See Swadesh Rana, "International Terrorism : A Mode of Combat ?" India Quarterly ; Vol. XXXIV, No. 4 of 1978, p. 491.

[3] M. K. Nawaz and Gurdip Singh : "Legal Control of International Terrorism" IJIL Vol. 17 (1979), p. 66 at op. 76-79.

[4] U. N. Monthly Chronicle, Vol. XIV, No. 4 (April 1977), p. 54.

[5] A/Res/31/102 of 19 January, 1977.

In its thirty-eighth session (1984), the General Assembly vide resolution 38/130 urged all states, unilaterally and in cooperation with other states, as well as relevant U. N. organs to contribute to the progressive elimination of the causes underlying international terrorism and called upon states to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within their territory directed towards the commission of such acts.[7]

Reference may also be made to the 26th Assembly of the 156-members International Civil Aviation Organisation wherein Canada submitted a proposal regarding tough new international laws to punish terrorist attacks on airport terminals. On 27 September, 1986, both the Super Powers, the U. S. and the U.S.S.R.—endorsed the Canadian proposal. If approved by the I.C.A.O.'s Council and ratified by member states the changes would be first since 1971 to the three conventions on air-hijacking or air-terrorism. The non-aligned Summit at Harare in September 1986 asked states to refrain from organising, assisting, or instigating terrorist acts in other countries. The two-day meeting of the Foreign Ministers of South Asian Association for Regional Cooperation (SAARC) meeting at Dhaka in the second week of August 1986 condemned terrorism and called for concrete steps to fight it. But the Summit of the SAARC which concluded on 19 November, 1986 in New Delhi failed to define terrorism. Thus one of the most formidable problems facing the legal control of terrorism is the precise definition of terrorism.[8]

It has been rightly pointed out : There are grave difference amongst states on several issues concerning the adoption of a multilateral convention on International terrorism. The definition problem is probably the most controversial. A resolution of this controversy is a pre-requisite for the adoption of a universally acceptable convention. A narrower definition of international terrorism is probably more likely to receive the approval of a large number of States.

As far as the adoption of legal measures to control terrorism is concerned, the issue of making international terrorism extraditable is of paramount importance".[9] Further, "In some quarters, it is, felt that an International Criminal Court should be established with jurisdiction over International Crimes, and in particular over act falling within the definition of terrorism".[10] But "The time is certainly not propitious for the establishment of an International Criminal Court—notwithstanding the effort of some good intentioned jurists to establish such a Court".[11]

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[6] U. N. Monthly Chronicle, Vol. XIV, No. 4 (April 1977) p. 54.

[7] U. N. Chronicle, Vol. XXI (No. 2 of 1984) p. 51.

[8] See also Brig N. B. Grant (Retd), "Terrorism In search of a Definition, Indian Express, dated 25 November 1986.

[9] M. K. Nawaz and Gurdip Singh : "Legal Control of International Terrorism", IJIL; Vol, 17 (1977), p. 66 at p. 81. See also Yogesh K. Tyagi, "Political Terrorism: National and International Dimensions", IJIL. Vol 27, Nos. 2 & 3 (April-Sept, 1987) p. 160 at pp. 162-180.

[10] Ibid at pp. 162-180.

[11] Ibid, at p. 82.

According to Brian Jenkins, a terrorism expert, 1985 has proved to be the "the worst year yet" and claimed as many as 600 lives worldwide in hijackings, bombings, assassinations and sabotage. These terrorist activities involved as many as 77 countries. As pointed out by U. S. Ambassador to the U. N. Mr. Vernon Walters, "There is today no people, no government, no diplomat, no traveller who can count himself immune from the terrorists". Though the malady of terrorism, has become universal and its dangers are present everywhere irrespective of race, religion, nationality, ideology or sex, the efforts made so far have been far from satisfactory.

Reference may also be made here to "State terrorism" which "is directed by those in power and carried out by state organs against a certain population ......State terror may include not only terrorist-type acts by a government against its own population but also government support of individual terrorist activity. State terrorism is also involved when a government supports acts of terrorism by supporting terrorist groups, providing them with training and financing them.[12] As against this, "International terrorism is an act of terror violence containing an international jurisdictional element *e.g.*, the perpetrator may be from one state while the victim belongs to another state, or the terrorist act may occur in a jurisdiction foreign to both".[13] Though several attempts have been made, through international conventions, to enforce humane standards of behaviour, abolition of torture etc., yet several states indulge in the practice of torture and other forms of state terror.[14] Terrorism in any form, whether International or state, deserves to be condemned.

On 9 December, 1985, the General Assembly of the Organization of American States adopted Inter-American Convention to Prevent and Punish Torture. According to Article 2 of the convention torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish to his physical or mental capacities, even if they do not cause physical or mental anguish. However, the concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred above. Article 11 of the convention provides that state parties shall take necessary steps to extradite anyone accused of having committed the crime of torture or sentenced for commission of that crime, in accordance with their respective national laws on extradition and their international commitments on this matter.

On 4 November, 1987, the Member States (namely Bangladesh, India, Nepal, Bhutan, Maldives, Pakistan and Sri Lanka) of the South Asian Association for Regional Cooperation (SAARC) adopted SAARC Regional Convention on Suppression of Terrorism. Article I of the provision provides that subject to the overall requirements of the law of extradition, conduct constituting any of the following offences, according to the law of the contracting state shall be regarded as terroristic and for the purpose of extradition shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives :—

(a) An offence within the scope of the convention for the Suppression of Unlawful Seizure of Aircraft, signed at Hague on December 16, 1970.

(b) An offence within the scope of the convention for the Suppression of Unlawful Acts against the safety of Civil Aviation, signed at Montreal on September 23, 1971.

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[12] J. N. Saxena, "Relationship Between International Terrorism, State Terror and Human Rights in the World Order", IJIL Vol 27 (1987) p. 194 at pp. 196-197.

[13] Ibid, at p. 196.

[14] T. S. Rama Rao "State Terror as a Response to Terrorism and vice versa : National and International Dimensions", IJIL, Vol 27 (1987) p. 183 at 186.

(c) An offence within the scope of the convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed at Newyork on December 14, 1973.

(d) An offence within the scope of any convention to which the SAARC member states concerned are parties and which obliges the parties to prosecute or grant extradition.

(e) Murder, manslaughter, assault causing bodily harm, kidnapping, hostage taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property.

(f) An attempt or conspiracy to commit an offence described in sub-paragraphs (a) to (e), aiding, abetting or counselling the commission of such an offence or participating as an accomplice in the offences so described.

Article III of the convention provides that the provision of all extradition treaties and arrangements applicable between contracting states are hereby amended as between contracting states to the extent that they are incompatible with this convention. Article VII, however, gives very wide power and discretion to the contracting states with regard to extradition. It provides that contracting states shall not be obliged to extradite, if it appears to the requested state that by reason of the trivial nature of the case or by reason of the request for the surrender or return of a fugitive offender not being made in good faith or in the interests of justice or for any other reason it is unjust or inexpedient to surrender or return the fugitive offender. It has, therefore, been rightly remarked, "The law of extradition has obstructed international reaction against terrorism though all states agree that terrorism should be effectively suppressed". Indeed if terrorism is to be effectively curbed the law of extradition will have, to be suitably amended.

With a view to give effect to SAARC Regional Convention on Suppression of Terrorism, on 26th April, 1996 the Parliament enacted the SAARC Convention (Suppression of Terrorism) Act, 1993. Section 3 of the Act provides that Articles I to VIII of the convention shall have the force of law in India. As regards the Hostage taking, Section 4(1) provides that whoever by force or threat of force or by any other form of intimidation, seizes or details any person and threatens to kill or injure the person with intent to cause a convention country to do or abstain from doing any act as the means of avoiding the execution of such threat, commits the offence of hostage taking under Section 4(2) such hostage taking is punishable with punishment for a term which may extend to ten years, and shall also be liable to fine. As regards the question of extradition of such accused, Section 5 provides that for the purposes of the Extradition Act, in relation to a convention country an offence under sub-section (1) of Section 4 or any other offence specified in Article 1 of the convention, shall not be considered as an offence of a political character.

While on the regional level some concrete steps such as the above and adoption of the 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of international significance by the OAS General Assembly in the third session meeting in Washington from January 25 to February 2, 1971, the adoption of1977 European Convention on the Suppression of Terrorism signed at Strasbourg on January 27, 1977 have been taken, there was absence of a no worldwide convention to tackle the problem of terrorism in an effective way till recently. Since this is a matter of vital importance to everybody sincere and joint efforts should be made to tackle this problem on a worldwide scale forgetting for the time being all political, ideological or other differences.

On 18th October, 1993, India and Russian Federation signed an agreement on cooperation between the two countries in dealing with terrorism, crime, drug trafficking etc. Till an International Convention, which is universally binding, is adopted, such bilateral agreements should be entered into by most of the countries to combat terrorism. Reference may also be made here to the adoption of a resolution on terrorism by the Third Committee of the U. N. on 7th December, 1993. This resolution was moved by Turkey and was co-sponsored by India. The resolution says that terrorism is a violation of human rights.

Reference may also be made to the Delhi Declaration adopted by the Eighth Summit of South Asian Association for Regional Cooperation (SAARC) held at New Delhi from 2 to 4 May, 1995. Through this Declaration the Heads of State or Government expressed serious concern on the spread of terrorism in and outside the region and reiterated their unequivocal condemnation of all acts, methods and practices of terrorism as criminal. They deplored all such acts for their impact on life, poverty, socio-economic development and political stability as well as on regional and international peace and cooperation. They once again emphasized that highest priority should be accorded to the enactment of enabling legislation at the national level to give effect to the SAARC Regional Convention on Suppression of Terrorism. They urged Member States which had not done so, to enact expeditiously enabling legislation at the national level to implement the convention and reiterated in need for a constant dialogue and interaction among the concerned agencies of Member States, including submission of periodic recommendation to the Council of Ministers. Finally they underlined that cooperation among SAARC Member States was vital if the scourge of terrorism was to be eliminated from the region.

America has expressly recognized Pakistan's hand in sponsoring state terrorism and has warned it several times. America has not only ratified the extradition treaty between America and India but has also agreed to tackle terrorism jointly. This change of attitude has come after Pakistan's intrusion in Kargil area of Kashmir.

Yet another development that has taken place is that India has been able to secure Russia's cooperative action to fight cross border terrorism. Russia on its part is alarmed and annoyed by Pakistan's role in assisting militants in Chechnya and Dagestan war.

Reference may be made here to the adoption of International Convention for the Suppression of Terrorist Bombings. This convention was adopted by the General Assembly on 15 December, 1977. The Convention entered into force on 23rd May, 2001. So far 164 countries have become parties to this Convention.

Reference may also be made here to the International Convention for the suppression of the Financing of Terrorism which has been passed by the General Assembly in December, 1999 to halt the flow of money to terrorist organisations.

Following a proposal by France, the U.N. General Assembly initiated work on the treaty in 1998. It was adopted by the General Assembly on December 9, 1999. The International Convention for the Suppression of the Financing of Terrorism (1999) came into force on 10th April, 2002.

One of the main reasons of the early ratification of the treaty was the terrorist attack of September 11, 2001 on Twin Towers of World Trade Centre which shocked the whole mankind. America regarded it as "Attack on America" with this horrible incident the International terrorism reached its zenith. Spurred by this incident a number of States ratified the above convention. So far the convention has been ratified by 26 States. It is significant to note that out of total 26 ratifications, 22 ratifications were made after September 11 attacks. So far 188 countries have become parties to the Convention.

According to the Convention it is a crime to provide or collect funds with the intention or knowledge that the money will be used to carry out a terrorist attack. Since financing is at the heart of terrorist activity, the Convention paves the way for closer co-operation between nations, law enforcement agencies and financial authorities. The Convention mandates stepped up efforts to identify, detect and freeze or seize funds earmarked for terrorist acts and requests States to use such funds to compensate victims and their families. It also calls on financial institutions to report to their governments any unusual or suspicious transactions.

A brief reference may also be made here to the U.N. Millennium Summit held in September 2000. The Summit pledged to take concerted action against international terrorism.

Prior to the 1999 Convention referred above the Convention of the Marking of Plastic Explosives for the Purpose of Detection was signed at Montreal in March, 1991.

Reference may also be made to the Working Document submitted by India on the Draft Comprehensive Convention on International Terrorism. The Draft Convention in the preamble expresses the resolve to take effective measures to prevent acts of terrorism and to ensure that perpetrators of terrorist acts do not escape prosecution and punishment by providing for their extradition or prosecution. Article 2 of the Draft Convention provides that any person who commits an offence within the meaning of this Convention if that person, by any means unlawfully and intentionally does an act intended to cause :

(a) death or serious bodily injury to any person ; or

(b) serious damages to a State or Government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss.

When such act, by its very nature or context is to intimidate a population or to compel a Government or an international organization to do or abstain from doing any act.

Further, any person also commits an offence if that person attempts to commit an offence or participates as an accomplice in an offence as set above.

Article 4 provides that each State Party shall adopt such measures as may be necessary :

(a) to establish as criminal offences under its domestic law the offences set forth in Article 2 ;

(b) to make those offences punishable by appropriate penalties which take into account the grave nature of those offences.

Further, each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Draft Convention also provides for extradition of alleged offender or if it does not extradite, it will prosecute him without exception (Article 11).

Besides submitting the above draft Convention, the Indian Parliament enacted Prevention of Terrorism Act, 2002. Article 1 of the Act provided that except in respect of entries at serial numbers 24 and 25, the Act shall be deemed to have come into force on the 24th day of October, 2001 remained in force for a period of three years from the date of its commencement. Thus Prevention of Terrorism Act (POTA) expired on 23rd day October, 2004. Its no more in existence.

Last but not the least, the U.N. Security Council on 28 September, 2001 passed a resolution on terrorism. Acting under Chapter VII of the United Nations, the Security Council resolved that all States shall :

(a) prevent and suppress the financing of terrorist acts ;

(b) criminalize the wilful provision for collection by any means, directly or indirectly, of funds by their nationals or in the territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts ;

(c) freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of the terrorist acts or entities owned or controlled directly or indirectly by such persons ; and if persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from such property owned or controlled directly or indirectly by such persons and associated persons and entities; and

(d) prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, or of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such person.

The Security Council also decided to establish, in accordance with Rule 28 of its provisional of procedure, a committee of the Security Council, consisting of all the members of the Council to monitor implementation, of this resolution, with the assistance of the appropriate expertise, and called upon all States to report to the Committee, not later than 90 days from the date of adoption of this resolution and thereafter according to a time-table to be proposed by the Committee, on the steps they have taken to implement this resolution. Finally, the Council decided to remain seized of this matter.

This is indeed an important step to prevent and suppress terrorism yet it cannot be denied that terrorism has assumed such a magnitude that many other stringent steps will have to be taken to curb it.

In addition to the above steps the United Nation's General Assembly adopted in April, 2005, International Convention for the Suppression of Acts of Nuclear Terrorism. This was the thirteenth convention designed to combat terrorism. Incidentally, this was the first one adopted by the General Assembly since the terrorism attack of September 11, 2001. The Secretary-General of the U.N. opened this convention for signature on September 14, 2005.

The above steps may go a long way to curb terrorism, therefore, it is necessary that States should ratify these conventions and to implement them in an effective way. This is imperative because there has been no decrease in the terrorist acts.

Last but not the least one of the major failures of the United Nations is that uptil now it has not been able to define the word 'terrorism' which may be universally acceptable.

(II) Nuclear Terrorism.—It has been aptly remarked, "Against the backdrop of a global environment which accepts legitimacy of nuclear weapons, countenances vast nuclear arsenals, and the use of coercive diplomacy by the powerful nations, state terrorism in several countries and state sponsored terrorism in the form of 'covert operations' the prospects of finding solutions to international terrorism seem far from bright".[15] Since the menace of terrorism is constantly increasing, it is not difficult to envisage a situation wherein a terrorist organisation is in possession of nuclear arms and eventually makes their use for acts of terrorism.[16] According to the panel headed by retired U. S. Rear Admiral Thomas Davies and Bernard O'keefe on the prevention of nuclear terrorism, "the possibility of nuclear terrorism is increasing".

The danger stems from a confluence of factors such as : (i) the growing incidence, sophistication and lethality of conventional forms of terrorism, often to increase stock value; (ii) the support and in some cases sponsorship of terrorism by nations; and (iii) an increasing number of targets, such as nuclear reactors used to generate power or conduct research. According to report of the panel, "Terrorists could go nuclear in a variety of ways". It added : the most serious threat involves the possible theft of a nuclear weapon which might be detonated "with the most catastrophic consequences" in a densely populated area. The next riskiest prospect was the "theft of nuclear materials and their use or threatened use in a crude home-made bomb".[17] Further, nuclear terrorism may also be resorted to by disgruntled groups within the Government.

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[15] R. G. Sawhney, "Combating World Terrorism", The Pioneer, dated 25 June, 1986.

[16] See Louis Rene Beres Terrorism and Global Security—The Nuclear Threat Boulder, Westview Press, New York, 1979.

The fears of imminent nuclear terrorism are not totally unfounded. Some attempts in this direction have already been made.[18] For example, three young Americans were arrested by the U. S. Federal Bureau of Investigation in October 1978 on the charge of conspiracy to steal the *USS Trepang*, an American nuclear missile submarine. The second such incident occurred in April 1985 when unusually high levels of radioactive plutonium were found in New York's water supply. Apprehensions were expressed that this appeared to be the work of terrorists because after the incident an anonymous letter containing a threat to poison reservoirs was received by the city Mayor. Besides this, during the cultural revolution in China in 1967 it was reported that the military commander of Sinkiang province threatened to seize the nuclear base of the Maoists attempted to take over the provincial government. Moreover, during the revolt of the French General against President de Gaule in 1960, previously scheduled nuclear test had to be conducted several days ahead of plan to prevent the chances of rebel generals taking over nuclear warheads. Last but not the least, during 1974 Cyprus crisis in view of the fear of either Greece or Turkey or both these NATO parties seizing nuclear weapons to blackmail the U.S., the U. S. ordered its Sixth Fleet in the Mediterranean to be prepared to send a Marine detachment aboard helicopters to recover nuclear warheads in Greece and Turkey. Since the nuclear powers have emplaced nuclear arsenals at numerous strategic places all over the world, the chances of some of them falling in the hands of terrorists by theft or otherwise cannot be ruled out. Since the proliferation of nuclear weapons has increased instead of being checked in recent years and some more countries are either on the threshold of acquiring nuclear weapons or have already acquired, the possibility of nuclear terrorism has been constantly increasing. With the breaking up of the Soviet Union, the problem has assumed serious magnitude because the nuclear arsenals of the former Soviet Union were situated in several of its former republics.

Some steps have been proposed to meet the threat and grave situation arising out of nuclear terrorism. It has been proposed to establish an international police force to prevent thefts of nuclear materials—a sort of nuclear super interpol. It has been suggested that more stringent accounting procedures be created to plug the leak of materials from facilities. But even these may not suffice because "every country is vulnerable to nuclear terrorism whenever it might take place and the weakest national links in any safeguards system could effect all other countries. Secondly............ protection and control of inventories cannot be made perfect, and the risks can be reduced but not entirely eliminated".[19] It need not be overemphasized that the problem of nuclear terrorism is grave and needs to be tackled earnestly. The accident at Soviet nuclear reactor at Chernobyl has clearly demonstrated the helplessness of experts and scientists to check effectively the accidents of nuclear reactors. The situation will indeed be very grim if the terrorists are ever able to make use of nuclear weapons as an act of terrorism or a successful attack is made against any of the powerful nuclear reactors. It is therefore, imperative to create a supra-national authority capable of monitoring and effective preventive action. This is possible only if the super-powers and other nuclear powers unite to achieve the desired effect forgetting power politics in this respect and disregarding their ideological and other differences. Hitherto all such efforts have been confined to nuclear weapons states. Since terrorism is a world-wide phenomenon, if a world-wide effective safety system is to be built the support of all countries, big or small, will have to be enlisted. It is necessary to have continuous planning and special crisis-management policies at various government and non-governmental levels to deal with the situation.[20] Let us hope that good sense will prevail upon those who are at the helm of affairs and an effective supra-national authority capable of monitoring and preventive action will be created well in time to save world from catastrophe.

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[17] The Pioneer, dated 27 June, 1986.

[18] Several such attempts have been narrated in excellent article by P. K. S. Namboodiri, "Nuclear Terrorism", Times of India, dated 18-9-85, 19-9-85 and 20-9-85.

[19] P. K. S. Namboodiri, "Nuclear Terrorism", Times of India, dated 18-9-85, 19-9-85 and 20-9-85.

It may be noted here that a draft Convention on Fighting Acts of Nuclear Terrorism is being prepared. In his address to the General Assembly of the U.N. on 21 September, 1999, Russian Foreign Minister, Igor Ivonor spoke that his country was fully aware of the threats and challenges of militant nationalism, separatism and terrorism. He, therefore, emphasized the need and urgency "to finalise the draft Convention on Fighting Acts of Nuclear Terrorism". The Russian Foreign Minister also supported the initiative of holding an anti-terrorism Conference under the auspices of the United Nations or a Special Session of the U.N. General Assembly in 2000.

·International Convention for Suppression of the Financing of Terrorism, which was adopted by the General Assembly on December 9, 1999 came into force on 10th April, 2002. So far 188 countries have become parties to the Convention. Reference may be made here to the International Convention for Suppression of Terrorist Bombings, 1997. This convention was adopted on 15th December, 1997 and came into force on 23 May, 2001. So far 170 countries have become parties to the Convention.

(III) Legality of Air Dropping of Medicines and Essential Supplies in Jaffna (Sri Lanka) by India

N.B.—For this please see Chapter on "Intervention".

(IV) Question of withdrawal of Indian Peace Keeping Forces (IPKF) from Sri Lanka

N.B.—For this also please see chapter on "Intervention".

(V) American Intervention in Nicaragua

N.B.—For this please see chapter on "Intervention".

(VI) U. S. Attack on Libya

N.B.—For this also please see chapter on "Intervention".

(VII) Accident at Soviet (now Ukaranian) Nuclear Plant at Chernobyl

N.B.—For this please see matter discussed under the heading 'Nuclear Safety' in Chapter on "Environment and Development".

(VIII) The Afghan Issue

N.B.—For this please see chapter on "Intervention".

(IX) Falklands Islands Issue

N.B.—For this also please see chapter on "Intervention".

(X) Star Wars and International Law

N.B.—For this please see chapter on "Disarmament".

(XI) Financial Crisis Faced by the United Nations

N.B.—For this please see chapter on "The General Assembly of the United Nations".

(XII) American Decision of closure of Observer Mission of the Palestinian Liberation Organisation (PLO)

N.B.— For this please see Chapter on "Definition, Nature and Functions and Evolution of International Organisation".

(XIII) Rejection of Application for Visa to PLO Leader Yasser Arafat by the United States of America

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[20] See Sankar Sen, "Nuclear Terrorism", The Hindustan Times, 4th January, 1994.

N.B.—For this also please see Chapter on "Definition, Nature and Functions and Evolution of International Organisation".

(XIV) Emergence of Namibia (South West Africa) as an Independent State

N.B.—For this please see Chapter on "The International Trustee System and the Trusteeship Council".

(XV) Problem of the Independence of the Trust Territory of Pacific Islands or Micronesia

N.B.—For this also please see chapter on "The International Trustee System and the Trusteeship Council".

(XVI) Global Warming, Depletion of Ozone Layer etc. : 'Global Warming : Global Warning'

N.B.—For this please see Chapter on "Environment and Development".

(XVII) Intermediate Range Nuclear (or INF) Treaty

N.B.—For this please see Chapter on "Disarmament".

(XVIII) State Liability for Acts of Multinational Enterprise or Corporation : Bhopal Gas Leak Disaster

N.B.—For this please see Chapter on "State Responsibility".

(XIX) American Intervention in Panama

N.B.—For this please see Chapter on "Intervention".

(XX) Need for Enlargement of the Security Council

N.B.—For this please see Chapter on "Security Council".

(XXI) Gulf War (1991) or Iraqi Invasion and Annexation of Kuwait

N.B.—Please see Chapter on "Intervention" for a discussion on this topic.

(XXII) Kurd's problem and the legality of action taken by the U.S. and the United Nations

N.B.—For this also please see Chapter on "Intervention".

(XXIII) Kashmir Problem.—In accordance with the provisions of Indian Independence Act, 1947, India became an independent Dominion with effect from 15 August, 1947. The Government of India Act, 1935 provided that any Indian state could merge in the Indian Dominion by executing an instrument of accession. Referring both the above-mentioned Acts, Maharaja Hari Singh of Jammu and Kashmir announced on 26 October, 1947 the accession of the State of Jammu and Kashmir with the Dominion of India and on the same day he executed the instrument of accession. The then Governor-General of India, Mountbatten also accepted the accession of the State of Jammu and Kashmir with the Dominion of India. According to the Instrument of Accession dated 26 October, 1947, the accession of the State of Jammu and Kashmir with the Dominion of India was subject to certain conditions. In the first place, it provided that the Instrument of Accession would not be amended by the Indian Independence Act, 1947 or any other Act until it was consented to by the Maharaja. That is to say, it could be amended only with the consent of Maharaja. Secondly, the Legislature of Indian Dominion would not be entitled to the compulsory acquisition of land in the State of Jammu and Kashmir. If according to the Dominion, acquisition, of certain land was essential, on its request and expense the Maharaja would acquire the land, and transfer the land to Dominion. In case the land in question belonged to Maharaja, he would transfer the same to the Dominion. Thirdly, the Instrument provided that despite the Instrument of Accession, Maharaja would not be bound by future Indian Constitution nor shall such Constitution adversely affect his discretionary right to enter into agreement with the Government of India.

In view of the above facts and circumstances, Article 370 was included in the Indian Constitution and in keeping with the letter and spirit of the Instrument of Accession, the State of Jammu and Kashmir was conferred a special status in the Union of India. Article 370(1) provides that notwithstanding anything in this Constitution, the power of the

Parliament to make laws for the said State shall be limited to those matters in the Union list and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify. Article 370(3), however, clearly provides that notwithstanding anything in the foregoing provisions of this Article, the President may, by public notification, declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify. There is a proviso to Article 370(3) which adds : Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

A perusal of the above Acts, Instrument of Accession and the provisions of the Constitution makes it clear that accession of the State of Jammu and Kashmir into the Dominion of India was complete and final. Thus the State of Jammu and Kashmir came under the sovereignty of India and it became a part of India. Despite this Pakistan attacked Kashmir in 1947. India raised this issue in the Security Council of United Nations. India hoped that the United Nations would declare Pakistan as an aggressor and that justice would be done with her. But the western countries adopted a biased attitude. Instead of declaring Pakistan as an aggressor, they converted this issue as general matter or subject of relations between India and Pakistan and established India-Pakistan U.N. Commission. Pakistan claimed that plebiscite be held in the State of Jammu and Kashmir so as to ascertain the views of the people as to whether they want to merge with India or Pakistan. This demand is totally unjustified. Plebiscite[21] is based on the principle of self-determination[22] which finds mention in Article 1 of the U.N. Charter. It is not a binding principle of international law. It has become a binding principle of international law only in the context of colonialism. It need not be over-emphasized that Kashmir is not a colonial situation. As noted above, the accession of Jammu and Kashmir into India is complete and final and that it is irreversible. Despite this legal and factual position, under certain pressures, India agreed to hold plebiscite in Kashmir. The resolution of the United Nations which provided for plebiscite clearly provided for withdrawal of Pakistan Armed Forces from Pak-occupied Kashmir as a condition precedent for holding plebiscite. Plebiscite could not be held because Pakistan never fulfilled this condition. After so many years, resolution for holding plebiscite has lost its relevance and the United Nations has recognized it.

Legal Aspects.—In respect of Kashmir Pakistan has always claimed that plebiscite be held and that India is bound to do so. Though at an early stage India had agreed to hold plebiscite in Kashmir but this was subject to the condition that Pakistani armed forces be first withdrawn from Pak-occupied Kashmir. Since Pakistan did not fulfil this condition, plebiscite could not be held. India now claims that in view of the changed conditions, there is no justification whatsoever for holding the plebiscite. When on 26 October, 1947, Maharaja Hari Singh of Jammu and Kashmir executed the Instrument of Accession, from that very day Jammu and Kashmir became part of India, Jammu and Kashmir has had several elections since then and people have had the opportunity of exercising their franchise. America, Britain and other western countries have also been supporting India's stand since 1990 and have consistently expressed the view that plebiscite in Kashmir is no more essential and that India and Pakistan should settle their problems in accordance with Simla Agreement (1972).

Yet Pakistan continues to harp on the plebiscite for the solution of Kashmir problem. The basis of plebiscite is the principle of self-determination which finds mention in Article

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[21] For Plebiscite as mode of acquiring territory and with reference to Kashmir see Chapter on "State Territory".

[22] For the principle of self determination see Chapter on "Origin, Purposes, Principles, Membership etc. of U.N.".

1(2) of the U.N. Charter. According to it, one of the purposes of the U.N. is to develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, and to take other measures to strengthen universal peace. "Self-Determination" usually means two rights—(1) the right of the people to determine as to which country they would belong to ; (2) the right of the people to determine the type of government they will have. The principle of self-determination is not a binding principle of international law under all circumstances. The right of self-determination finds mention in Article 1 of the U.N. Charter. Article 1 deals with the purposes of the U.N. Purposes as such, are not binding. They can become binding being connected with other provisions of the charter, the resolutions of General Assembly and state practice. The principle of self-determination has become binding principle of international law in the context of colonialism only. According to jurists, combined effect of Articles 55 and 56 of the U.N. Charter, resolutions of the General Assembly relating to eradication of colonialism, especially Resolution relating to Granting of Independence to colonial Peoples [Gen. Ass. Res. 1514 (XV)], State practice, advisory opinions of the International Court of Justice is that in the context of colonialism, the principle of self-determination has become a binding principle of international law. Thus the principle of plebiscite can be applied as a binding principle only in the context of colonialism. It cannot be applied to established states. Indeed Kashmir is not a colonial situation and hence principle of self-determination, and for that matter plebiscite, cannot be applied as a binding principle of international law in respect of Kashmir. Prof. Rahmatullah Khan has also aptly said, "The principle (*i.e.,* the principle of self-determination) must be deemed to have application in the process of decolonisation alone. It could not be applied to established states in their territorial disputes. No such state is likely to espouse this principle and invite self-destruction. For what else would it be but self destruction if India accedes to the demands of the Nagas, the Mizos and others or if Iraq concedes the demands of the Kurdish claim, or if the U.S. allow extremist Black Panther demands for a separate Negroland".[23] U.S. congressman Solarz has also expressed the same view. Putting a question to those supporting plebiscite in Kashmir, he said, "Would we call for a plebiscite in Quebec?"

It is often forgotten that the Kashmir issue arose because of the aggression committed by Pakistan. It was India who lodged the complaint in the Security Council of the U.N. Jammu and Kashmir's accession to India cannot be successfully challenged. As rightly pointed out by Rikhi Jaipal, the real issue is not whether Jammu and Kashmir is or is not a part of India. The real issue is that Pakistan has been illegally occupying occupied Kashmir. After the end of 1971 war with Pakistan, India should have insisted that the territories conqured from Pakistan would be returned to Pakistan only when it first withdraw from occupied Kashmir. Idealism ought to have no place in international relations. International relations should be maintained on the basis of realism and national interest.

As regards Kashmir issue, in second fortnight of November, 2010, an annual report of the U.N. Security Council to the U.N. General Assembly has once again dropped mention of Jammu and Kashmir in keeping with a trend that started in 2006. Welcoming the U.N. Security Council report, Indian diplomats said that the issue has not been part of any U.N. Security Council since 2006. In 2006, then U.N. Secretary General Kofi Annan declared that the "plebiscite" issue could not be enforced or self-implemented. Thus Indian official said it was a "dead letter".

Time and again, Pakistan has been approaching number of times the U.N. to mediate between Pakistan and India over dispute in Kashmir. But as in past, the same was declined and asked it to solve it bilaterally with India.

N.B.—See also in this Appendix Pakistan's Fresh Intrusion in Kargil Area of Kashmir (April-May, 1999). During the Kargil war a Pakistani military aircraft was shot down by

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[23] Rahmatullah Khan, "The U.N. Handling of the Kashmir Problem" in Asian States and the Development of Universal International Law" edited by R.P. Anand (1972) p. 108 at p. 118.

India on August 10, 1999. Pakistan filed a case against India in the International Court of Justice. The Court decided in favour of India on 21 June, 2000.

Kashmir now a Union Territory—Inoperation of provisions of Article 370 of the Constitution and scrapping of Article 35-A of the Constitution.—In a historic move, Home Minister of India moved a Bill in the Lok Sabha on 5th August, 2019 for doing away with the obnoxious provisions of Article 370 and removal of Article 35-A of the Constitution of India. The Bill proposed the change of the terms of engagement with Jammu and Kashmir by doing away with the special status of State enjoyed under Article 370, scrapping Article 35-A and splitting the sensitive border State into Union Territories of Jammu and Kashmir and Ladakh. The Bill passed by overwhelming majority in the Lok Sabha was approved by the Rajya Sabha by voice vote. Special status of Jammu and Kashmir was revoked.

One of the formidable obstacles in the amendment of Article 370 was the requirement of the consent of the legislative assembly. Since at the relevant time, Jammu and Kashmir was under the President Rule and incharge of the State of Jammu and Kashmir was Governor. Thus this requirement was met by taking the consent of the Governor.

Then, on 5th August, 2019, the President of India, passed the Constitution (Application to Jammu and Kashmir) Order, 2019 which runs as follows :

"In exercise of the powers conferred by clause (1) of Article 370 of the Constitution, the President, with the concurrence of the Government of State of Jammu and Kashmir, is pleased to make the following order—

(1) This order may be called the Constitution (Application to Jammu and Kashmir) Order, 2019. It shall come into force at once, and shall thereupon supercede the Constitution (Application to Jammu and Kashmir) Order, 1954, as amended from time to time.

(2) All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows :

To Article 367, there shall be added the following clause, namely—

"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—

(a) references to this Constitution or to the provisions thereof shall be construed as references to Constitution or the provisions thereof as applied in relation to the said State ;

(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and

(d) in proviso to clause (3) of Article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State".

Thereafter, on 6th August, 2019, the President issued the "Declaration under Article 370(3) of the Constitution" which runs as follows :

"In exercise of the powers conferred by clause (3) of Article 370 read with clause (1) of Article 370 of the Constitution of India, the President, on the recommendation of Parliament, is pleased to declare that, as from the 6th August, 2019, all clauses of the said Article 370 shall cease to be operative except the following which shall read as under, namely :

> "370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in Article 152 or Article 308 or any other article of this Constitution or any law, provision of the Constitution of Jammu and Kashmir or any other document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under Article 363 or otherwise."

Finally, the Parliament passed the Jammu and Kashmir Reorganisation Act, 2019 which also received the assent of the President of India.

Thus the issue of Jammu and Kashmir has been solved permanently. The obnoxious provisions of Article 370 have been made inoperative and Article 35-A has been removed from the Constitution. For the effective administration Jammu and Kashmir has been divided into two parts and these two parts have been made Union Territories. These two parts are—(i) Jammu and Kashmir with Legislative Assembly, (ii) Union Territory of Ladakh without Legislative Assembly. Each of these two parts are governed by a Lt. Governor. The problem of Kashmir has thus been solved for ever.

(XXIV) UN's Sanctions Against Libya—Lockerbie case.—On 21st January, 1992, the United Nations Security Council passed an unanimous resolution calling on Libya to accede to the requests of the U.S. and U.K. to hand over two Libyan officials wanted in connection with the 1988 bombing of Pan American (flight 103) airliner. The U.S. and the U.K. have indicted the said two Libyan officials for the bomb attack in which the airliner blew up over Lockerbie (Scotland) killing 270 persons. According to the U.S. Ambassador Thomas Pickering, since the two Libyan officials were agents of the Libyan Government, an impartial trial for them in Libya would be an impossibility. He added, "The council was faced in this case with clear implications of Government involvement in terrorism as well as the absence of an independent judiciary in the implicated state". As regards the above resolution of the Security Council, he said, "The resolution makes clear that neither Libya nor any other state can seek to hide support for international terrorism behind traditional principles of international law and State practice". British Ambassador Sir David Hannay expressed the same view adding that "in the circumstances of this, it must be clear to all that the state which is itself implicated in the acts of terrorism cannot try its own officials". The above resolution calling on Libya to hand over to U.S. or U.K. the two Libyan Officials accused of blowing up Pan American airliner over Lockerbie (Scotland) was co-sponsored by France along with the U.S. and Britain. France had earlier issued arrest warrants for four high-ranking Libyan intelligence officials, for the bombing of a French airliner over Nigeria in 1989, killing 171 people. U.N. resolution ordering the sanctions also calls on Libya to cooperate, with investigation of this case. It is a fact that Libya has been guilty of promoting terrorism as an instrument of its foreign policy. Conduct of Libyan Leader as well as sponsorship of terrorism over the last two decade has been a constant cause of worry among the western circles. Right from the day of the Lockerbie incident, Americans were determined to find the truth and bring to book the guilty persons. This is clear from the following policy statement of Ambassador Paul Brener III :

"We are determined to do everything in our power to see that this cowardly, senseless act will not go unpunished. We are committed to the bringing of the perpetrators to justice. Working with the British and other governments, we will follow every lead until we have answers. It may take time—there are not always quick answers in these cases—but......... by using all our resources we will succeed in locating the murderers. Then we will exert all efforts to bring them to justice."[24]

The Americans did succeed in locating the terrorists who blew the Pan American over Lockerbie in mid-air and also Libyan Government's involvement and as per their resolve the above resolution of the U.N. Security Council was the logical culmination of their efforts. It may be recollected that on 15 April, 1986, American aircraft attacked two Libyan cities of Tripoli and Bengazi as a retaliation for Berlin Explosion for which it held Libya responsible. Though American action then was questioned under international law yet Americans claimed that it was their deliberate and well-calculated reply to counter terrorism. As pointed out by L. Paul Berner, III, "Our 1986 airstrike on Libya's terrorist camps was the watershed event in the world's fight against terrorist supporting states. European states followed our lead against Libya by imposing political, economic, and security measures against the Libyan regime. European Community members expelled more than 100 Libyan 'diplomats' and restricted the movements of other Libyan 'diplomatic' and 'consular' personnel. These moves severely damaged Libya's European network dedicated to supporting international terrorism".

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[24] "Terrorism : Its Evolving Nature" current Poly No. 1 U.S. Deptt. of State Bureau of Public Affairs, Washington D.E., p.1

Further, "The pillar of U.S. Government policy may not force these nations to cease entirely their support for terrorist groups. Indeed, both Libya and Syria continue to provide such support. But a concerted, vigorous western strategy does make them move more cautiously and become more circumspect".[25]

On 4 January, 1989 once again America took action against Libya by shooting down two Libyan Jets (MIG 235 and F-145) because according to America Libya had built a chemical factory 16 km. south to Tripoli. At that time also American action was questioned as violative of the rules of international law. But things have changed significantly since America's role in Gulf War (1991), the end of Soviet Union and the emergence of the United States of America as a sole Super Power have completely changed the entire international prospective. It is also clear like crystal that Libya failed to learn a lesson from earlier American action and western strategy. Moreover, in the present Lockerbie case, the United States of America has taken a wise step in not resorting to direct action. Instead of taking direct retaliatory action, America has utilized the forum of the Security Council in order to achieve the desired objectives. After the Gulf War (1991) and the end of Soviet Union, the Security Council has become more or less a captive body of the western countries led by America.

In response to Security Council resolution, Libya offered to hand over the two suspects accused to a neutral country for trial. But this was not acceptable to the U.S. and U.K. nor was it "full and effective response" of the Council resolution. On 5th March, 1992, U.N. Secretary-General said that Libya had not yet agreed to hand over agents accused of the mid-air 1988 bombing of a Pan American airliner over Lockerbie (Scotland), paving the way for sanctions by western powers. Subsequently, Libya modified its stand and offered to hand over two suspects to the Arab League which might turn them over to the U.N. Secretary-General and finally to either the U.S. or U.K. for trial. In the meantime, however, on 31st March, 1992, the U.N. Security Council passed a resolution imposing sanctions against Libya. The resolution had an easy passage but five members—India, China, Morocco, Zimbabwe and Cape Verde—abstained from voting. Earlier China had been warned by the U.S. not to exercise veto. It was made clear that if China exercised veto its relations with the U.S. would be strained. The resolution asked all states to break aviation links, stop sale of all types of arms even for paramilitary forces, reduce number and level of Libyan diplomatic staff and restrict and control movement of the remaining diplomats till it hands over the two suspects and ceases all forms of terrorist action and assistance to terrorist groups. The resolution has asked Libya to promptly, by concrete action, demonstrate its renunciation of terrorism. The resolution prohibits all air links with Libya except humanitarian flights previously cleared by the sanction which would be established by the Security Council. The resolution also bans operation of Libyan Arab Airlines and asks all countries to deny entry to its personnels who may have been denied entry or expelled by other States because of their involvement in the terrorist activities. According to the resolution, these sanctions against Libya would start from 15 April, 1992 and would continue until Council determines that Libya has fulfilled all conditions.

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25. "Countering Terrorism in the 1980s and 1990s" Department of State Bulletin, February, 1989, p. 91.

It may be noted here that even before the resolution imposing sanctions against Libya had been passed, the Government of the U.S. (Treasury Deptt.) froze American assets of 48 business, which according to American Government, are ultimately controlled by the government of Libya.

Despite these pressures Libya continued to adopt a defiant attitude. It changed its stand and refused to hand over the two suspects even to the Arab League. In Libya there were violent protests causing damages to foreign embassies especially Venezuelan embassy in Tripoli because when resolution imposing sanctions was passed Venezuelan Ambassador was the President of the Security Council. Consequently, on 3rd April, 1992, the Security Council strongly reacted and described attacks on Venezuelan Embassy as "intolerable and extremely grave events" and said that "they were prompted by the sanctions in the resolution underlines the seriousness of the situation". The statement called upon Libya to ensure security of personnel and property of Venezuela's Embassy and other diplomatic missions including the U.N., from violence and terrorism and demanded that Libya pay compensation for the damage caused. Later on, Libya announced its willingness to pay compensation to Venezuelan government for damage caused to its embassy in Tripoli.

On 10th April, 1992, the Arab League requested the Security Council to postpone imposition of sanctions against Libya which was to go into effect on April 15, 1992 to give the league time to hammer out a diplomatic settlement in view of new Libyan proposal. That two suspects are free to give themselves up to a neutral country). But this request was not accepted.

Libya made an eleventh hour bid to forestall sanctions by offering to hand over the two suspects to Malta but this offer was also rejected. On 14 April, 1992 Libya suspended communications and air, land and sea links with the outside world in a national day of mourning, 24 hours before U.N. sanctions against Libya were to take effect.

On 3rd March, 1992, Libya instituted at International Court of Justice separate proceedings against the U.K. and the U.S. Libya contended that the U.K. and the U.S., rejecting Libya's efforts "to resolve the matter within the framework of international law", including the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, are pressurising Libya into surrendering the men for trial. Libya asked the President of the World Court to enable any order the Court may make on Libya's request for provisional measures to have its appropriate effects.[26]

In case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*)—Request for Indication of Provisional Measure [I.C.J. Reports 1992, p. 3.].—On 14 April, 1992, the International Court of Justice rejected Libya's plea to bar the U.S. and U.K. from taking any action to force Libya to hand over two suspects in the Lockerbie airline bombing. Thus the world court rejected Libya's request for a temporary injunction to back the sanctions. The Court ruled this by a majority of 11 to 5 without going into the legality of Security Council resolution and held that the Montreal convention on Hijacking does not bar extradition of suspects to the nations where they are charged. In its ruling the Court stated that "the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures". The Court also stated that Libya, the U.S. and the U.K. as U.N. members were obliged to accept and carry out the Security Council's decision. It also said that the rights claimed by Libya under the Montreal Convention "cannot now be regarded as appropriate for protection by the indication of provisional measures".[27]

Libya had made an identical request to the World Court for indication of provisional measures against the United States of America in case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial

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[26] See U.N. Chronicle, Vol. XXIX, No. 2 (June, 1992), p. 21.

[27] See U.N. Chronicle, Vol. XXIX, No. 3 (September, 1992) p.22.

Incident at Lockerbie (*Libya* v. *U.S.*) [I.C.J. Reports, 1992, p. 114], the court gave almost a similar verdict.

The U.N. sanctions against Libya came into effect from 15th April, 1992. It may be noted that India and four other members of the council who had abstained from voting the resolution imposition were not happy with the resolution and had several reservations against it. But in view of the present international situation and the dominant position being occupied by the western countries led by the U.S., none had the courage to vote against the resolution. Similarly Arab countries are not happy in this respect but they also have no option but to co-operate with the U.N. in respect of sanctions against Libya. Thus Libya stood completely isolated.

Reports appeared in the papers giving indications that Libya might hand over the two suspects provided that the U.S. and U.K. guarantee fair trial to the accused. On 18th April, 1992, the government spokesman of the U.S., Mr. Richard Boucher, said that the U.S. did not receive any offer in this respect. However, he said that the two Libyans suspected in Lockerbie bombing would receive due process under U.S. law if handed over for trial. He added, "In a trial, of course, they would be afforded all the due process guarantees provided by U.S. law and available to all defendants regardless of national origin of the nature of crime".

Sanctions imposed against Libya still continue in force. On 3rd April, 1993, it was reported[28] that the Seven-member Ministerial Committee of the League of Arab States was engaged in serious effort to find a peaceful solution to the ongoing crisis between Libya and certain western countries.

As noted above Libya has been changing its stand from time to time. On 24th August, 1993, he said the two men would be prepared to stand trial in Scotland or the U.S. if Britain and the U.S. agreed to restore diplomatic relations with Libya. On 19th September, 1993, Five Arab Foreign Ministers backed a conditional Libyan offer to surrender two men implicated in the 1988 Lockerbie airliner bombing. But Britain dismissed the Libyan offer and warned that U.N. Sanctions on Tripoli would be broadened and strengthened unless Libya complied with the extradition of two men.

It may be noted that China opposes sanctions against Libya and wants the Lockerbie bombing issue to be settled through negotiations. In the first week of January, 1994, Libya said that it had no part in the 1988 bomb attack on a U.S. airliner over Lockerbie in Scotland and therefore he was now closing its file on the matter. The Sanctions still continue in force and solution of this issue at an early date does not seem to be in sight.

On 15th December, 1998, Libya's Parliament accorded its conditional approval for the trial of two suspects in the 1988 Lockerbie bombing saying the said two men cannot be freed unless several outstanding hitches were solved. This appeared to be a major step toward a trial. Earlier Libya had accepted in principle a proposal by the U.S. and Britain that the two alleged Libyan intelligence agents to be tried before the Scottish Judges in the Netherlands. Thus Libya agreed to surrender the two accused subject to the condition that they would be tried in Netherlands under the Scottish law. Britain and U.S. accepted this proposal. In the first week of April, 1999 the two accused in 1988 Lockerbie bombing were surrendered at Tripoli to U.N. Under-Secretary for Legal Affairs consequently, the U.N. lifted sanctions against Libya. The U.S. also reduced some sanctions especially relating to food and medicines.

In August, 2003, U.N. Secretary-General Kofi Annan asked the Security Council to formally lift sanctions against Libya. But the Council has not yet lifted all the sanctions against Libya. Earlier on 20th January, 2003 America suffered a great set back when Libya was elected to chair the United Nations Human Rights Commission. For the first time since the Commission was founded in 1947, the decision went to vote after America said it could not "reward Libya's terrible conduct" and demanded a ballot. The Libyan candidate got 33 votes in a secret ballot of the 53 Country Commission with 17 states abstaining and three voting no, obviously including the U.S. This clearly shows that Libya's isolation has not only ended but it has once come in the mainstream of international politics.

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[28] See U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 47 ; See also S/225531.

Legal Aspects.—Before proceeding to discuss legal aspects of Lockerbie case and U.N. Sanction against Libya, it must be noted that Libya has attained notoriety for promoting terrorism and cannot be given any quarter on this account, Libya has promoted terrorism as an instrument of its foreign policy. For last two decades Libya has been accused of sponsorship of terrorism and the U.S. and U.K. have a lot of reliable evidence which has established it beyond reasonable doubt. The point for consideration, therefore, is as to how far U.S. & U.K., and for that matter the U.N. which is acting on their request, are justified in taking the above-mentioned action against Libya.

The sanctions imposed against Libya by U.N. Security Council find mention in Article 41 of the U.N. Charter. Article 41 provides that the Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications and the severance of diplomatic relations. This is exactly what the Council has done against Libya in the Lockerbie case. First the Security Council asked Libya to hand over the two suspects to the U.S. or U.K. by 15 April, 1992. Libya failed to comply with the decision of the Council, in violation of Article 25 of the Charter paving way for the sanctions. Consequently the council announced sanctions against Libya. But it may be noted that Article 41 as noted above occurs in Chapter VII of the charter entitled "Action with respect to threats to the Peace, Breaches of the Peace and Acts of Aggression". Thus sanctions can be imposed only when the decision of the council is related to the above subject i.e. international peace and security because the very first Article of Chapter VII *i.e.* Article 39 provides that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. Since the council has imposed sanctions, it clearly implies that in the view of the council, blowing of airliner in mid-air amounts a threat to peace or breach of peace. The Council is justified in so determining because blowing of a Pan American over Lockerbie (Scotland) in mid-air is indeed a terrorist act of such magnitude that it constitutes a breach of peace. Once the Security Council makes such a determination and imposes sanctions there is nothing in the charter or elsewhere except of course a veto in the council itself, to prevent the council from enforcing such sanctions.

As regards the action of the U.S. in approaching the Security Council, unlike earlier times when it preferred to make a direct retaliatory action, there is nothing wrong in it. Rather it is fully justified. Otherwise also as permanent members the U.S., U.K., and also France, owe special responsibility for the maintenance of international peace and security.

But a very pertinent question arises, as argued by Libya, that under Montreal Convention for the Suppression of Unlawful acts Against the Safety of Civil Aviation (1971), Libya cannot be compelled to hand over the two suspects and is entitled to try them and punish them according to Libyan national law. There is force in this argument because Article 5(iii) of the Montreal Convention clearly provides : "The Convention does not exclude any criminal jurisdiction exercised in accordance with national law". This may be one of the defects of the Convention but it is very much there and hence the validity of Libyan argument. However, Convention makes acts against the safety of civil aviation's as extraditable offence. That is to say, they cannot come under the category of political crimes. Consequently the International Court of Justice rejected Libya's request for temporary injunction to block the sanctions on the ground that the Montreal Convention does not bar extradition of suspects to the nations where they are charged. Obviously sponsors of the resolution, U.S., U.K. and France, were pleased with the verdict because an adverse verdict would have embarrassed them.

The next pertinent question, though purely an academic one now, arises what would have been the position had the world court accepted Libyan request and granted temporary injunction ? The U.S., U.K. and France maintained that the Court and Council are independent bodies under the Charter and that the Court has no jurisdiction over criminal cases. Their contention that the World Court and Council are independent bodies is correct. So far as matters relating to international peace and security are concerned, Charter makes the Security Council the supreme body not even subject to the decision of the Court. The function of the Court is to assist the functioning of the organisation rather than to obstruct it. Even if the Court had granted a temporary injunction, the Council was within its power to go ahead with the sanctions and to ignore the verdict of the Court.

Last but not the least, the fact remains that the Security Council has rightly been criticized of applying double standards. While the Security Council, at the instance of the U.S., U.K. and France, promptly imposed sanctions against Libya, it never took serious note of the violation of its resolutions by Israel. Further, is Pakistan not guilty of promoting and assisting terrorist activities against India in Punjab and Jammu and Kashmir? The only difference is that in the present case, resolution was sponsored by three permanent members led by the United States of America which, after the Gulf War (1991) and end of Soviet Union has emerged as the sole super power. Libya seems to have been singled out as specific example to be given a lesson to serve as an eye opener for other members of international community so that they may think several times before challenging the might of the sole super power or for that matter doing anything against its interest.

The period of U.N. sanctions against Libya is being increased from time to time. In March, 1996 America told the Security Council to commence oil Embargo also against Libya. Thus sanctions against Libya continue and America wants them to continue until Libya is compelled to accept all its conditions.

Since the two Libyans persons accused in 1988 Lockerbie Bombing were surrendered in the first week of April, 1999, the U.N. lifted sanctions against Libya. The U.S. also followed suit by considerably reducing the sanctions.

(XXV) *U.N. War Crimes Commission and Establishment of International Tribunal for Prosecution of Persons Accused of Violations of International Humanitarian Law and Ethnic cleansing in former Yugoslavia*

N.B.—For a discussion of this topic, please see Chapter on "War Crimes".

(XXVI) *Provisional Measures by International Court of Justice against Federal Republic of Yugoslavia for Prevention of Genocide*

N.B.—For this please see Chapter on "Genocide".

(XXVII) *Case Concerning Electronica Sicula S.P.A. (ELSI) [U.S.* v. *Italy] Judgment of International Court of Justice dated 20th July, 1989*

N.B.—For this case please see Chapter on "Treatment of Aliens".

(XXVIII) *Crisis in Somalia (1991-1994)*

N.B.—For this please see Chapter on "Intervention".

(XXIX) *Vienna Declaration of Human Rights and Programme of Action for 21st century (June, 1993)*

N.B.—For this please see chapter on "Universal Protection of Human Rights".

(XXX) *Establishment of U.N. High Commissioner for Human Rights*

N.B.—For this please see Chapter 64 on "Universal Protection of Human Rights".

(XXXI) *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya* v. *U.K. [I.C.J. Reports 1992, p. 3]*

N.B.—For this please see "U.N.'s Sanctions Against Libya—Lockerbie case" discussed earlier in Appendix II.

(XXXII) Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v. Yuoslavia, Serbia and Montenegro], I.C.J. Report 1993, p. 3 and also further requests for the indication of Provisional measures, [I.C.J. Reports 1993, p. 325]

N.B.—For this please see Chapter on "Genocide".

(XXXIII) Legality of the Use by a State of Nuclear Weapons in Armed conflict—Request for advisory opinion by WHO—Decision dated July 8, 1996

N.B.—For this case please see chapters on "International Court of Justice" and "Laws of Aerial Warfare".

(XXXIV) Legality of the Threat or Use of Nuclear Weapons—Request for advisory opinion by the General Assembly—Advisory opinion dated July 8, 1996

N.B.—For this case also see chapters on "International Court of Justice" and "Laws of Aerial Warfare".

(XXXV) Treaty to Ban Anti-Personnel Land Mines (1997).—The Treaty to ban Anti-Personnel Land Mines was signed on December 3, 1997 by as many as 125 countries at Ottawa (Canada). It is a great achievement because every year thousands of people are killed or wounded by land mines all over the world. Every year nearly 200 million dollars are spent in removing these land mines. It has been calculated that at present there are 100 million land mines buried in 60 countries all over the world. Indeed it is a great human problem because wherever there is war or armed conflict, most of the persons who die are the victims of land mines. According to the experts, the one of the most heavily mined countries of the world is Cambodia. The Treaty provides for destroying of stockpiles of mines within four years and to remove the scattered land mines within a period of 10 years.

Canada was the first country to sign the treaty. Thereafter, 124 countries more signed the treaty. The countries who did not sign the treaty include America, Russia, China, Turkey, Iran, Iraq, Libya, India, Pakistan, Egypt, Israel, South Korea, North Korea and Vietnam. India has not signed the treaty from the point of view of her security. Moreover, one of the reasons for India not signing the treaty was that China and Pakistan also did not sign the treaty. Though India agreed with the objectives of the Treaty yet because of the reasons of security from its neighbouring countries India could not sign the treaty.

According to experts, land mines kill or injure about 25,000 people each year. Though agreeing with the objects of the Treaty, President Clinton of the United States of America refused to sign the treaty. American President claimed that he was the first world leader at the United Nations to call for a total ban on production and deployment of land mines. He claimed that the United States had destroyed 1.5 million U.S. mines since he became President in 1993 and besides this, America was about to destroy another 1.5 million mines. Though strongly supporting the objectives of the treaty, like Canadian Prime Minister Jean Chretien, American President expressed his inability to sign the treaty because he wanted to keep land mines on Korean peninsula and retain there that the mines were aimed at blowing up tanks, not people.

It is unfortunate that three permanent members of the U.N., namely, America, Russia and China have not signed the treaty. Though as many as 125 countries have signed the treaty, the Treaty cannot become universal unless the said three permanent members and some other countries including India, Iran, Iraq, Pakistan, Egypt etc. also sign the treaty. The objectives of the Treaty are so high, laudable and humanitarian, that it would not be wistful thinking to hope that in a near future world public opinion and domestic pressure will compel the said countries also to sign the treaty.

It is a matter of concern that while India has come for a lot of criticism for not signing the treaty, Pakistan has escaped such censure. The spokesman of the International Campaign to Ban Landmines (ICBL) has remarked that ICBL had no confirmed reports about Pakistan's current mine-laying activities. As regards India, it has been pointed out that 129 civilians had been killed from landmines in Jammu and Kashmir in the year 2000.

The Treaty to ban landmines has rightly been hailed as "a historic victory for the weak and vulnerable of the world". By signing this Treaty 125 countries have recognized that the tide of history has changed. U.N. Secretary-General, Kofi Annan has said that it is an alliance that has shamed the world and enlightened it. It has, for once, made, the international community a living, thriving reality, he added.

Treaty to ban Anti-Personal Land Mines, 1997 is officially known as Convention on the Prohibition of the Use, Stock-piling, Production and Transfer of Anti-Personnel Mines and their Destruction. To date 161 countries have became parties to this Convention. But a total of 36 United Nations Member States have so far not become parties to this Convention.

(XXXVI) Kyoto Environmental Summit on Global Warming (December,1997), Cancun Summit and Durban Conference.—It has been made clear earlier under the chapter on "Development and Environment" that nibous oxide, methan Chlorifloro Carbons' carbon di-oxide and other industrial gases used in industries are causing green house effect which is warming the earth. These green house are adversely affecting the climate. In the Earth Summit of 1992 a convention on climate change or green house emissions was concluded and it was decided that a review conference would be convened after a period of five years. Therefore, a conference on climatic change was held at Kyoto (Japan) on December 1, 1997 to review the progress made in five year's and to chalk out plans and fix strategies and objectives for the future. More than 150 countries participated in the Conference.

After untiring efforts of eleven days, the Conference succeeded in taking certain solid decisions. At the end of the conference it was decided that the emissions of greenhouse gases from the 1990 level would be reduced by 8%, 7% and 6% by European Union, America and Japan, respectively. Similarly, targets of 21 other industrial countries were fixed for reducing emissions of green-house gases. These targets are to be achieved in between 2008 and 2012.

The developing countries expressed the view that their economic conditions do not permit them to accept such commitments. Therefore, the developing countries (including China and India) were for the time-being exempted from such commitments. One of the main reasons for this is that per capita emission of these gases in these countries is far less than in industrial countries. For example, per capita emission of these gases in America is 5,228 million tons as compared to per capita emission of only 803 million tons in India.

During the conference, in the beginning America was not prepared to accept the target of more than 5% reduction of green house gases. But due to the pressure of European and other countries America had to accept the target of 7%. Doubts were however, expressed as to whether the American Senate would ratify the treaty. The targets and objectives of the Kyoto Environmental Summit can be achieved only when the countries participating and signing the Treaty ratify it at an early date and strictly enforce the same in their respective countries. It would not be an exaggeration to say that survival of the planet earth depends on the success of Kyoto Environmental Summit. If emission of green house gases is not reduced considerably within the period fixed in the Kyoto Summit, global warming may increase to an extent wherein the existence of the planet will be jeopardised, level of the seas will increase and vegetation on earth will be destroyed. If desired steps are not taken within time, the planet earth will have to face the same catastrophe as the planet Mars has had to face earlier. It is, therefore, imperative that nations of the world should keep in mind not only of their own self interests but also the interests of the planet earth as a whole because environment of the whole planet is one and indivisible. As regards America, the least that can be said is that if it cannot take the initiative, it can at least follow the example set by European Union.

On the contrary, however, America decided to abandon Kyoto Treaty in 2001 and President Bush of U.S. announced in February, 2002 an alternative plan to the Kyoto climate change treaty. He proposed a voluntary cut of emissions. Under this voluntary plan America would lower emissions from an estimated 183 metric tons per million dollar of gross domestic product in 2002 to 151 metric tons per million dollars of GDP in 2012. In order to induce business and consumers to go along with the plan, Bush Administration offered $ 4-6 billion over five years in tax credits for renewable energy sources.

Earlier, while abandoning the Kyoto Treaty, President Bush said, "I will not commit our nation to an unsound international treaty that will throw millions of our citizens out of work. Yet we recognise our responsibilities".

According to Canada, Bush plan was not an adequate solution to the global warming. India has also made it clear that India would not be pushed into accepting new obligations envisaged under Bush's alternative to the Kyoto Protocol and insisted that any action taken by it would be "voluntary". Britain and Germany also do not agree with the latest American plan and have their own reservations.

Kyoto Protocol entered into force on 16th February, 2005. On 18th November, 2004, Russia deposited its instrument of ratification with the United Nations. This marked the start of the ninety day count to the entry into force of the Protocol, an international legally binding agreement to reduce green house gases emissions world wide. Kyoto Treaty could enter into force with the support of 141 countries. But unfortunately, America, the greatest polluter of the world did not join the treaty.

As of November 2009, 187 countries had become parties to the Kyoto Treaty on Climate Change, 1997.

On 8th December, 2010, Michael Jarrand, head of World Meteorological Organisation (WMO) told a news conference on the sitelines of a meeting of almost 200 nations in the Caribbean resort of Cancun trying to curb global warming, 2010 so far was slightly warmer than both 1998 and 2005, but could slip if December is a cool month. He added that land and sea surface temperatures so far in 2010 were 0.55^{0}C above a 1961-1990 average of 14^{0}C. The years 2001-10 were the warmest 10 year period. Temperature have already risen by about 0.8^{0}C since pre-industrial times. The WMO said warming had been especially strong in Africa, parts of Asia and parts of the Arctic. Pakistan, hit by devastating floods, recorded a record temperature of 53.5^{0}C the warmest in Asia since 1942. Therefore sooner effective remedial measures are taken the better.

It may be noted here that Copenhagen Summit Conference on Climate Change, held in third week of December, 2009 is generally regarded as unsuccessful Conference and a dismal failure. However, realizing that the Summit Conference was moving to an unsuccessful end, leaders of America, China, Brazil and South Africa in an attempt to save the conference becoming unsuccessful presented an agreement before 194 countries attending the Conference. Thus after the negotiations of two weeks, the conference had before it a positive agreement. The main achievement of this agreement was the establishment of a Green Fund with a view to protect poor countries from global warming. A Green Fund of 100 billion Dollars was to be established for the period 2010 to 2012. America promised 3.6 billion dollars, Japan 11 billion dollars and 10.6 billion dollars was promised to be contributed by European Countries. India agreed to all this because Kyoto Treaty had yet not been abandoned.

Copenhagen Summit fixed target of limiting global warming by 2^0 Celsius but no targets were fixed for the year 2020 or 2050. Though the Copenhagen conference was not a successful conference yet the Kyoto Treaty, the only international treaty obliging rich nations to cut their emission remained in act. Kyoto Treaty, it must be admitted, was not perfect yet it was a start to tackling global problem. But Cancun Summit sounds a death knell to the Kyoto Treaty.

On 11th December, 2010 World leaders from 193 countries signed a new global climate regime called the Cancun Agreement. They sounded the death knell for Kyoto Protocol. Definite obligations of countries were not fixed at Cancun. They were likely to be fixed at Durban in 2011.

From 28th November to 11th December, 2011, United Nations climate change conference was held in Durban (South Africa) to establish a new treaty to limit carbon emissions. The conference agreed to a legally binding deal comprising all countries, which will be prepared by 2015 and to take effect in 2020. After two weeks of negotiations a deal was reached only on the last day, 11th December, 2011 after a 60 hour global warming. The terms of the Treaty were to be defined by 2015 and will become effective in 2020. The agreement referred as the "Durban conference" is notable in that for the first time it includes developing countries such as India and China as well as in the U.S. who refused to sign the Kyoto Protocol. So far 192 countries have become parties to the Kyoto Protocol.

It is significant to note that the agreement entails the continuation of the Kyoto Protocol although some countries including members of the European Countries are not likely to commit to it. Last but not the least, a notable achievement of the conference was the progress regarding creation of a Green Fund for which management frame work was adopted. The Fund is to distribute US $ 100 billion per year to help countries adopt to climate impacts.

(XXXVII) Legality of Pokharan-II or Second Nuclear Explosions made by India (11 May, 1998).—For a considerable period of time the security environment on India's borders was causing concern while on the one hand, Pakistan was waging an undeclared war by sending trained militants to India, on the other hand China was adding to the gravity of the problem by supplying new weapons and nuclear missile technology to Pakistan. Time and again India tried to attract the attention of the International community towards this grave situation in the Indian sub-continent. Despite clinching evidence of Pakistan's hand in training and aiding and sending militants to India, America deliberately ignored this and continued to show soft corner towards Pakistan. This attitude of America further increased after Bill Clinton became America's President. It was an open secret that Pakistan was pursuing a nuclear weapons programme. Despite knowledge of this to America, China was continuing to help Pakistan. Instead of dissuading China from aiding and assisting Pakistan in its said programme, America's relations with China further improved by American President's visit to China. India could not afford to ignore all this for a long time. It also became clear that mere lodging of protests would be of no avail. It therefore became obvious that India must take some solid steps and to exercise its nuclear option to fortify its defence.

On 11 May, 1998, India exercised its nuclear option by conducting three nuclear tests at Pokharan in Rajasthan. They may be referred at Pokharan-II because the site was nearly the same as that of Pokharan-I. On the same day at 6 P.M., India's Prime Minister Atal Behari Bajpai, announced of India's conducting of the said nuclear tests. America and western countries strongly criticized India for this. But without bothering for the said criticism and reactions, India went ahead and completed her programme by conducting two more nuclear tests on 13 May, 1998. India then announced that she was prepared to hold talks for signing of CTBT.

America and Japan immediately announced trade sanctions against India. Similarly other countries announced various sanctions against India. In reply to India's nuclear tests, Pakistan also conducted five nuclear tests on 28 May, 1998. Thereafter, Pakistan conducted one more nuclear test on 30 May, 1998. After India's exercise of its nuclear option, it was almost certain that Pakistan would not lag behind. America therefore, put a lot of pressure on Pakistan for not conducting nuclear tests as per its announcement. But ignoring all this Pakistan went ahead with its nuclear programme. Consequently the Security Council of the U.N. in its meeting on 30 May, 1998 condemned Pakistan's action and asked it to announce that it would never repeat it in future.

Prior to this after conducting five nuclear tests India had declared that it will not conduct any nuclear test in future as the same was no more required. On 17 May, 1998 Scientific Adviser to India's Minister of Defence, Dr. A.P.J. Abdul Kalam said that India's nuclear programme was complete and there was no need for further tests. Like France, India computerized the results of nuclear tests and as such no more tests will be required in future.

America and some western countries have been pursuing one sided nuclear programme while they have huge stockpiles of nuclear weapons, they want to prohibit acquisition and production of such weapons by others. They are not prepared to destroy their existing nuclear weapons and want to continue, rather perpetuate their monopoly of such weapons. Even Russia and China are with them in this respect. They, therefore, insist that other countries should sign CTBT and ratify so that their monopoly may perpetuate. On its part, America has not yet ratified the CTBT.

Legal Position.—The legal position of Pokharan-II is almost the same as it was in respect of Pokharan-I of 1974 which has already been discussed in Chapter on "Laws of Aerial Warfare". As regards legal position of Pokharan-II, it can be discussed under two heads of International Law—(i) Customary Rules; and (ii) Conventional Rules.

So far as customary Rules of International Law are concerned, every sovereign country is free to conduct nuclear tests within its territory provided that in consequence of it radio activity may not increase in neighbouring countries. No neighbouring country claimed that it was adversely affected by increase of the level of radio-activity. Thus the impact of the nuclear tests was well-contained within the Indian territory. Thus India did not violate any rule of customary law of international law.

As regards Conventional Law, the following treaties deserve mention :

(i) Partial Nuclear Test Ban Treaty, 1963.

(ii) Treaty on Non-Proliferation of Nuclear Weapons, 1968.

(iii) Comprehensive Test Ban Treaty (1995).

India is not party to the above-mentioned last two treaties. The question of their violation therefore, does not at all arise. As regards the first treaty, though India is a party to this treaty, it does not prohibit underground nuclear tests since India's nuclear tests were underground, India has not violated any rule of Conventional Law.

Thus India's nuclear tests conducted in May, 1998 have not violated any rule of international law. So far as the question of disarmament is concerned, India has always advocated and supported total disarmament. Total disarmament is possible only when the nuclear powers agree to destroy the existing stockpiles of nuclear weapons. In fact the main cause of annoyance of America and other nuclear powers is that despite their opposition India conducted nuclear tests and emerged as a nuclear power. They regard it as a challenge to their monopoly of nuclear weapons. Now when India has emerged as a nuclear power, they are not prepared to recognise it. Thus they have maintained a partial and biased attitude in this respect. On her part, India has made it clear that she is prepared to sign the CTBT provided that some basic changes are made in it and it is made more equitable.

It deserves mention here that while America has been pressurizing India and other countries to sign and ratify the CTBT, America itself has not yet ratified the treaty nor the CTBT has come into force because the prescribed number of countries have not ratified it. These prescribed number of countries which number 44 were required to ratify treaty by September, 1999.

(XXXVIII) Fisheries Jurisdiction case (Spain v. *Canada) [4 December, 1998]*

N.B.—For this please see the Chapter on "International Court of Justice".

(XXXIX) Case Concerning the Vienna Convention on Consular Relations (Germany v. *U.S.) (ICJ Reports 1999) [Decided on 3 March, 1999]*

N.B.—For this also see Chapter on "International Court of Justice".

(XL) Case Concerning the Legality of the Use of Force (Yugoslavia v. *United States of America) [ICJ Reports (1999) Decided on 2 June, 1999]*

N.B.—For this also see Chapter on "International Court of Justice" and Chapter on "Intervention".

(XLI) The M/v "Saiga" case (Saint Vincent and the Grenadines v. *Guinea)—[Decided by the International Tribunal for the law of the Sea on 4 December, 1997]*

N.B.—This has been discussed in detail in Chapter on "The Law of the Sea".

(XLII) The M/v "Saiga" case No.2 (Saint Vincent and the Grenadines v. Guinea)—
[Decided by the International Tribunal for the Law of the Sea on 11 March, 1998]

N.B.—For this also see Chapter on "The Law of the Sea".

(XLIII) Pakistan's Intrusion in Kargil Area of Kashmir (April-May, 1999).[29]— Pakistan once again made intrusion in Kargil area of Kashmir. This intrusion took a serious turn in April-May, 1999. This time Pakistan not only sent militants across the Line of Control (LOC) on the Indian side but Pakistan regular army also provided them strong support from behind. Thus mercenaries and Pakistan armed forces in large number intruded into Kargil and Drass areas of Kashmir. Kargil area is spread over 150 kms. on the one side of it is Drass on the other side is Batalik. Pakistan's intrusion was spread over nearly 100 kms. There were certain reasons for Pakistan to have chosen this area for intrusion. This is the only area on the Line of Control (LOC) over where Pakistan is in a better position whereas in other places India is in a better position. The main aim of Pakistan intrusion was to obstruct Srinagar-Leh Road because it is very important for Indian Army for carrying food and other supplies. During the winter season Indian Army vacates high altitude posts. Taking advantage of this situation Pakistan made the fresh intrusion. But by violating the Line of Control Pakistan displeased not only India but also America and other European countries. Pakistan could not even secure the support of its old friend, China for this misadventure.

On the other hand, India was compelled to take retaliatory action. The intrusion was so strong and forceful that India had to deploy aircraft for repulsing the attack probably Pakistan plans suffered from a major error that they failed to visualise that India could use aircraft.

In the beginning Pakistan denied direct or indirect involvement in attack on Kargil. But when the situation started worsening for it, it started giving several arguments. Pakistan even argued that the Line of Control (LOC) was not logical and ought to be changed. As usual, Pakistan tried to internationalise the conflict. Pakistan appealed to the U.N. to send a special envoy to solve the Indo-Pak conflict on LOC. But India strongly opposed this proposal and made it clear that the LOC is internationally recognized and it is futile to hold talks or attempt settlement in this respect. Consequently the U.N. did not take any interest in the Pakistani proposal.

In the first week of June, 1999 after the fierce battle in the Batalik area the dead bodies of three Pakistani soldiers were found in the Indian territory. Thereafter such incidents continued to recur. Many Pakistani soldiers were apprehended and the dead bodies of several other Pakistani soldiers were found. This clearly established Pakistani Army's direct involvement in attack in Kargil. In the second week of June, 1999, Pakistani Army expressly admitted the presence of Pakistani Army personnel in Kargil and Drass areas.

As regards the legal position Pakistan's violation of LOC is a flagrant violation of the rules of International Law. Attempts to change the internationally recognized LOC by use of force is clearly violative of rules of International Law including the provisions of the U.N. Charter. On the other hand, India resorted to military action only to defend herself. That is why, America, European nations and other prominent countries of the world condemned Pakistan's illegal intrusion in Kargil and supported India's action and stand-point. From India's point of view, it is for the first time since the beginning of Kashmir Problem that India's stand-point was appreciated by America and European countries. America and European countries also clearly realized and expressly admitted that the idea of plebiscite was not just and adequate for the solution of Kashmir problem. Thus Kashmir problem can be solved only by bilateral talks between India and Pakistan.

(XLIV) Case of Shooting Down of a Pakistani Military Combat Aircraft on August 10, 1999 by India in its Airspace during Kargil war decided in favour of India on 21 June,

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[29] For background and other details see "Kashmir Problem" discussed earlier in Appendix II.

2000.—During Kargil war, India shot down a Pakistani military aircraft in its airspace on August 10, 1999. On 21 September, 1999 Pakistan filed a case against India in the International Court of Justice in respect of a dispute relating to the destruction, on 10 August, 1999, of a Pakistani aircraft. Pakistan had filed the case to claim a compensation of $ 60 million. In its application, Pakistan founded the jurisdiction of the court on Article 36, paragraphs 1 and 2, of the Statute and the declarations whereby the two parties have recognized the compulsory jurisdiction of the court. India by its letter of 2 November, 1999, notified the court that she wished to indicate its preliminary objections to the assumption of jurisdiction by the court on the basis of Pakistan's Application. Those objections, set out in a note appended to the letter were as follows :

(i) That Pakistan's Application did not refer to any treaty or convention in force between India and Pakistan which confers jurisdiction upon the court under Article 36(1).

(ii) That Pakistan's Application fails to take into consideration the reservation to the Declaration of India of 15 September, 1974 filed under Article 36(2) of its statute. In particular, Pakistan being a Commonwealth Country, is not entitled to invoke the jurisdiction of the court as sub-paragraph 2 of paragraph 1 of that Declaration excludes all disputes involving India from the jurisdiction of the court in respect of any State which is or has been a Member of the Commonwealth of Nations.

(iii) The Government of India also submits that sub-paragraph 7 of paragraph 1 of its declaration of 15 September, 1974 bars Pakistan from invoking the jurisdiction of the court against India concerning any dispute arising from the interpretation or application of a multilateral treaty, unless at the same time all the parties to such a treaty are also joined as parties to the case before the Court. The reference to the U.N. Charter, which is a multilateral treaty, in the Application of Pakistan as a basis for its claim would clearly fall within the ambit of this reservation. India further asserts that it has not provided any consent or concluded any special agreement with Pakistan which waives this requirement.

As regards the reservation regarding Commonwealth membership Pakistan contended that it was "obsolete".

Pakistan also relied upon Article 1 of the Simla Accord, paragraph (ii) of which provides *inter alia* that :

"the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon them."

The World Court made it clear that the court regards this provision as an obligation, generally, on the two States to settle their differences by peaceful means, to be mutually agreed by them. But the said provision in no way modifies the specific rules governing recourse to any such means including judicial settlement. Thus the court cannot interpret the obligation as precluding India from relying, in the present case, on the Commonwealth reservation contained in its declaration. Indeed the court cannot therefore accept the argument in the present case based on estoppel.

It follows from the foregoing that the Commonwealth reservation contained in sub-paragraph (2) of the first paragraph of India's declaration of 18 September, 1974 may validly be invoked in the present case. Since Pakistan is a member of the Commonwealth of Nations, the court held that it has no jurisdiction to entertain the application under Article 36, paragraph 2 of the statute. Hence it is unnecessary for the court to consider India's objection based on the reservation concerning multilateral treaties contained in sub-paragraph (7) of the first paragraph of its declaration.

As regards Pakistan's contention regarding paragraph 1 of Article 36, and Pakistan's reliance on Article 1 of the Simla Accord which provides that "the Government of India and the Government of Pakistan has agreed...............

(i) That the principle and purposes of the Charter of the United Nations shall govern the relations between the two countries, the International Court of Justice held that this provision represents an obligation entered into by the two States to respect the principles and purposes of the Charter in their mutual relations. It does not as such entail any obligation on India and Pakistan to submit their disputes to the Court. Thus the Court held that it has no jurisdiction to entertain the application on the basis of Article 36, paragraph 1 of the statute.

Finally the International Court of Justice[30] held by fourteen votes to two that "it has no jurisdiction to entertain the application filed by the Pakistan on 21 September 1999".

(XLV) Attack on America's World Trade Centre (11 September, 2001) America's War Against Terrorism.—In an unprecedented attack on America, the terrorists struck at the heart and might of America on 11th September, 2001 when several large planes hijacked simultaneously from airports were crashed into the symbols of American establishment and enterprise—the 110 storey towers of World Trade Centre in New York and the Pentagon building outside Washington. America regarded it a war on itself and declared a full scale war against terrorism. American Secretary of State, Colin Powell said, after the carnage in which about 10,000 people were believed to have been killed, "The American people made a judgement : we are at war, and they want a comprehensive response. They want us to act as if we are at war and we're going to do that".

11th September, 2001 was probably the blackest day of American history because it was a great blow on the prestige and might of America. It stunned and shocked not only American people but the entire mankind. Besides the staggering carnage in the attack, it was equally stunning as the monumental intelligence failure of the mightiest country of the world that prides itself on being ahead of the game.

Unlike earlier times when faced with terrorist attacks on its embassies, this time America did not act in haste. It took stock of the whole situation, including the chances of long drawn battle in the difficult hilly terrains of Afghanistan. As a first step, America pressurised Pakistan to allow a multinational armed force based on its territory for an attack on Afghanistan. Thus America forced Pakistan to take a complete U-turn in respect of its policy towards Taliban Government in general and terrorists in particular. Then America consulted its allies and sought their help and cooperation in its war against terrorism. America was successful in enlisting the help and support of a large number of countries including Great Britain, France and Russia. It was only after taking world leaders into confidence and enlisting their support American forces launched its strikes on military guerilla bases in Afghanistan on 7th October, 2001 and on the very first day Kandhar radar system was smashed, American and its allied forces launched a two pronged attack on Afghanistan. First, American and allied forces launched direct attacks on main cities and strongholds of Taliban Government. Secondly they helped Northern Alliance forces which had all along been fighting the Taliban forces. One after the other cities and strongholds of Taliban Government started falling in the hands of the Northern Alliance forces. The Prime Minister of Taliban Government fled away and went underground.

It took America nearly two months to overthrow the Taliban Government of Afghanistan. Under the auspices of the United Nations, a conference was called in Bonn (Germany) to form a new interim Government of Afghanistan. On 5th December, 2001, envoys of Northern Alliance, former King Mohammad Zaheer Shah and two smaller exile groups signed the U.N. mediated accord after nine days of talks. Hamid Karzai, whose fighters were part of the President Bush to oust the Taliban from their last stronghold in Kandhar, was chosen to head the interim administration to replace Taliban rule after the Northern Alliance won control of most of the country.

Taliban's last bastion crumbled when on 7th December, 2001 with the militia surrendering its only remaining bastion of Kandhar. The capitulation of Kandhar came two weeks before a new government headed by Hamid Karzai was set to begin work. The new interim Government of Afghanistan headed by Hamid Karzai was inaugurated on 22nd

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[30] For the judgement of the court see : case concerning the Aerial Incident of 10 August ,1999 (*Pakistan v. India*), KJ Rep. (2000).

December, 2001. On 24th December, 2001; the cabinet of Afghanistan met for the first time to restore peace in a country shattered by decades of war and newly freed by terrorists.

Legal Aspects.—At the instance of the United States of America, the Security Council of the U.N. passed a resolution on 15th October, 1999 asking Taliban Government of Afghanistan to surrender Osama Bin Laden by 11th November to the U.S. or some other country which promises to hold trial against him for terrorists acts and on failure to do so U.N. sanctions against it will start. Since Taliban Government of Afghanistan failed to surrender Laden by the 14th November, 1999, the last date for compliance of the Security Council resolution U.N. sanctions against Taliban Government came into force. Security Council resolution being binding by virtue of Article 25 of the Charter of U.N., Taliban Government not only violated U.N. Charter but also defied International Community (U.N. having as many as 192 members).

It need not be over emphasized that terrorism is contrary to the rules of international law. It constitutes violation of human rights.

Moreover, after terrorist's act on America on 11th September, 2001 America became entitled to exercise the right of self defence. After the attack of 11th September, 2001, America announced that it was clearly war against America. Thereafter when America retaliated by attacking Taliban Government of Afghanistan it exercised the right of self defence which is available to every member of the U.N. under Article 51 of the Charter. Attack on twin towers of WTC and Pentagon building was nothing less than an armed attack. Unlike earlier times, this time America's action fulfilled all conditions laid down in Article 51 of the Charter. America not only reported the matter to Security Council and kept in touch with the Council and its members throughout it had the support of the U.N. even after the overthrow of the Taliban Government, it was under the auspices of the U.N. that a conference was convened to form the new interim Government of Afghanistan. The new interim government of Afghanistan headed by Hamid Karzai has the blessings of the U.N.

Thus American action to retaliate against Taliban Government leading to its overthrow was throughout legally justified. Even its war against terrorism in general has the support of the U.N. What is really alarming is that militants are reported to have sought refuge in Pakistan and Pakistan occupied Kashmir and are reported to be regrouping themselves.

(XLVI) India-America Nuclear Deal (2005-2008).—Indo-American Nuclear Deal, which is yet to be approved by American Senate is a historic deal. Relations between India and America were improving for quite sometime. An important turn in their relations came when during his American tour, Indian Prime Minister Manmohan Singh signed on 18th July, 2005, a joint statement with American President G. W. Bush. In this joint statement both the leaders pledged to convert their relationship into global partnership. This is the first time that America gave priority to India as compared to Pakistan. Both the leaders also pledged to combat terrorism strictly.

The joint-statement speaks of the agreement in respect of the following :

(i) For the economy;
(ii) for energy and environment;
(iii) for democracy and development;
(iv) for non-proliferation and security;
(v) for high technology and space.

In the present discussion we will confine ourselves to non-proliferation and security and high technology and space, and especially to the latter, *i.e.*, high technology and space.

As regards non-proliferation and security, the joint-statement expressed satisfaction about the new framework of American-Indian defence relationship which would form the basis of future relations. Both the nations pledged their commitment to play main role in international efforts to prevent the spread of Weapons of Mass

Destruction (WMD). America welcomed the adoption of Indian legislation on Weapons of Mass Destruction.

The joint statement stresses the need for a framework in the field of high technology and space and to enter into an agreement. And in this respect, establishment of American-India High Technology Cooperative Group (HTGC) was proposed to provide research and training and to establish public and private agreement.

In the field of space, the joint statement provides for the establishment of intimate relations and in this connection, to establish Indo-American Working Group for civil-space cooperation.

Recognising the importance of fulfilling the demands of world energy in a clear and efficient way, both the leaders discussed the subject of civil nuclear energy development programme.

President Bush of America praised the strong commitment of India to prevent the spread of Weapons of Mass Destruction (WMD) and said that with advanced nuclear technology, India as responsible nation should get all benefits which are possessed by such nations. American President Bush said that he would work with India for full civil nuclear energy cooperation so that the targets of nuclear and energy security be achieved. American President also stated that he would endeavour to get the American laws and policies amended by the Congress and would ask his friendly and allied nations to cooperate and trade with India in respect of civil nuclear energy. The President also assure that America would provide fuel for safeguarded nuclear reactor of Tarapur.

America asked India to take benefits and bear responsibilities equally which other countries having advanced nuclear technology take and bear. American President Bush asked India to identify her civil nuclear facilities in separate stages and to make a declaration to place them voluntarily under the safeguards of IAEA. He also asked India to sign Additional protocol of IAEA and to become its party. Further, India was asked to issue a unilateral moratorium and to become a party to Multilateral Fissible Products Reduction Treaty and also not to transfer the Reprocession technology to the countries who do not possess it. Besides, this, India was also to follow the guidelines of Missile Technology Control Regime and Nuclear Supplies Group.

President Bush of America welcomed the assurances given by Prime Minister Manmohan Singh. Both the leaders decided to establish a working group to take necessary action in stages in respect of these commitments. Both the leaders agreed that during President Bush's Indian tour in 2006, the progress made by them would be reviewed. Both the leaders reiterated their commitment that they would play prominent role in respect of prevention of the spread of nuclear, chemical, bio-logical and radioaction, weapons also in respect of the prevention of spread of Weapons of Mass Destruction (WMD).

Indo-American talks had to take place in four stages. In the first stage, both the countries had to enter into agreement in respect of separation plan *i.e.* in respect of division of civil nuclear energy and military nuclear energy. In the second stage, America had to get changed existing laws for the implementation of the agreement. In the third stage, discussion and bargaining had to take place in respect of safeguards. In fourth stage, it would be decided what additional safeguarded for India.

Unless and until India divides its nuclear facilities into two categories—(i) civilian and ; (ii) military, her civil nuclear facilities cannot be put under the safeguard of U.N. watch dog IAEA. The greatest controversy was in respect of India's fast breeder reactor programme. These are the special nuclear reactors, in which fusion is through first neutrons and more fissible or fission products are produced than enriched fuel that is used. More over, India also wanted Bhabha Atomic Research Centre near Bombay should remain outside the safeguard. These fast breeder reactors are important for nuclear weapons programme of India. These facilities include a reactor called CIRUS which has been built with the help of America and Canada and was started in 1960 and in which

Plutonium is produced for weapons. India has about 80 nuclear facilities, out of which 15 are power reactors and unspecified number of military establishments.

On the other hand many American look to above agreement in the content and perspective of the treaty of Non-Proliferation of Nuclear-Weapons.

It may be noted that the conclusion of Indo-American Nuclear Agreement would be subject to the condition that India would have to help America in its campaign against Iran. When India voted against Iran and supported America, the whole world expressed surprise and shock because it indicated India's siding with America's foreign policy and going against non-alignment. Thus India's foreign policy underwent a shift before Indo-American Agreement of 18th July, 2006. This led to a lot of discussion India was severely criticised for shift/change in her foreign policy. Both in India and America, Indo-American Deal aroused mixed reaction. Some American express, the view that the said deal would badly affect the policy of non-proliferation. It may be noted that India has not signed Non-Proliferation Treaty. According to former American Foreign Secretary, unless some modification or amendment is made in existing American policy, for some immediate benefit, America would sacrifice its world policy of non-proliferation.

Before a few days of the American President Bush's Indian tour in March, 2006, Indian Prime Minister Manmohan Singh told the Indian Parliament that under Indo-American Nuclear Deal, out of 22 nuclear reactors, 65% capacity would be put under international safeguards and 35% have been reserved for military purposes. Thus 65% or 4,375 mega watt capacity would be under International safeguards of IAEA and the remaining 35% or 2,355 mega watt capacity would be reserved for military purposes and research.

Reviewing the progress made in deepening the global partnership between the U.S. and India since their joint statement of July 18, 2005, the President and the Prime Minister reaffirmed their commitment to expand even further the growing lines between the two countries. Consistent with this objective, the two leaders wished to highlight the efforts, the U.S. and India are making together in the following areas :

(I) For Economic Prosperity and Trade;
(II) For Energy, Security and Clear Environment;
(III) For Innovation and Knowledge Economy;
(IV) For Global Safety and Security;
(V) Deepening Democracy and Meeting International Challenges.

As regards Energy Security and Clear Environment, the Joint-Statement welcomed the successful completion of India's separation plan and looked forward to full implementation of the commitments in July 18, 2005 Joint statement on nuclear cooperation. Further, this historic accomplishment will permit both the countries to move forward towards their common objective of full civil nuclear energy cooperation between India and the U.S. and between India and the International community as a whole.

The joint-statement welcomed the participation of India in the ITER initiative on fusion energy as an important further steps towards the common goal of full nuclear energy cooperation.

The joint-statement agreed on India's participation in Futuregen an International public-private partnership to develop new commercially viable technology for clean coal near zero commission power project. India will contribute funding to the project to participate in the Government steering committee of this initiations.

The joint-statement welcomed India's interest in the Integrate Clear Ocean Drilling Programme, an international marine research endeavour that will contribute to long-term energy solution such as gas-hydrates.

Further, noting the positive cooperation under the U.S. Energy Dialogue highlighted plans to hold joint conference on topic such as energy, efficiency and natural gas to conduct study missions on renewable energy to establish a clearing house in India for coal-bed methane/coal mine methane, and to exchange energy market information.

For innovation and knowledge economy, emphasizing, the importance of knowledge partnership, announced the establishment of a Bi-National Science and Technology and Promotion Commission and promote industrial research and development.

Further, the Joint Statement welcomed the inclusion of the U.S. instruments in the Indian Lunar Mission Chandrayan I. They noted that memorandum of understanding to be signed by ISRO and NASA would be significant steps forward in this area.

The joint-statement also welcomed, the U.S. Department of Commerce's plan to create a licence exception for items that would otherwise require an export licence to end-users in India engaged solely in civil activities.

For global safety and security, the joint-statement noted the enhanced counter-terrorism cooperation between the two countries and stressed that terrorism is a global scourage that must be fought and rooted out in every part of the world.

Further, the joint-statement reiterated their commitment to international efforts to prevent proliferation of Weapons of Mass Destruction (WMD).

According to America-India Nuclear Deal : (i) India would have to separate 14 civil and 8 military nuclear reactors by the year 2014; (ii) IAEA would have to determine India-specific safeguards; (iii) India would be entitled to declare any future nuclear reactor as a churl nuclear reactor; and (iv) America would have to modify or amend its laws in conformity with Nuclear Deal.

It has been publicized that the Nuclear Deal will be as much in interest of India as in the interest of America. It is regarded an achievement of India in the sense that it will end India's isolation in the field of Nuclear Technology after thirty years. But in some respects the Deal has been critized both in America and India. In America, the main point of criticism has been that it will adversely affect the policy and Treaty of Non-Proliferation of Nuclear Weapons, especially because India is not a party to the Treaty on Non-Proliferation. In India, many people do not consider America as a reliable nation. Thirty years before India and America entered into an agreement whereby America undertook to supply fuel for Tarapur Atomic Reactor. America did not fulfil its commitment as American Senate did not approve the agreement. Even under the present Deal, America is required to modify or amend its laws. But a number of members of American Congress have objections to the Deal on the ground of adverse effect on non-proliferation of nuclear weapons etc. According to India, the deal will affect India's policy of non-alignment and that India would come under American pressure for ever. It is also criticized because the Deal would nullify all that India has done to develop fast breeder reactor by using indigenous capacity and technology. These fast breeder reactors will then be placed in civilian list. This apprehension has been expressed by Anil Kakodar Secretary of Atomic Energy Department. But subsequently, he was silenced by political leaders. The view expressed by Anil Kakodar has also been voiced by several other top scientists. Since Manmohan Singh seems to be determined to go through and implement the Nuclear Deal, they are hesitating to speak openly. In short, the political leadership seems to be prevailing, over the expert scientific advice.

Yet another obstacle to Indo-American Nuclear Deal is on account of Rattehalli Rare Materials Plant which produces enriched Uranium for nuclear submarine. But, Prime Minister assured the Parliament that it has been kept apart from separation plan. Yet another achievement claimed by the Indian Government is that it received exemption for Bhabha Atomic Research Centre.

In the meantime, on 9th July, 2006, India held the first round of serious discussion between India and IAEA regarding India-specific safeguards plan including a fuel supply guarantee. It was pointed out that the safeguards agreement will be based on a template that is already in use in six nuclear reactors in India.

As regards the approving of Nuclear Deal on American side, it may be noted that on 27th June, 2006, the House of International Relations Committee approved a legislation to implement the Indo-U.S. Nuclear Deal by a vote of 37 to 5, sending it to the full House floor for debate and vote. Subsequently, on June 29, 2006 Senate Foreign Relations Committee debated and passed another bill by 16 to 2 votes with the same intention but in different language. Thus two bills would be voted in House of Representatives and Senate separately.

The Conference Committee would merged two bills, reconciling language and retaining obligations and conditionalities endorsed by the two Houses. It would keep intact spirit of legislation to amend 1954 Atomic Energy Act to allow nuclear trade and collaboration with India. Reconciled text would go to Houses of Congress for a yes or no vote. There no amendments would be permitted. If approved, the bill would go to White House for Presidential assent and would become law.

In July 2006, the House of Representative passed the enabling legislation by 359 to 68 votes.

As noted above, India's top nuclear scientists are not only dissatisfied but are agitated over the Indo-U.S. Nuclear Deal. On the eve of Independence Day, *i.e.*, on 14th August, 2006 eight top atomic scientists, who have crafted India's nuclear might and headed the atomic establishment in their time, cautioned Government against lowering the flag of sovereignty on the Indo-U.S. Nuclear Deal and sacrificing research and strategic policy making. They also urged Parliament to uphold national interest in this matter. These top scientists issued a joint statement cautioning the Government on the eve of Independence Day. Some of the points raised by these scientists are—(i) India, should be free to carry forward its nuclear strategic (arms) programme without interference. Hence, any interference in perpetuity should not be acceptable; (ii) External or international safeguards should be restricted to imported facilities and materials ; (iii) The Nuclear Deal, as passed, by the House of Representatives puts curbs on indigenous research and development, especially on research in strategic defence and self-sufficiency and this should not be acceptable to us; and (iv) Indian Parliament ought to lay down ground rules on what is acceptable and what is not.

Prime Minister of India Manmohan Singh held a meeting with these top scientists and tried to ally their fears and assured them that India's national interests would always be kept in mind. It is, however, doubtful after the signing of the Nuclear Deal the concerns of those scientists would ever be satisfactorily looked into. On 13th September, 2006, Secretary, Atomic Energy Commission, remarked at Bangalore that any proposal in the Indo-U.S. Civil nuclear agreement that does not allow for reprocessing spent fuel will not be acceptable to India. He added, India should not bother if the proposed Indo-U.S. Civil Nuclear Agreement does not come through. Further, "Indian Programme is on. If there is an agreement, it will come very soon. If it does not come through, don't bother".

Earlier, Indian Prime Minister Manmohan Singh admitted on 17th August, 2006 in the Rajya Sabha that Government was concerned with two versions of the Indo-U.S. Nuclear Bill in the U.S. Congress, He categorically assured the House : "If the final Bill passed by the U.S. Congress is not in consonance with joint agreement of July 18, 2005, India will draw its conclusions.... There is no question of India being bound by a law passed by a Foreign Legislature".

On 15 October, 2007 Prime Minister Manmohan Singh told American President that for some reasons India would not be able to hold safeguards talks with IAEA for sometime. This was due to some problems relating to implementation of the agreement. Thus talk with IAEA were delayed indefinite period of time.

Subsequently, Prime Minister of India Manmohan Singh again tried to revive this issue and said if the Government is not able to complete this agreement it will be great setback to his government. Communist party wanted a definite assurance from the Government that the government would not further the Nuclear Deal in the contrary, the Government wanted to keep alive the Nuclear Deal talks. Thus, Nuclear Deal remained the disputed issue between them. The Communist Parties made it clear to the Government that they would have no option left but to withdraw their support from the Government and for that Congress Party will be responsible.

On the other hand, America made it clear to the Government of India that the Nuclear Deal could not remain suspended for a long time. American Deputy Secretary for Political Affairs, Nicholas Burn told India on 23rd October, 2007 that India should hasten to reach some conclusion and this ought to be done latest by the end of the year, *i.e.*, 2007. This was obvious because of the American elections next year because then it would not be possible to get it passed in the Senate.

Prime Minister of India Manmohan Singh finally declared that Nuclear Deal is very significant for his Government and he would go ahead with the Deal, let come what may. The U.P.A. Government, therefore, proceeded ahead with the safeguards talks with IAEA on 1st August, 2008. India won Nuclear-trust vote in IAEA in Vienna. Thus India took a big stride on 1st August, 2008 to join the elite Nuclear Club. The India-specific safeguards sailed through the meeting of IAEA's 35 member board of governors in Vienna.

After getting IAEA clearance, there remained two more crucial steps to be crossed. First, Nuclear Deal was to go to Nuclear Suppliers Group (NSG) on 21st August, 2008. Secondly, after NSG clearance the Nuclear Deal was to go U.S. Congress in September, 2008.

On 6th September, 2008 India ultimately managed to get the approval of Nuclear Suppliers Group. Thus on 6th September 2008, India entered elite Nuclear Club after high voltage diplomacy after thwarting a last minute Chinese shocker to block consensus at NSG. Thus ended India's 34 year nuclear isolation following 1974 Pokharan test. India would now get Nuclear technology despite without signing Non-Proliferation Treaty (NPT) and Comprehensive Test Ban Treaty (CTBT).

American President Bush approved, signed and rushed the updated U.S. India Civilian nuclear agreement with the required documentation to Congress on 10th September, 2008 showing the kind of urgency and speed that made it almost certain that the deal would have final legislative clearance in the next fortnight. In the meantime Indian Prime Minister Manmohan Singh decided to visit to Washington on 25th September, setting the stage for a grand finale to the deal conceived in early 2005 and initiated only July 18 that year.

U.S.—India Nuclear Deal is also called 123 Agreement because under Section 123 of the U.S. Atomic Energy Act, under the U.S. has to conclude any bilateral civilian cooperation agreement.

It may be noted that it would be wrong to say that everything went on smoothly and that there were no patent or latent conditions. Two things deserve to be noted in this connection. First there seemed to be an informal pact among NSG members not to lift the ban on supply of sensitive technology to India. Secondly, the rights and declarations of both India and the U.S. are clearly spelt out in the 123 agreement. Once this Inter-Governmental agreement enters into force, the agreement would become a legal document in accordance with well-recognised principles of international law and the Law of Treaties. It was reported that there was a clear understanding among the senators that if and when India conducts a nuclear test, all the sensitive technology, fuel supplies, etc. would be withdrawn. The opposition in India, especially the Communist Parties called it a complete sell out. Subsequently, however, reported that the originally words "legally bound to withdraw....." were changed to "morally bound........" to remove the fears and apprehensions of India.

Due to the efforts of the American President George Bush, the Nuclear Bill was passed by the U.S. Congress—first by the House of Representatives by huge majority and then by the American Senate. The U.S. lawmakers gave a final stamp of approval to a landmark nuclear cooperation. This paved the way for ending India's three decade-long nuclear cooperation. President signed the Bill in White House on 11th October, 2008. India can now forge a new role as partner of U.S. and becomes a Nuclear Power. India will now get nuclear reactors, technology and fuel for its energy programme. India will also be able to obtain dual-use technology for areas like biotech, health and weather forecasting.

On 11th October, 2008 the Government of India sent its entire negotiating team led by External Affairs Minister Pranab Mukherjee on a 12 hour visit to Washington for the 123 Agreement signing ceremony in the State Departments glittering. Benjamin Franklin arrived in the afternoon, signed the agreement in the evening and left for New Delhi in the night. The Agreement was signed by American Secretary of State Condoleeza Rice on behalf of America and External Affairs Minister Pranab Mukherjee on behalf of India.

Last but not the least, the Government of India's problems are not over. The Government will have to face the Parliament and convince opposition especially, left and BJP that the Nuclear Deal is not a sell out. It will also have to negotiate with IAEA on inspection of India's Nuclear facilities.

(XLVII) U.S. North Korea Issue.—After Iraq war, United State of America turned its attention towards Iran and North Korea. We have already discussed Iran issue which is still going and its solution does not seem to be possible in a near future. North Korean issue is also likely to engage American attention for a considerable time.

Korea is said to be one of the sixth most dangerous regions of the world. North Korea is self-proclaimed Nuclear power. North Korea joined International Atomic Energy Agency (IAEA) in 1974. It withdrew from the IAEA on 13th June, 1994. According to America, since January 2005, North Korea has been mobilizing for Nuclear War. It is continuing further development of nuclear weapons and has pulled out of nuclear non-proliferation talks.

It may be noted here that North Korea joined Non-Proliferation Treaty in 1995 but in January 2003 it announced its intention to withdraw from the Treaty. Obviously America wants North Korea to join Non-Proliferation Treaty whose membership now stands at 190. Other notable countries who remain outside Non-Proliferation Treaty (NPT) are India, Pakistan and Israel.

In 1999 North Korea voluntarily announced a moratorium on testing long-range-missiles. Tensions in the region soared following intelligence reports that North Korea was fuelling a ballistic missile believed capable of reaching American territories. The U.S. and Japan said that they could consider sanctions against the impoverished State and push the U.N. Security Council for retaliatory action should be launched go ahead. On 21st June, 2006, U.S. and European Union urged Iran and North Korea to give up military and nuclear ambitions which threatens country's neighbours and destabilise the world. But North Korea replied by contending that its self-imposed moratorium on testing long range missiles from 1999 no longer applied because it is not in direct dialogue with Washington, thereby suggesting it would hold off on any launch if the U.S. agreed to new talks. Denying that the proposed launch is a violation of the moratorium, Chief of North Korean Mission to the U.N. said, "North Korea as a sovereign State has the right to develop, deploy, fire and export a missile. Further, we are aware of the U.S. concerns about our missile test launch. So our position is that we should resolve the issue through negotiations". While North Korea insisted on direct talks with the U.S., America insisted that it would speak to the North Korea at six nation nuclear talks. North Korea refused to return to the said nuclear talks since November last because of U.S. crackdown on the country's alleged illicit financial activity.

As in the case of Iran, in case of North Korea also while U.S. and Japan want U.N. Security Council's sanctions, China and Russia were opposed to slapping sanctions on North Korea. In the first week of July, 2006 a defiant North Korea acknowledged for the first time that it had launched a missile and vowed to carry out more tests and threatened to use force if the international community tried to stop it. On the other hand the U.S. and Japan closed ranks in the face of a U.N. Security Council split over whether to slap sanctions on North Korea over the volley of missiles it fired off.

But North Korea took stand that "this (the missile launches) is not attack on anyone". On 6th July, 2006, Russia and China refused to back a Japanese resolution on North Korea for testing missiles. The Japanese draft, for issuing sanctions by the Security Council was strongly backed by the U.S., Britain and France but Russia and China refused to support it. After second meeting of the Security Council, the five veto-wielding permanent members remained divided.

It may be noted that the concerns of Japan seem to be well-founded because North Korea test fired seven missiles without warning, including for the first time a long range Taepodong-2 crashing into the sea of Japan (east-sea), but which has a range capable of reaching Tokyo. Therefore, in the first week of July, 2006, Japan decided to accelerate its missile defence plans. Three surface to air missiles used to intercept incoming missiles will now be deployed in 2007, a year earlier than planned the PAC-3s (patriot advanced capability 3s) were initially due to be deployed in metropolitan areas by the end of March, 2008, followed by deployment in rural areas. But it was thought necessary to set up the interceptor systems far sooner after North Korean missile-tests. Japan even weighed a pre-emptive strike on North Korea's missile bases because Japan was badly rattled by North Korea's missile tests.

On 15th July, 2006, the U.N. Security Council voted unanimously for a resolution requiring nations to prevent North Korea from getting dangerous weapons and demanding that North Korea halts its ballistic missiles. North Korea immediately rejected this resolution. North Korea's foreign missile ministry threatened to "bolster its war deterrent" in an angry response to the U.N. Security Council resolution that condemned its missile tests.

After the U.N. Security Council voted to approve a resolution to impose weapons sanction on North Korea in response to its missile tests, America took a hardened stand and warned that the Koreans would pay a cost for missile tests.

Thus a very dangerous situation has arisen. The risk of nuclear war is imminent and needs to be avoided. America and its allies may now claim that with U.N. Security Council sanctions, they are legally entitled to take necessary action against North Korea. However, even the U.S. wants to avoid a full-fledged war. It therefore once again asked North Korea to come back into six way nuclear talks. But North Korea rejected American overtures. It need not be overemphasized that a defiant North Korea had declared in February, 2006 that it was a nuclear power and had produced nuclear weapons. In the first week of July 2006, North Korea went ahead and declared that it had unloaded 8,000 spent fuel rods from its reactor, a step that would allow it to re-process weapons grade plutonium for more nuclear bombs. Thus a very explosive and dangerous situation has arisen. Let us hope that ultimately wisdom will prevail and the world is saved from devastating nuclear war.

According to a North Korean diplomat in Australia, threats by United States to apply sanctions against North Korea were a declaration of war forcing North Korea to plan a nuclear test. Subsequently, defiant North Korea conducted on 9th October, 2006 a long anticipated nuclear test in the teeth of international pressure. This Nuclear Test particularly involved the U.S. and North Korea's immediate neighbourhood including Washington's allies South Korea and Japan, and the Communist regime's patron of many years' China. American President responded by remarking "North Korea has defied the will of the International community and the International community will respond".

A day after reported nuclear test, North Korea, came out with the statement that only direct talks with Washington and an underwriting from the U.S. would keep North Korea and its Communist directorship afloat would stop it going further down the nuclear path. The U.S. on the other hand, continued efforts to reach a unanimous Security Council resolution with other permanent members against North Korea even though domestic hawks wanted President Bush to get tough with North Korea. Despite the U.S. efforts, the U.N. Security Council remained divided on sanctions against North Korea differences between the U.S. on one hand and China and Russia on the other hand delayed a vote in the Council.

The U.S. wanted to bring North Korea back into six-way nuclear talks but North Korea rejected U.S. overtures while on the other hand proposed to resume Government to Government talks with Seoul (*i.e.*, South Korea), a neighbour and key U.S. ally, after a ten month hiatus.

Ultimately, the United Nations slapped sanction on North Korea. On 14th October, 2006, U.N. Security Council voted unanimously to impose financial and arms sanctions against North Korea for having defiantly conducted its nuclear weapons test. The U.S. drafted resolution (reached after strenuous efforts for more than a week) allows nations to stop cargo going to and from North Korea to check for weapons of mass destructions or related supplies.

It may be noted here after its bitter experience in its Iraq misadventure, the U.S. does not want to make hawkish response on its own. Like its successful initiative in Afghanistan, it wants to contain North Korea through the United Nations Security Council.

In lieu of American help North Korea agreed to suspend its emergency scheme of testing of nuclear weapons and long range missiles.—On 29th February, 2012, North Korea entered into an agreement suspending testing of nuclear weapons and long range missiles in exchange of supply of American food and other materials. It is worth noting here that there had been tension between Japan and North Korea for a long time in respect of testing of long-range missiles. In respect of this agreement, talks were concluded between America and North Korea in the third week of February 2012. This agreement would reduce international tension.

North Korea had planned to launch its rocket on 1 December, 2012. Earlier its launching date was April 2012 but that plan failed. In the last week of December 2012, satellite pictures showed that soon North Korea could make nuclear explosion. In defiance of the whole world, on 12 December, 2012, North Korea launched a rocket. It was feared that in disguise it might be testing of nuclear missile.

Therefore, on 7th March, 2013, the United Nations Security Council unanimously issued sanctions on account of the said nuclear testing. But these sanctions further enhanced tensions and consequently being annoyed North Korea nullified all non-aggressive agreements with South Korea.

On 29 March, 2013, newspapers reported that Chief Leader of North Korea Kim Jangun, directed his armed forces to be prepared to attack against South Korea and America. This incident occured after the day when American forces and North Korean forces, fighter aircrafts conducted exercises.

This obviously enhanced tension and danger in this area because on 2 April, 2013, North Korea again vowed to start its atomic plants. North Korea sent its missiles to east coast. In return America further strenghthend its bases.

On 3rd April, 2013, North Korea asked all embassies in its country to leave the country. North Korea further added that it not guarantee their safety after 10 April, 2013. However an important change took place on 13 April, 2013 when China pledged to end nuclear weapons of North Korea. Thereafter on 9th June, 2013 talks were held between North Korea and South Korea after a gap of two years and they agreed to meet again in high level meet between the two countries. This important change was welcomed all over the world.

Relations between America and North Korea continue to remain strained. While North Korea continues to test more and more powerful nuclear missiles targetting America and its ruler time and again threatens America with war. On the other hand, America has not only sent warship in the sea near North Korea and says it is prepared to respond effectively against any adventure by North Korea. Thus the situation is grim and the fear of war between the two nations looms large.

(XLVIII) Indo-Pak Havana Handshake to fight terrorism (September, 2006).—On 16th September, 2006, Prime Minister Manmohan Singh and President Musharraf had a one-on-one meeting during Non-aligned summit at Havana (Cuba) and thereafter a joint-statement was issued expressing the desire and determination to set up joint mechanism to fight terrorism and to solve other bilateral disputes.

The proposed Joint Indo-Pak mechanism to fight terrorism provides the following :

(i) An Indo-Pak anti-terrorism institutional mechanism will be put up.

(ii) A foreign secretaries meet will shortly be held in New Delhi to resume composite dialogue.

(iii) Consultations will take place for early solution of Siachen dispute.

(iv) Experts of both the countries will meet in November, 2006 to agree on coordinates for joint survey of Sir Creek and adjoining area, without prejudice to each other's position. They will also discuss maritime boundary.

(v) Both the countries will facilitate implementation of agreements already reached on LOC-related CBMO, including bus service, crossing points and truck service.

So far there have been talks and talks between the two countries and no existing dispute has ever been solved by talks. Let us hope that so called diplomatic risk, *i.e.*, Havana Handshake, will yield beneficial consequences.

(XLIX) Nobel Award Jointly Awarded to Inter-Governmental Panel on Climate (IPCC) and Al Gore, former Vice-President of America, 12th October, 2007.—On 12th October, 2007 Inter-Governmental Panel on Climate (IPCC) and Al Gore, former Vice-President of America, were jointly awarded Nobel Award. IPCC is a United Nations body consisting of about 3000 scientists. These scientists include environmental scientists, marine scientists, snow-experts, economists, etc. This Panel has authority to measure and judge global warming and its effect on Planet earth. It is a matter of great honour for India that this panel is headed by an Indian Rajendra Kumar Pachauri, who was elected in April 2002 and under whose leadership the Panel attracted the attention of the world towards the need to present climate change. Rajendra Kumar Pachauri has been the President of the Energy and Resources Institute of India for several decades.

It may be noted here that the Nobel Award has not been awarded to Rajendra Kumar Pachauri alone but it has been awarded jointly to IPCC whose Chairman is Mr. Pachauri and Al Gore, former Vice-President of U.S.

Former Vice-President of America Al Gore, after having been defeated by George Bush in 2000 Presidential elections started working as a warrior to save climate change. He produced a documentary which fetched for him Oscar Award. For his contribution towards saving climate change, he has been awarded Nobel Award jointly with IPCC.

It may be noted that due to constant increased in global warming, the scientists have warned the world of its devastating consequences. According to a report of the United Nations Environment Programme the climate of the Planet has reached a unique stage which had never occurred earlier. It has therefore become imperative that the governments of the countries must make environment part of the country's laws. The report also says that due to the present population of the world, the consumption of the resources has greatly increased. The population of the Planet Earth is consuming 40% more than its capacity to produce. During the summer season, the snow of Arctic decreases and goes back. As compared to earlier years this year it has gone back 10 lakh square miles more. This is all due to global warming. The level of the seas is slowly and gradually increasing. If all this is not immediately prevented it would result in disasters. In order to save the Planet Earth and to ensure the safety of future generations solid steps are urgently needed. In this context, the importance of the reports of the IPCC headed by Rajendra Kumar Pachauri has greatly increased.

(L) Ramlila Maidan Incident (4th June, 2011).—While Baba Ramdev and his supporters were sleeping in a tent, Delhi Police attacked them with tear gas and lathis at midnight without giving any prior notice to them to vacate the area. It is important to note the context of the whole events ultimately led to violent event which culminated in the attack with tear gas and lathis within a tent when all the peoples (supporters of Ramdev) were sleeping.

The Supreme Court took cognizance of the incidents of 4th June, 2011. After hearing both the parties, the Supreme Court held that attack of Delhi Police with tear gas and lathis at midnight on people without any prior notice on people who were sleeping was unjustified. It amounted to violation of right to life enshrined in Article 21 of the Constitution of India. According to the Supreme Court the right to sleep at night is a part of right to life and liberty contained in Article 21 of the Constitution of India. The Apex Court held that violent acts in midnight of 4th June, 2011 violated not only right to life but also democratic values enshrined in the Constitution.

The Supreme Court also provided for compensation to the victims. The Supreme Court ordered Rupees five lakhs to the relatives of deceased Rajbala (who suffered, serious injuries including broken spinal cord) and rupees fifty-fifty thousand each to the injured persons. The Supreme Court added that 25% compensation be provided by Ramdev because he contributed to the negligence by not controlling his supporters.

The Supreme Court delivered its judgment on February 23, 2012 (Suo motu WP (Cri) No. 122 of 2011) in *Ramlila Maidan Incident, In re.*[31]

Thus while directing the State Government and the Commissioner of Police to register and investigate cases of criminal acts and offences, destruction of private and public property against the police officers/personnel alongwith those members of the assembly, who threw bricks at the police force causing injuries to the members of the force as well as damage to property, the Supreme Court issued the following directions :

(1) Take disciplinary action against all the erring police officers/personal who have indulged in brickbatting, have resorted to lathi-charge and excessive use of tear gas shells upon the crowd, have exceeded their authority or have acted in a manner not permissible under the prescribed procedures, Rules or the standing orders and their actions have an element of criminality. This action shall be taken against the officer/personnel irrespective of what ranks they hold in the hierarchy of police.

(2) The police personnel who were present in the pandal and still did not help the evacuation of the large gathering and in transportation of sick and injured people to the hospitals also rendered themselves liable for appropriate disciplinary action.

(3) The police shall also register the police personnel and members of the gathering at the Ramlila Ground (whether they were followers of Baba Ramdev or otherwise) who indulged in damage to the property, brick batting etc. All these cases have already been reported to Police Station Kamla Market. The Police shall complete the investigation and file a report under Section 173 Cr. P.C. within three months from today *i.e.* the date of the judgment.

The Supreme Court also directed that the persons who died or were injured in this unfortunate incident should be awarded an ad hoc compensation. Smt. Rajbala, who got spinal injury in the incident and subsequently died, would be entitled to the ad hoc compensation of Rs. 5 lacks while persons who suffered grievous injuries and were admitted to the hospital would be entitled to the compensation of Rs. 50,000/- each and persons who suffered simple injuries and were taken to the hospital but discharged after a short while would be entitled to a compensation of Rs. 25,000 each.

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[31] (2012) 2 SCC (Civ) 820 : (2012) 5 SCC 1.

Further, for breach of the legal and moral duty, and for its contributory negligence, the consequences of financial liability would also pass, though to a limited extent, upon Respondent 4 Trust as well. Thus the Apex Court directed that in cases of death and grievous hurt, 25% of the awarded compensation shall be paid by the Trust. The said amount shall be paid to the Commissioner of Police, who in turn, shall make a cheque for the entire amount in favour of the injured or the persons claiming for the deceased.[32]

In his concurring judgment, Dr. Chauhan, J, has stated that people at large have a legitimate expectation that the executive authority would ensure strict compliance with the procedural requirements and would certainly not act in derogation of applicable regulation. Thus the present is a clear cut case of human rights violation.

Further, an individual is entitled to sleep as comfortably and as freely as breathes. Sleep is essential for a human being to maintain the delicate balance of health necessary for its very existence and survival, sleep is, therefore, a fundamental and basic requirement without which the existence of life itself would be in peril. To disturb sleep, therefore, would amounts to torture which is now accepted as a violation of human right.

Finally, the facts as uncovered and the procedural mandate having been blatantly violated, is malice in law and also the part played by the police and the administration shows the outrageous behaviour which cannot be justified by law in any civilized society.[33]

(LI) Nuclear Reactors Deal Between France and India.—On 2nd December, 2010, India and France unveiled plans for deals worth nearly $ 20 billion, almost twice the amount signed during the U.S. President Obama's visit. The major agreements signed during the four-day visit of French President Nicolas Sarkozy include a pact between the French Energy major *Areva* and state-run Nuclear Power Corporation of India Ltd. (NPCIL) for the supply of two nuclear reactors and fuel for 25 years. The deal is worth 7 billion euros ($ 9.3 billion).

India and France took several steps forward to setting the first French Nuclear reactors in India, but had to stop short of putting the nuclear deal into operation because of French's string reservations over Indian Law (namely Nuclear Liability Bill). France, like U.S. and Russia, wants its firms buffered from claims arising from damages in case of a nuclear accident.

At a joint press meet Prime Minister Manmohan Singh said, "The framework agreement provides for two reactors leading finally to 10,000 M.W. of powers......... So, cooperation with France will greatly increase our non-polluting supply of power". Further, "negotiations (with Areva) have reached an advanced stage to pave way for nuclear power reactors in Jaitapur in partnership with Indian industry".

It may be noted that Areva owns uranium mines in Nigeria, Kazakhistan, Canada, Australia, South Africa and Mongola, among other countries.

As the first country to support India's nuclear programme, the commercial contract between French firm Areva and New Delhi will mark India's international nuclear debut.

France, like the U.S. and Russia, wants Indian rules to be in line with global practices on nuclear liability.

As regards Jaitapur Nuclear Unit in Ratnagiri, the 9,900 M.W. Jaitapur nuclear power unit the country's largest, will be set up in collaboration with the French firm Areva. This largest nuclear-plant has received green nod, *i.e.* environment clearance. Jaitapur Project, was given environment clearance in just 80 days from the time the final environment impact assessment (EIA) report was submitted by the Nuclear Power Corporation (NPCIL). It was in fact, conditional clearance. Union Environment Minister Jairam Ramesh said elaborating the conditions laid down, a special plan to mitigate the adverse impact on the fisher folk community will have to be implemented.

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32. *Ramlila Maidan Incident, In re,* (2012) 2 SCC (Cri) 820 at pp. 932-933.
33. Ibid. at pp. 943-944.

The cooling water system will be designed to discharge into marine areas beyond 2.2 kilo metres. It shall also be ensured that temperature differential of the discharged water with respect to intake does not exceed 5 degree celsius at any given point of time. Further, the radio-active level in different components of the environment, including the food chain and quality of air, water and soil, shall be monitored regularly as per Atomic Energy Regulatory Board (AERB) standards.

(LII) North Korean Attack on South Korea.—On 23rd November, 2010 North Korea shelled an island near disputed sea border with South Korea, setting dozens of buildings ablaze and sending civilians fleeing for shelter. Sixteen South Korean soldiers and three civilians were injured and the extent of casualties on the northern side was unknown. The two sides technically remain at war because a peace treaty was never signed, and nearly 2 million troops-including tens of thousands from the U.S.—are positioned on both sides of the world's most heavily militarized border. The attack came amid high tension over North Korea's claim that it has a new uranium enrichment facility and just six weeks after North Korean leader Kim Jing II unveiled his youngest son as his heir apparent. According to South Korean officials, the skirmish began when Pyongyang warned the South to halt military drills in the area.

Earlier in March 2010, South Korean navy covette cheonan was torpedod, killing 46 sailors, an investigation team including experts from the U.S., Australia, U.K. and Sweden, said that North Korean submarine fired the torpedo.

After the North Korea shelled an island near disputed sea border put South Korea's military on high alert, was one of the rivals most dramatic confrontations since the Korean war ended in 1953. South Korean responded by firing K-9155 self-propelled howitzers and dispatching fighter jets, which might have caused considerable North Korean casualties. The whole skirmish lasted about an hour. Both sides threatened the other against another attack.

South Korean tension mounted on 26th November, 2010 war games a South Korean island was bombarded by North Korea as Pyongyang's military again fired artillery time in what happened to be a drill on its own territory. Meanwhile, South Korea struggled with the domestic political fallout from Tuesday's deadly attack, which exposed the weakness of South Korean defences brought public criticism of President Lee Myung-Bak for failing to retaliate more forcefully.

The United States and South Korea prepared, for war games on the 28th November, 2010 as South Korean's demanded vengeance over a deadly North Korean artillery bombardment that raised fears of more clashes between the bitter rivals. Meanwhile, the North worked to justify one of the worst attacks on South Korean territory since the 1950-53 Korean War. According to South Africa, four South Koreans, including two civilians, died after North Korean artillery fired on the small yellow sea island of Yeonpyeong which is home to both fishing communities and military bases.

South Korean President Lee Myung Bak promised in a televised speech on 29th November, 2010 to make sure that North Korea paid a dear price should it attack the South Korea again. On the other hand, North Korea placed surface-to-surface missiles in launch pads in the Yellow sea as the U. S. and South Korea began, military drills. China called for emergency talks for December among North Korea and South Korea, host China, United States, Japan and Russia.

Japan was, however, non-committal and responded continuously while cooperating closely with South Korea and the United States.

North Korea warned on 13th December, 2010 that U. S.-South Korea cooperation could bring a nuclear war to the region as the South began artillery drills and lingering tension nearly three weeks after the North Korea deadly shelling of a South Korea Island. After the North Korean attack, South Korea stayed joint military drills with the United States and also pushed ahead with more artillery exercises despite the North Korean warning that they would aggravate tension.

Thus the situation in the region is explosive and dangerous war will only aggravate the situation and will not solve any problem. Security Council of the United Nations should intervene on behalf of the International community and should try to bring peace in the region. It may however be noted that three permanent members of the Security Council, namely, the U. S., Russia and China, are directly or indirectly involved in the dispute. Thus Security Council can be effective only if the said three permanent members are willing to cooperate.

On 1st December, 2012 North Korea planned a rocket launch in December. Earlier attempt to make a rocket launch in April that year failed. In the last week of December, 2012 Satellite pictures signals revealed chances of a quick atomic explosion. On 12th December, 2012 launched rocket defying the world. It raised fears of disguised nuclear missile test.

On 7th March, 2013, the U.N. Security Council Voted unanimously for strong new sanctions against North Korea for its latest nuclear test ignoring threats by multinations to nuke the U. S. Thus backed by China the said move came after reclusive nation's threat to nuke U.S. It may, however, be noted that U. N. curbs escalated Korean Tension. Angrily responding to the U. N. Security Council's unanimous decision to impose tightened sanctions, North Korea said on 8th March, 2013 that it was nullifying all non-aggression agreements with South Korea, with one of the top's general claiming that his country had nuclear tipped inter continental ballistic missiles ready to blast off.

On 29th March, 2013, Korean State Media said that the country's leader, Kim Jongun to be ready to strike the United States and South Korea, which could signal either preparations for missile test or just more blustering. The U.S. criticized the threat, which came day after American forces had carried out an unusual practice to bombing exercise with advanced aircraft across South Korea. Thus Korean crisis was brewing and North and South Korea were on brink of war.

North Korea and South Korean crisis could spiral out of control because on 2nd April, 2013, North Korea vowed to restart nuke reactor on the other hand, the U.S. sent warship and send of its key vessels including a sea based radar platforms closer to North Korea on coast to monitor North Korea's military moves. Besides this U.S. stealth jets joined drills near North Korea. South Korean President vowed a strong response to any cross border attack. Tension rose as North Korea moved missile to east coast. On the other hand, America fortified Guana Base.

On 3rd April, 2013, North Korea asked embassies to evacuate. South Korea warned it could not guarantee safety after April 10, 2013. A significant change came on 13th April, 2013 when U. S. and China vowed to rid North Korea of Nuke. However, a significant thaw came on 9th June, 2013 when North and South Korea held their first official talks for more than two years, seeking to set up a high level meeting in Seoul after months of tensions and threats of nuclear war. The talks were aimed at agreeing a framework for rivals first ministerial meeting since 2007, tentatively scheduled to be held shortly. This move and trend should be welcomed and let us hope more such talks will continue to seek an amicable and peaceful settlement.

It may be noted that on 10th December, 2015, North Korean leader Kim Jong Un claimed that his country has developed a hydrogen bomb. However the experts outside the country were sceptical. As reported in newspapers, North Korea seems to have test Hydrogen bomb on 5th January, 2016.

It may be noted here that North Korea conducted underground tests to set of nuclear devices in 2006, 2009 and 2013, for which it has been subject to UN Security Council sanctions banning trade and financial activities that aid its weapons programme.

(LIII) Japan's Nuclear Disaster.—On 11th March, 2011 at 2.46 p.m. local time (11.16 am IST) a ferocious Tsunami spawned the biggest earthquake ever recorded in Japan (the fifth worst in the world since 1900) and slammed Japan's eastern Coast killing at least 1,000 people, sweeping away houses, boats and cars across cities and

farmlands. Hours later, the Tsunami hit Hawaii and set off alert warning as far away as the west coast of the United States and South America. It set alert warnings in as many as 50 countries including U.S. (Hawaii & West Coast), Peru, Mexico, Chile, New Zealand, Australia and South Korea.

As per Japanese Police Officials, toll was at least 1,000 with 300 bodies found in Sendai, a port city in northwestern Japan and the closest large population to the epicenter. The full extent of injuries were not known and the toll was feared to rise substantially.

Walls of water whisked away houses and cars in central Japan where terrified residents fled the coast. Train services were shut down across central and northern Japan, including Tokyo, and air travel was severely disrupted. A ship carrying over 100 people was swept away by Tsunami.

Though Japan is a country used to earthquakes, yet this earthquake proved to be horrific because of the Tsunami that swallowed everything in its path, as it surged several kilometers before retreating. The government evacuated thousands of residents near a nuclear plant about 250 km northwest of Tokyo after a backup generator failed.

TV showed waves of more than 12 feet high roaring island in Japan. The Tsunami drew a line of white fury across the ocean, heading toward the shoreline, cars and trucks were still moving on highways as the water rushed towards them. Power, train services were off Tokyo, Narita airport was shut down temporarily and phones were on brink. Besides a ship carrying 100 people were swept away and a train with unknown number of passengers were missing.

Japanese engineers conceded that burying the quake-ravaged Fukushima nuclear plant in sand and concrete may be a last resort to prevent a catastrophic radiation release. The method used to seal huge leakages from Chernobyl in 1986 after a fire and explosion in the Ukrainian plant.

Japanese authorities maintained that the cores at the six battered reactors at Fukushima Dailichi power plant are likely to be safely contained. However, they added that the worry was about the cooling pools for spent fuel.

It may be noted that Japan was on brink of Nuclear catastrophe as 3rd reactor exploded in three days. Three more reactors were on boil. As workers braved radiation and fire to prevent the radioactive cores of the damaged Fukushima reactors from melting there were concerns that nearby pools holding spent fuel rods could pose an even greater risk. With temperatures rising in the pools in reactors No. 4, 5 and 6, it was feared that the rods might catch fire, spreading radioactive materials.

A small crew of technicians braved radiation and fire through the day on 15th March, 2011 as they fought to prevent three nuclear reactors in northwestern Japan from melting down and stop storage pond loaded with spent uranium fuel rods from bursting into flames. For Japanese people, it was a grim reminder of that August morning of 1945.

On 15th March, 2011 evening Tokyo electric power company officials announced that they would consider using helicopters in an attempt to douse cold water on a boiling roof top on storage pond for spent uranium fuel rods. The rods were still radioactive and potentially as hot and dangerous as the fuel rods inside the reactors if not kept submerged in water. Thus priority right then was to cool reactors and luckily the Japanese scientists were able to succeed in their attempt.

The Japanese tragedy and disaster provides an opportunity to draw lessons and look forward. It is rather a grim reminder that whatever safety measure are taken the Nuclear Power Plants, besides being hazardous to environment are not hundred per cent safe. Several persons have rightly remarked on the amazing stoicism and the order the Japanese had managed to retain. In how many countries, especially ours, one could imagine such a scenario vis-a-vis lesser tragedies ? In India, with miserable and poor record of disaster management the casualties could have been several times more. It is indeed an eye-opener for countries like ours who dream of solving the shortage of electricity production through nuclear power plants. Solar energy seems to be the only way out. But unfortunately the scientists have so far failed to devise cheap and commercial use of solar energy.

Last but not the least, International Atomic Energy Agency (IAEA) has been criticized over its response to the nuclear crisis in Japan. It has been criticized for being slow to provide accurate information about the unfolding catastrophe. Observers however, point out that the fault lies more in the largely toothless mandate of what is frequently referred to as the U.N. Atomic "watchdog". In fact the statutes of International Atomic Energy Agency (IAEA) leave it wholly dependent on the voluntary compliance of member states to its safety standards. So also the control of information similarly lies in the hands of the member states.

As soon as it became clear that last week's devastating earthquake and Tsunami had also crippled the Fukushima atomic power plant the IAEA was swamped with calls and enquiries from a worried international public. The Vienna based agency's web site, not designed to cope with so much traffic frequently collapsed, leaving IAEA's officials to publish public notices on the social networking site Face book as backup.

The IAEA's Director General Yukiga Amano, himself, a Japanese national, in particular found himself in the firing line. While the first explosion at one of Fukushima's reactors occurred early Saturday, a statement on web site some six hours later. Updates over weekends were intermittent at best and it was not until Monday afternoon that Amano decided to appear before the press.

Amano only decided to fly to Japan himself to get a better idea of the extent of the devastation and discuss with the Japanese authorities, a full six days after the catastrophe hit. He briefed the watchdog's member states about his trip, in a special meeting of the 35 member board of governors in Vienna. In the face of crushing criticism Amano and his top aids repeatedly pointed out the agency was doing all it could within the bounds of its mandate.

(LIV) Chinese Incursion into Indian Territory.—It need not be over-emphasized that for foreign troops and terrorists, India has become a soft country. This is especially true of Chinese and Pakistani troops. In last several months, China has made a habit of making frequent incursions into Indian territory. At its best, Indian Government lodges a strong diplomatic protest.

The People's Liberation Army (PLA) continued to needle Indian forces all along the unresolved line of Actual control (LAC) from Arunachal Pradesh to Ladakh though so-called good atmosphere was generated during the earlier visit of Chinese Prime Minister to India and Indian Defence Minister to Bejing.

In yet another incursion in South-east Ladakh, a PLA Patrol crossed over into Indian territory in the crucial Chumar post area and took away an Indian Surveillance Camera after dismantling it on June 17, 2013. However, the camera was returned on July 3 after the Indian Army and ITBP lodged a protest during a flag meeting at Spanggur in Chishul Sector on June 19.

The Chumar post on Ladakh-Himachal Pradesh Border was the bone of contention even during the 21 days military face off in April-May, which saw the two rival armies pitching tents and indulging in banner drills after PLA troops intruded 19 km in the Indian Territory on Depsang Bulge area of Daulat Beg Oldi (DBO) sector.

Though Chumar is 250 km south of DBO Indian Observer post and surveillance cameras there had irked the PLA since they could look into Chinese territory and track troop movements. In fact, the main pre-condition laid down by the PLA to withdraw from Depsang the face-off was that India should dismantle temporary bunkers it had constructed in Chumar. The crisis was finally defused on May 5 after India dismantled what it called "a tin shed" at Chumar and the PLA troops simultaneously withdraw from Depsang.

(LV) Russian Intervention in Ukraine and the annexation of Crimea.—Ukraine was in past a constituent of the Republic of the USSR, being the South-Western part of the country. After the Russian Federation, Ukraine was the most heavily populated and economically important, of the Soviet Republic. Ukraine's capital is Kiev. Ukraine's steppe lands are one of the great wheat producing regions of Europe and the republic as a whole provides nearly a quarter of former U.S.S.R.'s food supply. It is also a major producer of coal and iron are. A Slavonic language similar to but distinct from Russia, that is spoken by most natives of Ukraine.

Ukraine, a country in Eastern Europe, has an area of 603,628 sq. km. (233,062 sq. mile), making it the largest country in entire Europe. Ukraine borders Russia to the East and North, Belarus to the North-East, Poland, Slovakia and Hungary to the West, Romania and Moldeva to the South-West and the Black Sea and Sea of Azov to the South and South-east respectively.

In 2011, Ukraine, was the world's third largest grain exporter with that year's harvest being made with larger than average. It is one of ten most attractive agricultural land acquisition regions. It also has a well developed manufacturing reactor particularly in aerospace industrial equipment.

A chaotic period of warfare ensued after the Russian Revolution. The internationally recognized Ukrainian Peoples Republic emerged from its own civil war. The Ukraine Soviet war followed, in which Red Army established contral in late 1919. This created the Ukrainian Soviet Socialist Republic which was on 30th December became one of the founding republics of the Soviet Union.

Ukraine became independent again when the Soviet Union dissolved in 1991. Thereafter, started a period of transition to a marked economy, in which Ukraine suffered an eight years of recission. However, since then, the economy experienced a high increase in GDP growth. Then once again Ukraine caught up in the worldwide economic crisis and the economy plunged GDP fell 20% from 2008 to 2009, then levelled off.

In November, 2013, Ukrainian President Yanukovich did not sign the Ukraine-European Union Association and instead pursued closer ties with Russia. This move sparked violence on the streets of Kiev. In December 2013 and January 2014, protesters started taking over various government building first Kijie and later, in Western Ukraine battles between protesters and police resulted in about 80 deaths in February, 2014. Following the violence the Parliament voted to remove President Yanukovich on 22nd February, 2014 from power and to free Yulia Tymoshenko from prison.

In March 2014, Crimean War resulted in Crimea being annexd by Russia. The referendum which was organized under Russian military occupation was denounced by the European Union and the United States of America as illegal.

For a considerable time Ukraine-Russia conflict has been in limelight in the international news. Pro-Russian protesters had been protesting against Government. The Ukraine's Government tried hard to suppress them by force. Disaffection among the Ukrainian population was growing. Fresh fighting flared in Central Kiev, date shattering a true declared by Ukrainian President Viktor Yanukovich, as the Russian backed leader met European ministers demanding the compromise with pro-Europeans. In a sign of dwindling support of Ukrainian President Viktor Yanukovich, his hand picked head of Kiev's city administration quit the ruling party of the Regions in protest against the bloodshed in the streets.

The protests broke out after Viktor Yanukovich Government rejected an accord with the European Union in November 2013 in favour of strong ties with Russia, outraged that a long standing aspiration for integration with Europe had been ditched, Ukrainians launched protests, drawing violent reaction from the authorities. After three months, protests were not less about Europe than about getting rid of a President who mainly believed in clinging to power.

The Foreign Ministers of Germany, France and Poland spent much of the day in Kiev on 21st February, 2014, meeting at length with Viktor Yanukovich and extending their stay to talk to opposition leaders. They sent an interim report to European colleagues in Brussels, who were meeting to decide on targeted sanctions against those deemed responsible for the bloodshed in Ukraine.

On 17th December, 2013, Russian President Vladimir Putin, offered economic lifeline to Ukraine, with $15 billion of loans and cheaper gas supplies. Later on, on January 16, 2014, Ukrainian Parliament passed 'draconian' anti-protest laws.

In a referendum watched closely around the world, residents of Ukraine's strategic Crimea voted on 16th March, 2014 on whether to demand greater economy or seek to join Russia. This has been condemned by the American and European countries. The referendum two weeks after Russian-led forces seized control of Crimea, a predominantly earlier Russian region on the Black Sea that hosted naval base. However, Ukraine's new Prime Minister insisted again on 16th March, 2014 that neither Ukraine nor the west would recognise the referendum, which it said was being conducted at gun point.

U.S. warned Russia on 16th March, 2014 about facing global isolation and sanctions. America was annoyed over Russian actions and warned President Vladimir Putin that Moscow would have to face sanctions in coming days and international isolation that would hurt Russia's economy.

On 7th April, 2014, Pro-Russian, who seized a provincial building in the Eastern Ukranian city by Donetsk proclaimed the region independent, an omnivorous echo of events prior to Russia's annexation of Crimea. Ukrainian authorities called the move an attempt by Russia to sow unrest. The activists demanded that a referendum to be held no later than 11th May, 2014 on the possible succession of the Donetsk, which borders Russia.

Donetsk is the home base of deposed Moscow backed President Viktor Yanukovich. Unlike in Crimea where ethnic Russians form a majority most people in the East and South are ethinically but speak Russian as first language. It is that Russia has been pushing internationally proposing the "Federalization" of Ukraine in which regions of the country would have broad powers of autonomy. Ukraine said that the Russian proposal was aimed at breaking up of former Soviet Republic.

It may be noted here that Eastern Ukraine was the heart land of support for ousted President Viktor Yanukovich, who fled to Russia in February after months of protest. About half of region's residents are ethnic Russians, many of whom believed Ukraine's acting authorities are nationalists who would oppress them. Ukraine's interim authorities denied they were infringing upon the rights of ethnic Russians and there had been no evidence of Russians facing harassment in Ukraine.

On 8th April, 2014, NATO warned Russia against making an 'historic mistake' by provoking a flaring recession crisis in eastern Ukraine which could degenerate in a civil war. NATO Chief Anders Eogh Rasmuseen reaffirmed on a visit to Paris further warned "it would have grave consequences for our ties with Russia and it would further isolate Russia internationally". Besides this, U.S. Secretary of State John Kerry, threatened Russia on 8th April, 2014, with tougher economic sanctions if it failed to be back down from its chaotic involvement in Ukraine. John Kerry further said additional penalties on Russian energy, banking and mining could be imposed if Moscow failed to honour a sovereign Ukraine.

On 12th April, 2014, men in the uniforms of then defunct riot police head quarters in Donetsk, the Eastern city that one of the flash points of a pro-Russian protests, hours after armed men seized local police head-quarters in the Slovyansk, a city about 90 km. away. The situation further worsened when on 16th April, 2014 separatists flew the Russian flag on armoured vehicles taken from the Ukrainian army, humiliating a Kiev Government operation to recapture eastern towns controlled by pro-Moscow partisans.

On the other hand, on the same date NATO said it would deploy additional air, sea and land forces in Eastern Europe in response to the worsening crisis in Ukraine.

On 17th April, 2014, Russian President Vladimir Putin rejected that Russian special forces were fomenting unrest in Eastern Ukraine, but recognized that for the first time that the troops in unmarked uniforms who had over taken Ukraine's Crimean Peninsula before the annexation by Russian soldiers. However Russian's Foreign Minister Sergei Lavroy announced that a deal had been reached with the Ukraine, the U.S. and the European Union to "de-escalate dangerously high tensions in the former soviet republic".

On 22nd April, 2014, U.S. Vice-President Joe Biden warned Russia of isolation if it continued to try "pull Ukraine apart" and pledged Washington's strong support for Kiev's leaders. On 24th April, 2014, Russian President Vladimir Putin, warned that there would be "consequences" if the Ukraine army had been used against its people after Kiev's interior Minister announced "up to fire" pro-Russian militants had been killed in the separtist controlled city of Slaviansk, on the same day, U.S. President Obama, accused Russian of failing to live up to its commitments. Obama warned that U.S. had another round of economic sanctions "tied up" even as he acknowledged penalties might do little influence handling of the crisis in Ukraine. Thus, USA pessimism under scored the limits of its ability to prevent Russia from stirring up instability in Ukraine's East.

On 25th April, 2014, Ukraine's Prime Minister Arseny Yatsenik accused Russia of wanting to start World War III by occupying Ukraine "militarily and politically". On 10th May, 2014, tensions were running at fever pitch in Eastern Ukraine on the evening of an independence referendum, as rebels briefly held several Red cross staff on suspicion of espionage. Ukrainian acting President Olekksandor Turchinov pressing Moscow to stop what they said was a flow of Russian arms and fighters into eastern Ukraine.

The situation become more serious and grim when pro-Russian separatists shot down an army transport plane killing 49 service men and dealing a blow to a military campaign to defeat the rebels. Later on it became clear that rebels mistook it for army transporter. It was in fact Malaysia Airline plane, Flight MH 17, which was shot down killing 295 persons including 15 crew aboard the plane. The unfortunate Malaysian Air flight was from Amsterdam and was going to Kuala Lumpur.

The shooting down of MH 17 shocked the whole world. All the right thinking men of the entire world were greatly annoyed and shocked. As rightly pointed out by the U.N. on 28th July, 2014, the downing of Malaysia Airlines told eastern regions gripped by pro-Russian upring that they would be courting catastrophe. If voted "yes" in a separatist referendum on 12th May, 2014. On 10th May, 2014, France and Germany threatened Russia with "consequences" if Moscow disrupted the Ukrainian Presidential elections to be held later on. In June 2014, stepping up diplomatic pressure on the eve of "illegal" referendum the west feared, would split the country apart.

After taking oath, new President on 7th June, 2014 talked tough. He said Crimea, is and will be Ukrainian. He called for dialogue with the country's east, gripped by a separatist insurgents and the armed groups to lay down weapons. He, however, said he would not talk with rebels he called "Gangesters and Killers" on the other hand, Russian President ordered the Federal security Service to strengthen protection of the border with Ukraine and prevent people calling illegally. The move seemed to be significant as Ukraine and Western Government flight MH 17 "may amount to a war crime". Moreover, the U.N. High Commission for Human Rights Navi Pillay, condemned the "horrendous shooting down" of Malaysian passenger jet in rebel-held territory killing 298 people on board. Pillay added, "This violation of international law, given the prevailing circumstances, may amount to a war crime". Further, "Every effort will be made to ensure that any of one committing violation of international law including war crimes will be brought to justice no matter who they are".

It may be noted that British investigators confirmed that the Malaysian Eastern Ukraine on July 17, 2014 suffered a "massive explosive decompression". Analysis of black box, flight recorders confirmed that the jet was destroyed by sharpnel from a missile blast.

It is clear from above discussion that shooting down Malaysian plane MH 17 constitutes a war crime. It must not only be condemned but the perpetrators of the heinous crime must be brought to book and punished. But a 100 billion dollars question is who will bell the cat. Perpetrators of the crime are backed by Russia who is not only a strong country but is also a U.N. Security Council permanent member with Veto power.

Nevertheless, it cannot but be admitted that Ukraine is at present a sovereign independent nation. Russia's meddling in Ukraine's affairs, especially annexation of Creamia and backing of protesters is clearly a violation of International Law including Article (2) of the Charter of the United Nations.

Lastly in October, 2014, voters in Parliamentary elections cemented their nation turn away from Russia, handling an overwhelming majority to champions of integration with west. President Petro Poroshenko, the billionaire who came to power after this year's revolution, after the three-quarters of the electorate had "shown firm and irreversible support for Ukraine's course toward Europe". According to Time Magazine (November, 2014), that meant a rebuke to the pro-Russian forces in Parliament and they have Russian President Vladimir Putin to blame for their defeat. He has alienated millions of Ukrainian voters who previously supported close ties with Moscow.

As far as Crimea is concerned, after annexation by Russia, it continued to rely on generators to meet its basis power needs after unkown saboteurs blew up electricity pylons supplying the peninsula with electricity over the weekend *i.e.* last week of November 2015.

Pro-Ukrainian have so far prevented repairs to the damaged pylons and associated power lines. Russia's Energy Minister Alexander Novak, said that Ukraine was in any case using very little Russian gas. He complained that Ukrainian authorities were not doing what they needed to allow their repair crews to restore some kind of political motivation. He added, "Their are different options, political ones, economic ones". This he said in reply to the question how Russia could ratialiate. Further, Russia delivers coal to the Ukrainian energy sector. We could, and may be in this situation, we need to, take a decision about halting deliveries of coal by our commercial organisations which deliver coal to Ukranian power stations". On 24th November, 2015, Russia ordered halt to gas supplies to Ukraine either on that day or next day. Thus Russia halted deliveries of gas because lack of advance payment, so also coal supplies in retaliation for a power blackout of Crimea.

Lastly, it may be noted that one of the main problems of Ukraine is prevalent corruption in the country. As pointed out by US Vice-President Joe Biden, on Ukraine reform, it is critical for Ukraine to root out the cancer of corruption. He added, what happens in the next year is likely to determine Fate of the country.

(LVI) India's Mangalyan or Mars Orbit Mission.—On 5th November, 2013, ISRO launched Mangalyan for the exploration of Planet Mars. It was launched at 2.38 p.m. on the said date and completed its first phase.

For initiating the second stage of the Mission Indian Space Research Organisation (ISRO) started preparations. On Wednesday, 27th November, 2013, Mangalyan remained for four days. In order to ensure that Mangalyan could go to right way, and might not astray, a plan had already been made by ISRO. ISRO's Scientific Secretary, V. K. Koteshwara said ISRO was planned to transway injection and had to ensure the liquid engine continued to fire or work continuously for twenty three minutes. At 0.49 a.m. on the night of 30th November, 2013. Thus on 1st December, 2013, Mangalyan left the earth's influence and proceeded towards the way to Mar's orbit. Thus the Scientists of ISRO succesfully crossed a great challenge in way of Mangalyan.

Thus Mangalyan completed second stage. Mangalyan was ready to travel 68 acres km. to reach orbit of Mars in ten months.

ISRO made certain changes in Mangalyan Travel onwards to Mars orbit and this connection planned four events.

The orbiter will be sent to Mars with little fuel using a method of travel called Nohmann Transfer orbiter. The cost of the mission is lowest in the world i.e. Rs. 450 crores which is 1/4th of what is incurred by NASA of United States of America.

India's Mars orbiter Mission faced the first test of its last manoeuvre around 2.30 on 24 September, 2014 which the main liquid engine would have to fire for 24 minutes to put Indian Space Research Organisation (ISRO) Scientists loaded the commands in second week of September 2014 to test if the engine, which had been idling for close to 300 days after it left the Earth's orbit on 1st December, 2014 to put the space craft in the desired Martian orbit.

Mars orbiter passed its first test successfully. ISRO 'woke' the main engine of Mars Orbiter Mission (MOM) spececraft. Having ensured that the 440 N Engine was in good shape, they prepared themselves for the 24 minutes firing reply on 24 September, 2014 and they successfully achieved it on 30th September, 2014.

Thus, ISRO's maiden attempt at exploring Mars worked with precision put into exclusive club with the United States of America, Russian and European agency. India achieved this task in her maiden attempt which was not achieved by any country before. P.M. Narendra Modi, was present to bless Indian scientists with this signal achievement. NASA said on the twitter, "We congratulate ISRO for its Mars arrival. Mars orbiter joins the missions studying the Red planet journey to Mars". Chinese Foreign Minister spokesperson said, "This is pride of India and Asia and is also a landmark progress in human kind's exploration of outer space. So we congratulate on that". K. Radhakrishnan Chairman of ISRO remarked, "I knew 'Mom' would't disappoint".

At 7.52 a.m. of 24 September, 2014, MOM was in final Mars orbit. At 8.05 earth got signal and thus mission was accomplished. On 25th September, 2014, ISRO presented first Mars image to P.M. Narendra Modi. It was one of the first images of the surface of Mars taken by MOM satellite on Thursday, 25th September, 2014.

ISRO Scientific Secretary V. K. Koteshwara Rao, said, "The Mars Colour Camera (MCC) on board started working soon after the orbiter stabilized in the elliptical orbit of mars and thus taken a dozen quality pictures of its surface and its surroundings".

The camera took the first image from an altitude of 7,300 km. with a 376 metre spatial resolutions. According to V. K. Koteshwara Rao that one of the scientific instruments that will study Mars for life-sustaining elements over the next six months, the cameras (MCC) will take images for its surface features and weather patterns such as dust storms.

Further, "The cameras will also take images of the planet's two moons-Phobos and Deimos—and beam them to our deep space network centre near Bangalore". Moreover, "Health and other parametres of the spece craft were fine and all essential function were performing well".

The other four instruments will conduct experiments to study the Martian surface and rich mineral composition and scan its atmosphere for methane gas to know if it can support life.

Mr. Rao further said that scientists at the mission control centre are monitoring the orbitral movement of the spacecraft around Mars and checking the health of its instruments round the clock. A team of 300 scientists and technicians perfectly executed mission as planned. Finally, "we have demonstrated our technological capability to launch interplanetary missions and achieved success in entering Mars orbit in the first attempt".

Thus, MOM achieved in first attempt what other nations could do in several attempts and at much higher costs, of the 51 Mars Missions by various countries, only 21 have been successful. Thus MOM's success was second great achievement, the first being sending space missions on moon. Among other discoveries, presence of water on moon was a great discovery and that was praised by all over the world.

In March 2015, Indian scientists enhanced the life of Mangalyan for six months. This could be possible because the remaining fuel, *i.e.* 37 km. On 9th June, 2015, Mangalyan completed 259 days in Moon's orbit. On 8th June, 2015, Mangalyan eclipsed or disappeared from stations situated on earth for 15 days. Thus for fifteen days Mangalyan disappeared from the eyes of the earth.

(LVII) Kailash Satyarthi and Malala Yousafzai awarded jointly Nobel Prize for work on child Rights.—Kailash Satyarthi of India alongwith Malala of Pakistan was awarded Nobel Peace Prize on 10th October, 2014, Kailash Satyarthi, aged 60, born in Vidisha (Madhya Pradesh). Young Satyarthi was moved by the plight of kids who worked even as he went to school. He began a football club to pay school fees of poor children and set up a book bank on his own. His NGO Bachpan Bachao Andolan had led the fight against child labour and trafficking in India freeing more than 80,000 kids. According to Kailash Satyarthi, "We (Malala and I) have to go a step further and work for peace in our sub-continent. For India and Pak, it is very important that our children are born and live in peace".

Malala aged 17, from Pak's Khyber Khwa Province hit international headlines in 2012 after Taliban gunmen shot her in the head for advocating women's right to education. She was air lifted to Britain for treatment. There she survived after series of surgeries. At 17, Malala is the youngest Nobel Laureate ever. She now studies in U.K. due to Taliban threat in Pakistan.

The Nobel Committee said it regarded it as an important point for a Hindu and Muslim, an Indian and a Pakistani, to join in a common struggle for education and extremism.

(LVIII) Elimination of chemical Weapons from Syria.—For a long time, situation of civil war continuing in Syria. A large population of Syria was revolting against the established Government. To suppress the revolt, Syrian government was accused of using chemical weapons. Twenty years back, the ruler of Iraq, Saddam Hussain's army had for the first time used poisonous chemical weapons in Halabja. Thereafter, the ruler of Iran used chemical weapons on Syria. In order to eliminate chemical weapons in Syria, United States of America and Russia entered into an agreement. Syria was thus compelled to eliminate chemical weapons. Both the above nations U.S. and Russia— decided that Russia would have to destroy facilities of chemical weapons by November, 2013 otherwise America and its allied nation's armies would use force against the forces of Syrian because Syrian forces had attacked outskirt areas of Damascus. According to Executive Council of Organisation for the Prohibition of Chemical Weapons (OPCW), in accordance with the above directions word had been completed by the next mandate i.e. 15th November, 2013, Syria would have to make a plan to destroy the stock of 1,000 metric tons of chemical weapons. The late target date was mid 2014 by which Syria would have to destroy entire chemical weapons.

(LIX) Tension Arising out of Violation of Chinese Air Defence Zone by Japan, S. Korea and America.—Tension increased between America and China when on 26th November, 2013, two American fighter air crafts B-52 flew over two small island groups. Thus Japan and America violated the Chinese edict to give prior notice of such flights over its zone. America clarified that it took such flights to respond the bluff of China and that it would, not tolerate the said assertion of China.

China said that the said two flights were made over the 'Air Defence Identification Zone (ADIZ)'. China re-asserted its capability to control the said Air Defence Zone. However, China refrained from repeating this time its warning that if aircrafts violated its Air Defence Zone, it would take 'defensive emergency measures, on the other hand, America's Secretary of State John Kerry, sent a telephonic message to Japanese Foreign Minister Funico Kishida, that it should start talks on ADIZ.

After this incident, on 28th November, 2013, military aircrafts of Japan and South Korea overflow disputed air zone i.e. ADIZ or Chinese Sea without any prior notice. Thus once again Chinese Air Zone i.e. ADIZ violated. Japan and America violated and ignored the said assertion of China because according to some experts, Chinese tactic was to end Japanese control over islands of Sen Kaku (in Japan) and Diaoyu (in China). Thus tension continued in the said zone. On 8th December, 2013, South Korea announced that it would expand its air defence zone. This announcement further increased the apprehension of tension.

(LX) 9th Ministerial conference of World Trade Organisation (WTO), 3-6 December, 2013 (Bali, Indonesia).—9th Ministerial Conference of World Trade Organisation was held from 3rd to 6th December, 2013 at Bali, Indonesia. In this Ministerial Conference, a new beginning was made to end deadlock of Doha Round. In Doha Round of talks deadlock was in respect of agricultural subsidy. According to India, America was giving excessive subsidy (more than 80 billion Dollars). India has severely criticized it. In Hongkong Conference, developed countries were asked to reduce agricultural subsidy by 2013. The deadlock is continuing for twelve years.

Prior to 9th Ministerial Conference was held in Geneva from 15th December to 17th December, 2011. During this Conference many decisions relating to intellectual property, electronics and commerce etc. were taken. India remained firm on her stand despite the power of America and its allied powers. In fact, America had special provisions to secure its agricultural productions.

In the 9th Ministerial Conference, a good beginning was made to end the deadlock in respect of the issue of agricultural subsidy raised by India. On the one hand America was giving excessive subsidy to protect its agricultural productions. Yet America was making vigorous efforts to ensure that developing Countries to open their markets for America and its allied nations.

However, India remained firm on her stand. India's Commerce Minister made it clear in the conference that India wanted to ensure the protections of its interests and food security which was very vital for India. In this conference, a new formula was made whereby it was provided that every member country would not give more than 10% agricultural subsidy. But in India's case, subsidy would definitely exceed 10%. Therefore, in order to deal with deadlock, WTO's General Secretary Roberts Azevedo devised a draft proposal to present before all the members. According to this proposal, India would be exempted from paying penalty for four years. America and European Union, asked to accept this peace clause. Surprisingly, India accepted this clause and expressing happiness this meant India was prepared to pay penalty if her agricultural subsidy exceeded 10%. If everything went alright, General Council would accept Bali (Indonesia) package.

However, in Bali conference, success was achieved in mainly Trade facilitation service to end the cost and to accelerate the speed of simplifying custom duty processes agreements.

After the fall of previous Government at the centre and the installation of New Government, the decision of the earlier Government was reversed by the new government. New Central Government made it clear that food security is vital for India's interests. On 31st July, 2014 Indian Government refused to meet deadline for adopting the Trade Facilitation Agreement of WTO which was agreed to by former Government. New Government took the said decision to secure interests of 263 million Indian farmers who form 50 percent of the Indian work force. It may be noted here that America had subsidised 15 million American farmers by $ 100 billion.

It was rightly said by the Finance Minister Arun Jaitley, "If we had stuck to what was agreed at Bali, it would sounded the death knell of the Food Security Act". Commerce Minister Nirmala Sitharaman also told in Parliament on 5th August, 2014, "The Bali out comes were negotiated as a package and must be concluded as such". Thus linking the

Trade Facilitation Agreement with the question of food security as a one package solution. Earlier on 1st August, 2014, in the clearest articulation of India's position on the WTO stand off, PM Narendra Modi visiting US Secretary of State John Kerry that the first responsibility of his Government was to the poorest people of the country. Mr. Modi added, "while we do not oppose the agreement, we believe that the needs of those living on the margines of society, not just in India but elsewhere too, have to be addressed". Further using the opportunity of the WTO discussions Prime Minister, according to a PMO statement, "emphasized that the developed countries to understand the challenges of poverty in developing countries and their Government's responsibilities in addressing them, when discussions take place in international forums".

(LXI) Bricks Bank.—The group of countries—Brazil, Russia, India, China and South Africa is called Bricks. It was envisioned by Jim and Neil of Invest Bank Goldman in 2001. Annual meeting of Bricks takes place in a member of the group-bricks. The Summit meeting the Brick was held in 2012. Before 2010, South Africa was not in the Bricks. In the Brick the GDP of five countries is 21%. Bricks countries together have foreign exchange of 44 Trillion Dollars. The trade among these countries has reached three hundred billion dollars.

Bricks group of countries met at the city of Fotileza (Brazil). Brazil, Russia, India, China and South Africa meeting at the said city of Brazil agreed to establish Bricks Bank. It was decided that to start the Brick Bank working within two year with a fund 100 billion dollars. India hoped that this would lessen the dependence on IMF for arranging the fund. In Russia. it would make available easy loans for busing petroleum properties. Besides this, this would give special encourage to the development of roads, port and intercom fields.

So far as the question of fund of 100 billion dollars is concerned, China will contribute 41 billion dollars. India, Russia and Brazil would contribute 18 billion dollars each. In view of the equal share of each, China for the present time will contribute only half of it. South Africa had pledged to contribute 5 billion dollars but could double this contribution.

For first six years, the reins of Bricks Bank of 100 billion dollars will be in the hand of India. On 16 July, 2014, official announcement of Bricks Bank was made. It was a great diplomatic victory. Prime Minister Narendra Modi to have consensus for making India to become Bricks Bank's chairperson.

Next Bricks conference was held in city of Ufa (Russia) on 9th July, 2015. Speaking before full session of Bricks Group of Countries, Prime Minister Narendra Modi suggested the establishment of an Agricultural Research Centre. He also proposed to an annual trade fair. He also proposed to equip the Bank a new chief renewable energy Fund. Prime Minister Narendra Modi also proposed to organise a Football Tournament of Bricks countries next year in India. He also proposed to face the challenge of climate change collectively.

(LXII) Indians Facing danger to their lives in Iraq.—Constantly increasing activities of terrorist group in Iraq created very critical situation. The terrorists seized several places and properties including oil Refinery. Iraqi forces were unable to face the challenge of the said terrorists. In such a situation, thousands of Indians who worked there were facing the danger of their lives. Many Indians were made hostage in Mosul. Indian nurses, construction workers and Indians working in other fields were facing danger of their lives. Keeping in view, the difficult and dangerous situation faced by Indians in Iraq, India devised a plan to save them and bring them to India. Under the leadership of Foreign Affairs State Minister Mr. V. K. Singh a team went to Iraq to help such Indians to bring to India. The said team did a very commendable work of safely bringing nearly four thousand Indians to India. Besides this, the said team rescued citizens of more than thirty countries and successful in bringing them outside Iraq so as to enable them to go to their respective countries.

(LXIII) Lima Deal on Climate change Talks.—In order to make 2015 Paris conference to make a success, an important effort was made at Lima. A draft agreement was prepared according to which all the countries were asked to clarify their national pledge about determined emissions. After 13 days of long debate, negotiations etc. the said draft agreement was adopted. In this connection, financial arrangements were clarified although the concerns of developing countries including India were taken into consideration. This step taken at Lima was expected to lay foundation for Paris conference to be held in November, 2015. According to Indian Environment Minister, Indian concerns were taken into consideration and it was a auspicious sign for ensuing Paris conference in which emissions targets for succeeding years upto 2020 and beyond would be fixed.

(LXIV) Indo-Bangladesh Land Boundary Agreement, 2015.—On 6th June, 2015, historic Indo-Bangladesh Agreement settling 4,096 km of boundary was made. This important question was pending since independence. Under this agreement, more than 50,000 persons without any nationality will get national identity. Besides this, 22 agreements on different matters were also signed. According to an important agreement, Indian cargo ships will be able to make use of Chittagong and Mongla seaports. As a result of this Indian cargo ships travel of 30-40 days will be shortened to one week.

Indo-Bangladesh Agreement of 2015, is an important achievement of Prime Minister Narendra Modi. Indian Prime Minister made available to Bangladesh 2 billion dollar loan. This will create 50,000 jobs in India and its Make in India Plan will be strengthened. The said loan would encourage export schemes of Bangladesh.

It may, however, be noted that no agreement could be made on the use of waters of teesta river. In present, waters of Teesta river come to West Bengal from Bangladesh but Prime Minister of Bangladesh does not have sufficient means of use of such waters. In 2011, then Prime Minister's efforts were nullified by State of West Bengal but did not consider the concerns of West Bengal. The Chief Minister of West Bengal wants to reconsider on Teesta river matter.

According to Indo-Bangladesh Agreement of 2015, India will now be able to keep secured its boundary.

(LXV) Nuclear Agreement Among Iran and Six countries—America, Britain, France, China, Russia and Germany.—On 14th July, 2015 Nuclear Agreement was entered into between Iran and 6 countries, namely America, Britain, France, China, Russia and Germany. As a result of this agreement, immediately all sanctions against Iran came to end and Iran's Central Bank, Oil companies, shipping and Airlines companies frozen around 100 billion dollars became free and available to Iran. Iran's oil exports will restart. If the International Atomic Energy Agency (IAEA) considers the agreement peaceful, arms embargo will also end. The said nuclear agreement was entered into in Vienna (Austria).

Under the Nuclear Agreement, the number of centifuges for the enrichment will be reduced by two-thirds. Under the restrictions Iran will not be able to use new weapons for a definite period.

It may be noted here that Israel is against nuclear agreement and termed it as an historic mistake. So far as India is concerned, India will be able to import more oil from Iran which had been reduced due to sanctions.

According to American President, Barak Obama, nuclear agreement with Iran was not based on justice or trust but on verification. In other words, Iran's activities will be monitored and be verified from time to time.

Death of Suleimani and end of Nuclear Agreement.—Top Iranian Military Commander, General Qassim Suleimani was killed by America in a drone attack. This angered Iran's Supreme leader, Ayatollah-Khamenei that he wanted Direct Proportional Retaliation. The Iranian Parliament on 7th January, 2020 labelled Pentagon's leadership "terrorists".

General Suleimani was so popular in Iran and neighbouring countries that a stamped took place as the procession carrying the coffin of Late General about 56 Iranians were killed.

As a measure of retaliation Iran attacked American bases in Iraq by missiles. These missiles caused some damages but America regarded them as nominal and ignored them. However, Iran persisted in retaliation and attacked with missiles several times.

Denial of Visa to Iran's Foreign Minister Javad Zarif.—America denied visa to Iranian Foreign Minister because American Secretary of State in Pompeo thought that this was not appropriate time for Iranian Foreign Minister to visit New York. U.S. National Security adviser, Robert O'Brien told that Javad Zarif intended to address the U.N. Security Council on January 9, 2020 on the American assassination of Iran top General, Qassim Suleimani in a drone attack.

Iran alleged and rightly too, that denying Iranian Foreign Minister violated 1947 U.N. Pact. As regards the U.S. Policy, US has a policy of issuing visas to members of foreign delegations in line with a 1947 pact with the United Nations, regardless of disputes with individual countries. Thus, denial of visa was violative of 1947 U.N. Pact. In past also, U.S. has made such violation several times.

(LXVI) Paris Pact on Climate Change.—Paris Summit on Climate began on 1st December, 2015 at Paris (France). India was labelled "obstractionist" by rich nations at Paris climate talks on 1st December, 2015 after it joined chorus from a group of developing countries saying a likely global deal must produce a clear climate finance road map and ensure affluent nations bear a heavier burden. The declaration at the plenary session also expressed concerned over the missing mitigation ambition in the pre 2020 emission reduction commitments of rich nations.

Prime Minister of India, who attended the plenary session at Paris, emphasized at the conference that India will not agree to a deal without a clear differentiation in responsibilities and action between rich and developing nations in all aspects, such as mitigation, adaptation and transparency.

On 9th December, 2015, rich nations led by United States and European Union forged an alliance on 9th December, 2015 with least developed and island nations that could drive a wedge between developing countries and isolate emerging economies like India and China as climate talks in Paris entered a decisive phase.

The "ambition alliance of 79 countries from Africa and Pacefic Islands as well as the U.S. and Europe was announced in the French capital with financial commitments for these most vulnerable nations to battle the impact of climate change". "The EU pledged $ 500 million and the U.S. $ 800 million by 2020 without clarifying on the nature of funding public or private in additions to an existing development fund. A negotiator from developing countries, however, cautioned, "The numbers appear impressive but in the past such money has not got developed".

However, by 9th December, 2015, Ministers of 196 countries at the Paris climate talks failed to arrive at consensus on tricky aspects of a road map to rein in global warming, underscoring the huge differences between developing and developed nations. Thereafter, U.S. President reached out to Prime Minister of India in an attempt to break the deadlock at the Paris Climate Summit, where the responsibility of developing countries such as India in tackling rising global temperature has been a sticking point. American President spoke to Prime Minister of India hours before 45 minute meeting in Paris between U.S. Secretary for State and Indian Environment Minister. The move by American President was apparently aimed at breaking the ice and resolving contentious issues before the first draft of ministerial consultations was released. Sources said the meeting between America and India failed to reach a compromise on a number of issues, including redefining the differentiation between the rich and the developing world. Further it was realized that an agreement in Paris will not be possible without India and the U.S. converging on a range of issues.

It may be noted here that, India earlier on 7th December, 2015 said that India will join the league of Europe and the United States by setting up a chain of observatories across Himalayas, deserts and islands, to monitor the impact of climate change.

The group of developing countries including India and China continued to blame trying to divide poor nations in Paris. On 10th December, 2015, however, sources said that there was some forward movement on transparency, differentiation in the Paris agreement, that held back last week. The ice between the United States and India broke with the two biggest emitters that there was "convergence on many issues, paving a way for final agreement in Paris". Environment Minister and U.S. Secretary for State met for the second time in two days and both termed the meeting "very constructive" unlike the first one where Indian Environment Minister Mr. Prakash Javedekar said there was "no compromise".

On 12th December, 2015, the draft agreement showed a landmark climate agreement aimed at slowing down global warming appeared poised for approval with key players like India, U.S. and China approving the final draft of a historic measure to save the planet from a catastrophe.

The Paris agreement will legally bind the world in keeping the planet's warming "well below" two degree celsius with an endeavour to limit to 1.5 degrees, the level scientists say is needed to avert the worst effects of global warming.

The Paris pact also commits $100 billion a year from 2020 to help developing countries cope with the problem. Moreover there is a provision for review after a period of five years.

According to Indian NGO centre for Science and Environment said on 13th December, 2015 that the Paris climate agreement was a minimum compromise. Before the Paris conference, the aim was to reduce temperature to 2 degrees. But under the Paris agreement the long term goal is 15 degrees celsius. However, Ministers from the world over created history in Paris by agreeing to a comprehensive climate change deal that may or may not only be ambitious to protect the planet but will also give a boost to clean energy business without compromising on developmental imperatives.

The road map for climate action yields a mixed bag for India. The Paris deal will have a lot in store for economies in transition like India with over trillion dollars in green investment set to be handed out in the next decade or so, enabling the adoption of greener technologies.

India can be the biggest beneficiary as it has capability and mechanism to adapt investment for clean and green energy. India has already declared a target of setting 175 Gigawatts capacity of renewable by 2020 and according to Indian Prime Minister the capacity can be doubled by 2030.

According to Director of Carbon Disclosure Report, estimates by industry leaders show that trillions of dollars will be available for investment from companies in Europe and America only the right policies are needed.

As regards India, continuation of the existing fire wall between the rich and the developing world in all elements of Paris agreement is an achievement and so is mention of sustainable lifestyle and climate justice. Paris can be said to be half battle won as a lot will be decided in subsequent climate conferences before 2020 when the agreement will come into force. According to experts Paris deal is a mixed bag for India.

India's Environment Minister said, "At the first glance, we are happy with the draft agreement : There is differentiation between developed and developing countries in all elements of the agreement". He termed the Paris agreement as "victory of persistent efforts" of India and its constructive role despite being branded as obstructionist at the beginning of the conference.

As noted above, Prime Minister of India and President of the United States of America are the two leaders are responsible for breaking the deadlock between developing and developed countries and must be given credit for the successful conclusion of the Paris Agreement. On 16th December, 2015, President of the U.S. phoned the Indian Prime Minister and thanked him for the cooperation in the conclusion of Paris pact.

(LXVII) Restart of India-Pakistan Talks and Terrorist attack at Pathankot Air-base (January, 2016).—At Paris (France), during the Paris conference on climate change, Prime Minister of India Narendra Modi utilized the opportunity to meet Prime Minister of Pakistan Nawaz Sharif to talk the Indo-Pak dialogue process between the neighbouring countries. The above two leaders also agreed that the two mechanisms will also be linked to the progress made by Islamabad on its commitment to cooperate in the fight against terrorism, and expedite the 26/11 Mumbai attacks trial. Further NSA talks will run parallel with formal peace dialogue. It was also agreed that the said proposal will come up for review by said two Prime Ministers on the sides of SAARC Summit which is scheduled for next year to be held in Pakistan.

Thereafter, India's Foreign Affairs Minister Sushma Swaraj went to Islamabad (Pakistan) to attend the Heart of Asia Conference on Afghanistan. She also met there Pakistan's foreign policy Chief and Pakistani Prime Minister.

They decided the schedule and modalities for the talks. The two leaders agreed that talks will be held on all topics including terrorism and Kashmir. It was agreed that Indo-Pak talks road map will be drawn in January, 2016.

It may be noted here that during last two months Prime Minister has emphasized that global response is needed to combat terror. He, stressed that the U.N. must define, at an early date, the term terrorism. At several international forums, he has emphasized that it must be clear who is a terrorist, there being no bad or good terrorism, and what are the countries who support terrorism. Meanwhile, there will be no let up in India's efforts to strengthen its defence and security against violation of ceasefire and infiltration by terrorists.

Further, Indian Prime Minister surprised all by a suddan move to reach Islamabad to congratulate Pakistani Prime Minister Nawaz Sharif on his birthday. While returning from his Russian visit, Indian Prime Minister reached Kabul (Afghanistan) and from there instead of returning to India, he reached Islamabad to wish Prime Minister of Pakistan on his birthday. He was warmly welcomed in Pakistan. This was considered to be a masterly move to further friendly relations with Pakistan.

But this move have annoyed terrorist organisations and after a week of Indian Prime Minister's visit to Pakistan, the terrorists attacked Pathankot Airbase of India and planned to cause huge damage there. But they were not allowed to go to technical sites, and all the six terrorists were gunned down and killed by Indian security forces.

Unlike the past, this time Pakistani Prime Minister, who was on a visit to Sri Lanka, phoned Indian Prime Minister on 6th January, 2016, and promised that he would take strong action against the terrorist organisation concerned. Indian Prime Minister insisted during the said telephonic talks, which lasted for fifteen minutes, that further talks and relations with Pakistan will depend on what action he takes against the terrorist organisation concerned. Earlier Indian NSA Advisor had talked to counterpart Pakistani NSA advisor sharing evidence against the terrorists and their Pakistani connection and asked for taking necessary action.

Thus India's future line of action will depend much on Pakistani Prime Minister's actions and response. It is only after that India is likely to determine its line of action.

(LXVIII) Case of Sentencing of Kulbhushan Jadhav by Pakistani Military Court and stay on sentence by International Court of Justice.—Indian national, Kulbhushan Jadhav was sentenced to death by Pakistan's Military Court on charges of spying for India. According to Pakistan, Kulbhushan Jadhav was an Indian spy and was carrying passport in the name of Hussein Mubarak Patel. But this Pakistani version was doubted even by some senior Pakistani figures such as Ex-Pakistan National Security Advisor (NSA), Mr.

Sartaz had raised doubts on evidence. He said evidence was not enough to give sentence of death to Jadhav.

In fact, Jadhav was a Commander Rank Officer with Indian Navy. He retired from Navy in 2012. According to India, Jadhav was kidnapped from Iran. His subsequent presence in Pakistan has not been credibly explained. It is said that Jadhav was caught by Taliban in Iran and Taliban handed over him to Pakistan. Pakistan on its part, charged him with spying for India.

Under Vienna Convention on Diplomatic Relations, 1961 when a national of a country is charged for crime in another country, such a fugitive has a right to seek and get legal aid and advice from the embassy of his country. As and when India came to know that its national Kulbhushan Jadhav was being tried by Pakistan's Military Court, India sought Counsel access for Kulbhushan Jadhav, but the same was denied by Pakistan. India sought such access as many as thirteen times but was denied by Pakistan. So far, India has sought such access from Pakistan for 18 times.

On its part, Pakistan claimed that Kulbhushan Jadhav has confessed his guilt. But the video that was released by Pakistan clearly showed that it had a number of cuts and confession clearly seemed to be forged. India took the sentence very seriously and India's Foreign Secretary told Pakistan, "If this sentence......is carried out, the Government and people of India will regard it as a case of premeditated murder. The Foreign Minister told the Lok Sabha that in case Kulbhushan Jadhav her Government will make all efforts to Pakistan and the Minister told that if sentence was carried out, it will have serious repurcussions and with adequate consequences.

India on her part, went to International Court of Justice and appealed against the sentence of Kulbhushan Jadhav. India argued on the lines referred above and the World Court recognized and upheld India's right of diplomatic access. The Court rejected the arguments of Pakistan and in its interim order stayed the sentence to death of Kulbhushan Jadhav till the final decision of the Court. Thus India's stand point was vindicated by the world.

Lastly, it may be noted that the case of Kulbhushan Jadhav is still pending. India fears that Pakistan might execute the sentence before the final decision of the International Court of Justice. This fear is not without reason because Pakistan has already showed its reluctance to follow the decision of the International Court of Justice. Let us hope good reason and wisdom prevails on Pakistan and it awaits and fulfil the final decision of the International Court of Justice.

The International Court of Justice, on 17th July, 2019 directed Pakistan to review death sentence to Jadhav and provide India consular access to meet him immediately. In a major legal and diplomatic victory for India, the International Court of Justice in the Hague on Wednesday, 17th July, 2019 held that Pakistan violated the Vienna Convention in Kulbhusan Jadhav case and it should review and reconsider his conviction and sentencing while allowing India consular access to him.

As directed by International Court of Justice, India approached Pakistan for consular access to meet Jadhav. Pakistan delayed any response for a considerable time. Then Pakistan allowed so called consular access because it allowed Indian representative to meet Jadhav in the presence of a Pakistani Official. It was therefore not a free and open access as envisaged under Vienna Convention. India then approached International Court of Justice to do the needful and the matter was still pending.

(LXIX) *Case of Mallya's Extradition.*—Vijay Mallya took loan of more than Rs. 9,000 crores from several banks for his Kingfisher Airlines. He not only defaulted in payment of loan but diverted the loan money for other purposes. Despite several reminders Mallya evaded payment. Thereafter, Mallya fled to U.K. on March 2, 2016. On 24 April, 2016, the Government of India revoked Mallya's passport. On 2 May, 2016, Mallya resigned from Rajya Sabha, a day before Ethics Committee of the Rajya Sabha was prepared to recommend his expulsion.

The Government of India decided to seek extradition of Mallya from U.K. During the visit of Indian Prime Minister to U.K., Indian Prime Minister asked British Prime Minister to extradite Mallya among several others. On 8 February, 2017, India made formal request for extradition of Mallya as per extradition treaty between India and the U.K. Meanwhile, Enforcement Directorate, attached several assets of Mallya and Kingfisher in India.

U.K. set in motion process for Mallya's extradition. As a first step in the extradition process in the U.K. Vijay Mallya was arrested by the Scotland Yard. Mallya was produced before the U.K. Court. Mallya was briefly held and then was granted bail on a £ 650,000 (Rs. 5.4 crore). The development for extradition stemed pursuant to orders from a Mumbai Court in two different cases against the liquor baron (Mallya) and founder of the now defunct Kingfisher Airlines. After the grant of bail, Mallya was asked to appear on 17 May, 2017. On a brief hearing on the said date, the Court fixed a date in July on the ground that India delayed the sending and submitting of evidence. India, however, later on claimed that documentary evidence etc. had already been handed over to U.K. authorities.

Thus the extradition case was pending. Finally, the British Court ordered extradition of Mallya. He then appealed in the High Court against the said order. The High Court rejected the appeal. Thereafter, Mallya appealed in the Supreme Court. The Supreme Court also rejected the appeal. Thus the way to extradition of Mallya to India has become clear and may be extradited to India at an early date.

(LXX) ISRO's Grand Performance of Launching Cartosat-2C alongwith other Satellites.—Cartosat-2C with other satellites was successfully launched by Indian Space Research Organisation (ISRO) on Friday, 23rd June, 2017. Cartosat-2C can be used for surveillance and mapping border areas, are primarily used for keeping an eye on enemies both on land and sea. Cartosat-2C is latest addition to 12 satellites being used for military purpose. Most of these near earth orbit (about 200-1200 km. above the earth's surface) and some in geo orbit. The recently launched 712 kg Cartosat space craft is an advanced remote sensing satellite capable of providing scene-specific spot imagery. It is pointed out that the total weight of all the satellites launched alongwith Cartosat-2C is said to be weight of several elephants.

It is also pointed out that India has the capability to build anti-satellites weapon. Former DRDO Director and Defence Technology Expert even went to the extent of saying : "Technological capabilities indigneously evolved in the process of development of Agni-V ballistic missile can be readily employed for 'satellite launch on demand' if needed. The 5,000 km. plus missile has demonstrated capabilities of reaching well beyond altitudes characteristics of relevant satellites with pay loads. However it may be noted that ISRO has no intention of engaging in such as anti-satellite weapon project. The present Director of Space Applications Centre said, "ISRO follows international norms, which prohibit member space agencies from militarising outer space".

Thus, ISRO's performance has been extremely good, rather grand. Earlier ISRO made a world record by launching as many as 104 satellites, many of which were satellites of foreign countries such as those of America, Britain, France etc. one of the notable features of launching of satellites by ISRO is that it is much cheaper in cost than those launched by other countries including developed countries mentioned above. That is why, other countries prefer to get launched by ISRO. Thus ISRO is rendering signal service in the field of science and technology. That is why, ISRO has also become foreign exchange earner.

(LXXI) Chandrayaan-2.—Under an overcast sky at the Sriharikota spaceport on Monday 22 July, 2019, India took a giant leap to moon, Indian Space Research Organization (ISRO) GSLV MKIII carrying Chandrayaan-2 lifted off from Sriharikota at 2.43 p.m. and 12 minutes later injected into a geo-stationary transfer orbit the lunarcraft comprising an orbiter, a lander and a rover.

It was expected to make a soft landing on Moon at 2:58 on September 7, 2019 and if successful, would make India the fourth nation after the U.S., Russia and China. The launch was perfect, the vehicle took the launch craft to an orbit that was 6,000 km. higher than planned.

The mission team had before it very hard task of performing 15 'very crucial' manoeuvres to take Chandrayaan-2 towards moon. To begin with it would be in earth's orbit for 23 days and five orbit raising manoeuvres were carried out to move it away from earth's gravitation pull on 23rd day, scientists performed "trans-lunar injection".

ISRO scientists planned that after lander separated, orbiter would circle moon for clicking images and sending them to earth. Chandrayaan-2 aimed to certain objectives. It was to map surface to trace origin and evolution of moon. It was to study extent of water on and below lunar surface. It was also to study lunar topography, seismography, minerals, surface chemical composition.

Most of the manoeuvres were perfectly carried out. But last manoeuvres of soft landing of the land rover was faulted. There was unfortunately forced and hard landing losing all the touch and control of earth. Thus nearly 85% success was achieved. As remarked by ISRO Chairman, K. Sivan, "We have bounced back with flying colours. A success on the back of a failure is doubly sweet".

This remark had been made before hard and forced landing of rover. Thus the last manoeuvres was faulted. Then ISRO Chairman became greatly disappointed and distressed and even burst into tears. Incidently, the Prime Minister, who had been invited to witness the historic event, was there. He consoled and exhorted ISRO Chairman and asked him to work with greater vigour in future to achieve the desired result. Last but not the least, it may be noted that orbiter was successful put in moon orbit and would work for the whole year sending images of the moon to the earth. Moreover, rover had been aimed to land on southern pole of moon where no one had yet reached.

(LXXII) Solar Mission.—Aditya L.J.—

It was planned by ISRO that after successful Mission of Chandrayaan-2, ISRO would launch in the first six months of the next year (2020). According to ISRO, the purpose of Solar Mission would be to study the Corona of Sun *i.e.* the outer surface extending upto thounsand of kilometres. This outer surface of Sun is 15 lakh Km. from earth. This study is necessary and important because earth's weather is greatly impacted by the said outer surface.

(LXXIII) Chinese Troops intrusion into certain parts of Sikkim, Uttarakhand and Laddakh.—As usual China has been following and practising expanist policy. To quote a few example, *viz.* South China Sea, Tibet, Taiwan, Dhoklam, Arunachal Pradesh etc. Recently its troops have intruded in certain parts of Sikkim, Uttarakhand and Laddakh. In Laddakh especially Chinese troops have been camping near Line of Actual Control (LAC). As many as 5000 Chinese troops have gathered there and they seem to stay there for long time. This is obvious because they have brought heavy vehicles carrying tents and other arms and tools facilitating them to stay there for long time. They are pressurizing Indian soldiers to withdraw back and stop construction of roads which Indians are carrying on upto LAC. Chinese troops have been arming themselves with multi-barrel rocket launchers and other heavy armed vehicles.

On the part of India, it was made clear that India would neither stop construction of roads upto to LAC nor Indian soldiers would withdraw even an inch. Indian soldiers from the place they are stationed. Chinese President on his part asked his army to be prepared for a long battle. But soon Chinese Ambassador to India said that Indian-Chinese conflict would be amicably settled through diplomatic channels. This makes it clear that China does not apparently, intend to escalate the issue. It may, however, be noted that despite all the China cannot be believed. India has to be always cautious. The fact remains that Chinese troops remain stationed. Rather they are strengthening themselves. Thus the Chinese problem remains unsolved and has not been solved. According to political circles Chinese President is beseiged with several domestic problems. The Chinese President is creating these problem to divert domestic public opinion with dozes of nationalism.

Happily, however, good sense prevailed on China and it agreed to solve problem by talks. Subsequently, both the countries withdrew their troops back nearly 1/2 km.

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